

**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  
Disability Retirement of:

Case No. 2014-0544

GRACIE JIMENEZ,  
Respondent,

OAH No. 2014100749

and

EMPLOYMENT DEVELOPMENT  
DEPARTMENT,  
Respondent.

**PROPOSED DECISION**

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on May 27, 2015, and January 20, 2016.

Christopher C. Phillips, Senior Staff Attorney, represented petitioner Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Gracie Jimenez appeared and represented herself on the first day of hearing. On the second day of hearing, Ms. Jimenez did not appear. Upon proof of compliance with Government Code sections 11504 and 11509, this matter proceeded pursuant to Government Code section 11520.

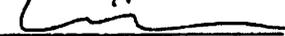
There was no appearance by Employment Development Department (EDD).

**ISSUE**

Was Ms. Jimenez permanently disabled or incapacitated from performing the regular and customary duties of a Disability Insurance Program Representative with EDD due to her bipolar disorder or attention deficit disorder?

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED February, 18 20 16



## SUMMARY OF DECISION

Ms. Jimenez had the burden of proof that she was permanently disabled or incapacitated from performing her regular and customary job duties due to her mental condition. Although the evidence established she does suffer from bipolar disorder and attention deficit disorder, the evidence did not support her claim that she was permanently disabled or incapacitated from performing the regular and customary duties of a Disability Insurance Program Representative with EDD due to those conditions. Ms. Jimenez's claim for disability retirement is denied.

## FACTUAL FINDINGS

### *Preliminary Matters*

1. Ms. Jimenez was employed by EDD as a Disability Insurance Program Representative. By virtue of her employment, Ms. Jimenez was a state miscellaneous member of CalPERS subject to Government Code section 21150.

2. On April 11, 2013, Ms. Jimenez filed a Disability Retirement Election Application with CalPERS. She claimed the right to receive a disability retirement because of her bipolar disorder and attention deficit disorder. She claimed she "suffered a mental breakdown due to working conditions."

3. Ivan S. Baroya, M.D., Ms. Jimenez's treating psychiatrist, completed a Physician's Report on Disability on April 17, 2013.<sup>1</sup> He documented Ms. Jimenez's patient history as "bipolar disorder and ADD symptoms." He reported that he first treated Ms. Jimenez on May 5, 2010. Dr. Baroya noted that as of March 28, 2013, Ms. Jimenez was unable to perform her job duties and her injury was work related. In the section asking him to describe how the injury occurred, Dr. Baroya wrote, "Decompensation of prior chronic illness exacerbated by workplace." He identified Ms. Jimenez's chief complaints as: "I'm not sleeping I keep getting fired and rehired." Her subjective symptoms were: "decreased sleep, poor concentration, severe mood swings." Dr. Baroya diagnosed Ms. Jimenez with bipolar disorder II. The objective findings were "poor sleep, mood lability, racing thoughts." He found Ms. Jimenez to be "totally disabled." His secondary diagnosis was ADD with objective findings of "poor concentration distracted attention" making Ms. Jimenez "currently unable to work."

In the member incapacity section of the report, Dr. Baroya opined that Ms. Jimenez was currently substantially incapacitated from performing her usual duties because of her "[i]nability to focus and concentrate with multiple aspects of job function when medical

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<sup>1</sup> Although the date of the disability report was listed as April 17, 2013, the date of the examination was identified as April 27, 2013. Clearly the report could not have been written before the examination, however, this discrepancy was not material for the findings reached in this decision.

illness affects all aspects of concentration, attention to detail, mood lability in reacting to others in a courteous fashion.” However, Dr. Baroya noted that the incapacity was not permanent and had a probable duration of six months. Dr. Baroya had reviewed documents regarding Ms. Jimenez’s job description and physical requirements of her position, as well as obtaining information from Ms. Jimenez in order to reach his conclusion.

4. CalPERS obtained medical records and reports related to Ms. Jimenez’s mental condition and selected Matthew Carroll, M.D., a board certified psychiatrist, to perform a disability evaluation. Dr. Carroll provided CalPERS with narrative reports of his findings and conclusions. After reviewing all of those documents, CalPERS determined that when Ms. Jimenez filed her application for a disability retirement, she was not permanently disabled or incapacitated from performing the usual and customary duties of a Disability Insurance Program Representative.

5. On November 19, 2013, CalPERS notified Ms. Jimenez that her application for disability retirement was denied. CalPERS advised her of her right to appeal that adverse determination.

