

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

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

In the Matter of the Reinstatement from  
Industrial Disability Retirement of:

TAMMIE L. SHORT,

Respondent,

and

DEPARTMENT OF DEVELOPMENTAL  
SERVICES, PORTERVILLE STATE  
HOSPITAL,

Respondent.

Case No. 2015-1131

OAH No. 2015120572

**PROPOSED DECISION**

This matter was heard before Jonathan Lew, Administrative Law Judge, Office of Administrative Hearings, on June 21, 2016, in Fresno, California.

Rory J. Coffey, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Tammie L. Short appeared on her own behalf.

There was no appearance by, or on behalf of, the Department of Developmental Services, Porterville State Hospital.<sup>1</sup>

Evidence was received, the hearing concluded, and the matter was submitted pending receipt of an Independent Medical Examination (IME) report by Mohinder Nijjar, M.D. The

<sup>1</sup> Compliance with service requirements under Government Code sections 11504 and 11509 was established. With respect to The Department of Developmental Services, Porterville State Hospital, this matter proceeded by way of default under Government Code section 11520.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED July 1, 2016  
C. Goddard

IME report was received on June 22, 2016, and marked and received in evidence as Exhibit 13. The record was closed, and the matter was submitted for decision on June 22, 2016.

## ISSUE

Does respondent remain substantially incapacitated, on the basis of an orthopedic (back, shoulder, wrist) condition, from the performance of her duties as a Psychiatric Technician Assistant for the Department of Developmental Services (DDS), Porterville State Hospital?

## FACTUAL FINDINGS

1. Respondent was employed by DDS as a Psychiatric Technician Assistant at Porterville State Hospital. By virtue of her employment, she is a state safety member of CalPERS subject to Government Code section 21151.<sup>2</sup>
2. On April 21, 2006, respondent filed with CalPERS an application for industrial disability retirement on the basis of an orthopedic (left limb; left shoulder; head and neck; cervical, thoracic lumbar, and sacrum; hips and both legs) condition arising from an industrial accident that occurred on September 5, 2003.
3. On July 31, 2006, CalPERS approved respondent's application for industrial disability retirement on the basis of an orthopedic (left shoulder, back, left wrist) condition. She was placed on the industrial disability roll effective April 1, 2006, and has been receiving her retirement allowance from that date.

### *Duties of a Psychiatric Technician Assistant*

4. Porterville State Hospital is a residential facility for adolescents and adults with developmental disabilities. As set forth in a Psychiatric Technician Assistant Job Analysis (Job Analysis), a psychiatric technician assistant provides direct care and support services to clients with responsibilities that include: 1) assist with implementation of training and recreation activities and provide physical care as planned by the interdisciplinary team for assigned clients; 2) provide clients with a comfortable, safe and clean living environment; 3) comply with facility, program, and residence policies and procedures; 4) subscribe to facility philosophy and objectives; and 5) maintain current certified nurse assistant certification. Among essential functions listed in the Job Analysis is the ability to

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<sup>2</sup> Government Code section 21151, subdivision (a), states: "Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service."

“participate in client containment/intervention/restraint when client’s behavior may lead to injury to self or others.”

5. The Job Analysis states that Psychiatric Technician Assistants must be able to continuously (80 – 100 percent of time) walk/stand throughout the day. They must be able to frequently (40 – 79 percent of time) lift up to 10 pounds throughout the work day miscellaneous items such as meal trays, personal hygiene items, clothing/laundry, and mops; rotate at their torso when assisting clients in dressing, personal hygiene, showering, clean up duties, feeding, and recreational activities; bend/stoop frequently when assisting clients in dressing, personal hygiene, making beds, mopping, assisting in feeding, and performing laundry duties; push/pull frequently when opening and closing heavy doors, pushing wheelchairs, push beds, and while mopping; reaching out-in-front frequently to open doors, push wheelchairs, push beds, assist clients with dressing, personal hygiene, showering, and mopping; frequently perform fine finger dexterity and simple grasping movements when answering telephone, charting, assisting patients, folding laundry, performing creative/play activities with client, administering medication, taking blood pressure, and assisting client with feeding and personal hygiene; and frequent wrist twisting/flexion/extension when turning keys in metal doors with hand and wrist (100+ times/day), tearing open medication/treatment packages (500 times/day), flushing toilets (up to 50 times/day) and when pushing/pulling wheel chairs, assisting with patient dressing and performing cleanup and other duties as required.