6. On December 13, 2013, Ms. Jimenez timely filed her appeal. She filed an addendum to that appeal on January 7, 2014. In it, Ms. Jimenez refuted Dr. Carroll’s conclusions and argued that the opinions of her treating psychiatrist “should hold more weight.” Ms. Jimenez also questioned the accuracy of Dr. Carroll’s findings. CalPERS forwarded the addendum to Dr. Carroll to review.

7. On October 21, 2014, petitioner filed the statement of issues in his official capacity. The statement of issues and other jurisdictional documents were served on all respondents. Ms. Jimenez requested a hearing. EDD did not respond to the statement of issues or appear in this matter. Upon proof of compliance with Government Code sections 11504 and 11509, this matter proceeded against EDD as a default pursuant to Government Code section 11520.

#### *Documentary Evidence Presented at Hearing*

8. The Position Statement of a claims examiner and the Physical Requirements of that position were introduced documenting the requirements of that position.

9. A packet of reports and medical notes between EDD and Dr. Baroya (Exhibit 19) contained various documents.

Twice in 2010, once in 2011, and twice in 2012, Ms. Jimenez filed requests for family medical leave (FMLA) due to her “serious health condition.” In 2010 Ms. Jimenez was deemed eligible for FMLA and EDD advised her of her reporting requirements while on leave. In 2011 and 2012 EDD advised Ms. Jimenez that she needed to submit sufficient certification to support her request for leave. Dr. Baroya completed the certification forms documenting the conditions that entitled Ms. Jimenez for leave.

On January 21, 2012, Dr. Baroya completed a Claim for Disability Insurance Benefits – Doctor’s Certificate noting that Ms. Jimenez would be unable to return to work until March 26, 2012. Dr. Baroya was providing Medication management” for Ms. Jimenez’s poor sleep, concentration, and mood swings. Dr. Baroya noted that her condition was not caused by her occupation. He documented that Ms. Jimenez had been under his care from “5/16/11 to the present,” which contradicted his other reports indicating that she had been under his care since May 10, 2010.

On March 17, 2012, Dr. Baroya completed a Claim for Disability Insurance Benefits – Doctor’s Certificate noting that Ms. Jimenez had been under his care from “5/5/10 to present” and she would be unable to return to work until June 1, 2012. Dr. Baroya listed his treatment as “medication management.”

On August 24, 2012, EDD sent a letter to Dr. Baroya seeking medical information from him because Ms. Jimenez had submitted a request for reasonable accommodation. Dr. Baroya advised that Ms. Jimenez first saw him on May 5, 2010. Her mental impairment was “mood lability, poor concentration.” He diagnosed her with “Bipolar Disorder, ADD.” The major life activities that were affected by her impairment were “regulation of mood, concentration of function, sleep changes, difficulty with multiple task activities.” Dr. Baroya advised that those functional limitations affected her ability to perform her job because of her “reduced concentration with multitasking, difficulty with distractions by other co-workers if in same area, getting anxious/irritable with excessive noise/chatter.” In response to the question of whether the medical condition was permanent or temporary, Dr. Baroya wrote, “Chronic illness. Patient would need a predictable consistent task to perform to focus for completion and to decrease mood swings.”

On May 22, 2012, Dr. Baroya completed an EDD Request for Continued Benefits - Physicians Supplemental Certificate in which he noted that Ms. Jimenez’s diagnoses were “ADD, Cyclothymia, Bipolar II.” Her condition prevented her from performing her work duties because of “disruptive mood, poor sleep, low concentration, irritable tearful.” She required more time off of work because “exacerbation of illness due to need for more medication and side effect regulation.” Dr. Baroya noted that Ms. Jimenez would be off work until August 6, 2012.

On August 28, 2012, Dr. Baroya completed an EDD Request for Continued Benefits - Physicians Supplemental Certificate in which he noted that Ms. Jimenez’s diagnosis was Bipolar disorder and he identified two “ICD codes.” Her condition affected her ability to perform her work because of “decreased mood, poor concentration, increased anxiety.” She required more time off work than previously estimated because of “illness flare-up and exacerbation of side effects.” Dr. Baroya opined that Ms. Jimenez would be off work until September 25, 2012.

On January 5, 2013, Dr. Baroya completed an EDD Request for Continued Benefits - Physicians Supplemental Certificate in which he noted that Ms. Jimenez’s diagnoses were Bipolar disorder, ADD. Her condition affected her ability to perform her work because of “recent manic episode having inability to interact with others as irritable frequently.” She

required more time off work than previously estimated because of “relapse of chronic illness that has been difficult to treat.” Dr. Baroya advised that Ms. Jimenez would be off work until February 11, 2013.

On March 28, 2013, Dr. Baroya noted, “Patient having history of return of medical illness and unable to work till 4/29/13.”

On May 15, 2013, Dr. Baroya wrote, “Patient having history of mood swings, anxiety, poor sleep, unable to focus, racing thinking. Patient with chaotic movements and side effects of medications. This is a chronic illness and at this time still active symptoms that would disrupt work assignments and unable to have adequate function due to ADA disability. Patient will need periodic absences even after stabilization per nature of medical illness is not predictable.”

10. Dr. Baroya’s notes and letters were introduced. Among the notes was one dated March 7, 2015, stating Ms. Jimenez “has bipolar disorder that has progressively worsened and totally disabled. She has been trying to obtain gainful employment but her illness has worsened and doubtful to recover [sic].” Other records were from 2010-2012 and were previously reviewed by Dr. Carroll when he authored his reports.

11. Ledger sheets documented the date treatment was provided to Ms. Jimenez, the costs of treatment, and the payments made for treatment. Nothing in those documents established that Ms. Jimenez was permanently disabled.

12. CalPERS retained Dr. Carroll to perform an independent medical evaluation. Dr. Carroll examined Ms. Jimenez on September 16, 2013. He reviewed her medical records and job description, and interviewed Ms. Jimenez. Dr. Carroll’s reported that Ms. Jimenez had multiple issues in the EDD workplace with her supervisors, as well as issues with prior employers and in her personal life. Dr. Carroll’s diagnostic impression<sup>2</sup> was: Axis I: Bipolar II Disorder, Occupational Problems; there were no Axis II or Axis III diagnoses; Axis IV: Occupational Problems; and Axis V: Global Assessment of Functioning, currently 70. Dr. Carroll opined there were no specific job duties that Ms. Jimenez was unable to perform because of her mental condition; Ms. Jimenez was not substantially incapacitated from the performance of her usual duties, and she had put forth her best effort during his examination.

13. In the addendum to her appeal, Ms. Jimenez included a December 12, 2013, letter from Dr. Baroya to Mr. Suine of CalPERS. The letterhead indicated that Dr. Baroya is a board certified psychiatrist. He has been treating Ms. Jimenez since May 2010 for

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<sup>2</sup> During his testimony Dr. Carroll admitted that his Axis diagnoses were made using the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision*, (DSM-IV-TR), the older version of the DSM that was still in use when he evaluated Ms. Jimenez. Axis diagnoses are no longer used in the newer version of the DSM, the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5). However, this did not change any of his opinions regarding his diagnoses or conclusions.

“Bipolar, ADHD and Anxiety.” He identified the four psychiatric medications that Ms. Jimenez was currently taking, noting that she had been disabled for almost two years and has not returned to work since February 29, 2012, due to her disability. Dr. Baroya wrote that:

[Ms. Jimenez] is unable to perform her regular duties because her condition has worsened. [Ms. Jimenez’s] depression at the present time is such that she has not been grooming or caring for herself. She cannot perform all aspects of her job with EDD or any other employer because she lacks concentration and experiences frequent mood swings, therefore interaction with others would be a problem. During her absence EDD has recently changed their policies to an all computerized program that she would have to be trained for and she lacks the capacity to focus for this training. She is over 51 years old and will need to be retrained in a different field. Returning to work for EDD would be detrimental to her health due to her serious illness.

Dr. Baroya concluded that “EDD has stopped medical benefits for [Ms. Jimenez] and she needs to be on her medications. She has no income to pay for her medications. The consequences of her not taking her medications could be harmful. I am pleading with you to reconsider your decision and allow her SSDI benefits for her permanent condition.”

14. CalPERS sent Dr. Carroll additional records from Dr. Baroya and Ms. Jimenez’s appeal wherein she asserted that Dr. Carroll made mistakes in her evaluation. Dr. Carroll wrote a second report on January 22, 2014, addressing those records and assertions. In it he wrote that his initial report merely contained information Ms. Jimenez provided to him during his interview with her. Dr. Carroll noted that Dr. Baroya’s global assessment of functioning score of 70 comported with Dr. Carroll’s findings because individuals with a score of 70 are “unlikely to suffer from any occupational impairment.” Further, Dr. Carroll noted that “[t]he last three months of Dr. Baroya’s notes note that [Ms. Jimenez’s] disorders are in remission. Dr. Baroya has seen Ms. Jimenez once a month for 15-minute appointments. Individuals who are in remission and need monthly 15 minute appointments are not likely to be impaired.” Moreover, Dr. Carroll wrote that during his interview with Ms. Jimenez, “her complaints were primarily about her treatment in the workplace. She felt that she was not being given reasonable accommodations. She noted that she was upset at her workplace, telling [Dr. Carroll], ‘I can’t forgive them anymore.’ She also noted that she has no desire to go back to work. As my report notes, ‘She now feel that she cannot go back to work there.’” Dr. Carroll concluded that his opinion from his previous report was unchanged.