6. Psychiatric Technician Assistants must be able to occasionally (20 to 39 percent of time) lift up to 40 pounds; and perform overhead reaching/stretching activities such as obtaining items from higher shelves, folding laundry, assisting clients with personal hygiene, showering and miscellaneous job duties. They only seldom (up to 19 percent of time) lift over 40 pounds, such as lifting a client from a wheelchair to a bed. They have the ability to request assistance from coworkers in these cases. They only seldom squat, kneel, crawl, climb, run or jump.

*2011 Independent Medical Evaluation (IME) by Mohinder Nijjar, M.D.*

7. CalPERS sent respondent for an IME to Mohinder Nijjar, M.D., a board-certified orthopedic surgeon. Dr. Nijjar physically examined respondent, reviewed her history, medical records and job duties, and issued an IME report dated November 15, 2011. At the time, respondent was 43 years old. Respondent told Dr. Nijjar that on September 5, 2003, she participated in a mandatory training course where one person was required to force the other person to the ground, and the other person was to exercise care in protecting herself. When respondent participated, she was slammed to the floor, injuring her left arm, neck and back. At the time she was examined by Dr. Nijjar, she complained of constant left shoulder pain, occasional discomfort/pain in her wrists, neck pain with radiation to the left scapular area, and constant pain in the lower back, worse after bending more than 10 minutes and with radiation to both legs.

8. After examining respondent and reviewing her medical records and job duties, Dr. Nijjar diagnosed respondent as follows: 1) Sprain/strain of the cervical spine superimposed over cervical disc protrusion; 2) Left shoulder sprain/strain with tear of the rotator cuff status post-surgical repair; and 3) Sprain/strain of the lumbar spine.

Dr. Nijjar opined that respondent was substantially incapacitated for performance of her job duties as a psychiatric technician assistant, explaining as follows:

Evaluation of physical findings is the claimant had sprain/strain of the neck, left shoulder, and rotator cuff injury and had surgical intervention in the form of decompression and left carpal tunnel release. She has pain in the neck and back. Findings on general examination reveal she has limitation of range of motion in the cervical spine.

Subjectively, she has significant pain, with overall consideration the claimant is unable to restrain clients with force if necessary. Otherwise she can perform the remainder of her job functions fully.

9. Dr. Nijjar opined that respondent's incapacity was permanent. After Dr. Nijjar's IME, respondent remained on disability retirement.

*February 10, 2015 IME by Ghol B. Ha'Eri, M.D.*

10. In 2015, CalPERS sent respondent for an IME with Ghol B. Ha'Eri, M.D., a board-certified orthopedic surgeon. Dr. Ha'Eri is also a Diplomate, American Academy of Neurological and Orthopedic Surgery. He has practiced over 47 years as an orthopedic surgeon. Dr. Ha'Eri has performed IMEs for CalPERS for approximately three years, and has performed approximately 100 disability evaluations in matters involving CalPERS members.

11. On February 10, 2015, Dr. Ha'Eri physically examined respondent, reviewed her history, medical records, diagnostic studies and job duties, and issued an IME report. At the time of this IME, respondent was 46 years old. Respondent complained of neck ache and stiffness, numb feeling and weakness of grip strength in her hands, and constant slight lower back pain, which increased in intensity with physical activities. She also indicated that she had radiating pain and tingling sensations in her legs. Dr. Ha'Eri noted that her past surgical history included left carpal tunnel release and left shoulder arthroscopic impingement release.

12. On physical examination, Dr. Ha'Eri noted that respondent had a normal posture and gait. She was not using an assistive device for ambulation. On cervical/thoracic examination, he noted that respondent had a normal cervical lordosis. He indicated that palpation of her neck revealed no tenderness, and there was no muscle spasm. Range of

motion of her cervical spine was within normal limits. Palpation of her thoracic region revealed no tenderness. He noted that there was no paraspinal muscle spasm.