#### *Witness Testimony*

15. Dr. Carroll testified in this hearing consistent with his reports. He presented as a very careful, conscientious, thoughtful practitioner. He was very polite when testifying and his opinions were supported by his findings and appeared well reasoned. He made a credible

and persuasive witness. Dr. Carroll testified that Ms. Jimenez's chief complaints related to how she had been treated in the workplace; she loved her actual job at EDD. Ms. Jimenez loved the work she did and her colleagues, but complained about her managers. Ms. Jimenez never said the job duties were a problem for her; it was the atmosphere in the workplace that was the issue.

Dr. Carroll testified that Ms. Jimenez was treating with mental health care providers, but none of them found that she could not perform her job. In fact, her treaters noted that her condition was in remission because of the treatment she was receiving. Moreover, Dr. Baroya gave Ms. Jimenez a global assessment of functioning score of 70, the same score Dr. Carroll found, which is a score that indicates one is having some difficulties in life but generally functioning quite well. Additionally, Ms. Jimenez was only seeing her providers once a month for 15 minute medication management visits and this care was not consistent with a patient suffering serious mental health issues. Further, Dr. Carroll's finding that Ms. Jimenez's symptoms were in remission was consistent with Dr. Baroya's opinions contained in his April 17, 2013, Physician's Report on Disability, wherein Dr. Baroya opined that Ms. Jimenez's symptoms were likely to resolve in approximately six months. Thus, Dr. Carroll disagreed with Dr. Baroya's opinion that returning to work would be detrimental to Ms. Jimenez's health.

Dr. Carroll testified that he found Ms. Jimenez's letter to him criticizing his evaluation "unusual" and he disagreed with her allegations contained therein. Dr. Carroll testified that the letter did not accurately reflect what occurred at his visit with Ms. Jimenez and he stood by the statements contained in his report.

## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

### *Applicable Statutes*

2. Government Code section 20026 defines "disability" and "incapacity for performance of duty," for purposes of a retirement, to mean "disability of permanent or extended and uncertain duration" based on "competent medical opinion."

3. Government Code section 21150, subdivision (a), provides that a member who is "incapacitated for the performance of a duty" shall receive a disability retirement.

4. Government Code section 21156 provides that if the medical evaluation or other evidence demonstrates that an eligible member is incapacitated physically or mentally, then CalPERS shall immediately retire the member for disability.

*Appellate Authority*

5. “Incapacitated” means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the public employee is not “incapacitated” and does not qualify for a disability retirement. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 886-887.)

6. The fact that an injury increases an individual’s chances of further injury does little more than demonstrate that the injury is prospective, hence, speculative, and presently not in existence. It is insufficient to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863).

*Evaluation*

7. In order to qualify for a disability retirement, Ms. Jimenez must demonstrate that she was permanently disabled or incapacitated from performing the regular and customary duties of a Disability Insurance Program Representative when she filed her application. The evidence demonstrated that Ms. Jimenez has mental health diagnoses, has received treatment for those conditions, and her conditions are in remission. Dr. Baroya’s note dated March 7, 2015, stating Ms. Jimenez “has bipolar disorder that has progressively worsened and totally disabled. She has been trying to obtain gainful employment but her illness has worsened and doubtful to recover [sic] was insufficient to meet Ms. Jimenez’s burden of proof. Absent anything else, this one note did not establish that she was permanently disabled or incapacitated from performing her regular and customary job duties in light of all the other overwhelming evidence that she could perform them.

The evidence did not demonstrate that she was permanently disabled or incapacitated from performing her job duties because of her condition. As such, her application must be denied.

*Cause Exists to Deny the Application*

8. Cause exists to deny Ms. Jimenez’s application for a disability retirement. A preponderance of the evidence did not establish that Ms. Jimenez was permanently disabled and incapacitated from performing the regular and customary duties of a Disability Insurance Program Representative as a result of her mental condition when she filed her application for a disability retirement with CalPERS.

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ORDER

The application for a disability retirement filed by Gracie Jimenez with the California Public Employees Retirement System on April 11, 2013, is denied. CalPERS's denial of Ms. Jimenez's application is affirmed.

DATED: February 12, 2016

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MARY AGNES MATYSZEWSKI  
Administrative Law Judge  
Office of Administrative Hearings