On lumbar spine examination, Dr. Ha'Eri noted that respondent had a normal lumbar lordosis and that palpation of the lumbosacral region revealed mild tenderness. He noted that no muscle spasm was present. Range of motion of her back was measured based on active voluntary flexion and extension, as well lateral flexion/rotation. It showed limited motion ranging from 10 to 20 degrees of normal. Dr. H'Eri noted that straight leg raising was normal, bilaterally to 90 degrees. Examination of both shoulders revealed no swelling or atrophy. He noted well-healed scars from arthroscopic portals in the left shoulder. Both shoulders moved through a full range of motion (normal). Dr. Ha'Eri conducted a bilateral wrist examination. He noted that there was no swelling and that palpation of both wrists revealed no tenderness. He noted that Tinel's sign was negative over both carpal tunnels. Range of motion of the bilateral wrists was normal, and the fingers of both hands moved through a full range of motion. Neurological examination of the extremities was grossly intact. There was no sensory deficit, and deep tendon reflexes were bilaterally present and normoactive. Circumferential measurements of her upper extremities were essentially equal, left and right. Circumferential measurements of her lower extremities (thighs) were 48.5 cm and 46.5 cm for her right and left thighs, respectively. Her calf measurements were equal.

13. After examining respondent and reviewing her medical records, MRI studies and job duties, Dr. Ha'Eri diagnosed her as follows: 1) Status post left shoulder impingement release on 04/14/2004; 2) Status post left carpal tunnel release on 08/02/2006; 3) Cervical, thoracic, and lumbar strain; 4) Lumbar degenerative disc disease (L4-L5 and L5-S1) with disc bulges; and 5) Obesity.

14. Dr. Ha'Eri opined that respondent was not substantially incapacitated from performing her usual duties as a Psychiatric Technician Assistant. Dr. Ha'Eri stated in his IME report:

There are no specific job duties that I feel that the member is unable to perform because of her physical conditions described under the heading of Diagnoses. ... It is my professional opinion that this member is not substantially incapacitated for the performance of her duties as a Psychiatric Technician Assistant at Porterville Developmental Center.

15. At hearing, Dr. Ha'Eri testified in a manner consistent with his report, elaborating on some of his earlier findings. Dr. Ha'Eri noted that respondent's cervical range of motion was within normal limits. He testified that he observed no spasms following palpation of her cervical, thoracic and lumbar spine regions. Were respondent experiencing significant pain, more guardedness and muscle spasm would be expected and not the mild tenderness on palpation he found. He found no abnormal curvature in her cervical or lumbar spine area. Straight leg raising revealed no pain, indicating that her sciatic nerve was not implicated. He averred that he administered the Tinel's sign at the wrist without a positive

response. Dr. Ha'Eri explained that the natural history of respondent's degenerative back condition would allow for natural stabilization and continuous improvement in that area to occur over time. He opined that more recent CT findings (June 15, 2016) showed improvement from the November 14, 2003 MRI of her lumbar spine. The earlier images showed disc bulge measurements of 5.5 mm at L4-L5, and 3.5 mm at L5-S1. The recent images showed disc bulge measurements of 3 mm at L4-L5; and 3 mm at L5-S1. Dr. Ha'Eri characterized respondent's November 14, 2003 MRI as "extremely normal." He opined that this is a naturally occurring condition that has little or nothing to do with her earlier industrial accident, which he described as a "trivial" event that resulted in an aggravated condition that should have been treated and resolved over a period of months. He disagreed with Dr. Nijjar's earlier IME medical report finding that respondent was disabled at the time she was seen by Dr. Nijjar.

16. Dr. Ha'Eri found no objective findings that could explain or corroborate respondent's complaints of pain, and does not believe that the mild degenerative changes in her low back area represent anything other than normal degenerative changes one would expect over time. He believes her condition has actually improved. He opined that respondent can substantially perform her job duties as a Psychiatric Technician Assistant.

#### *Testimony of Respondent*

17. Respondent testified to the current level of her activities. She moves slowly, noting that her hips and low back do not always work together in the same fashion. Sometimes she cannot shower because she cannot lift her leg over the shower side wall. She requires the assistance of her 19-year-old daughter during such times. She takes pain pills (Norco). Sometimes she takes as many as three pain pills per day, and other weeks she may take none. Sometimes her legs go numb. She reported falling three times this past year when her legs gave way under her. She also experiences migraines which she relates to her injury. She has tried exercising and recently joined a gym.

18. Respondent worked full time as a unit clerk at Sierra Vine Hospital, and also full time as a medical assistant in Porterville. She is not working at this time. She noted that she drops things easily and she does not trust her ability to grip and hold things. She indicated that she would love to return to work but is afraid that she would pose a danger to herself or others because she would not be able to restrain/control clients when needed.

19. Respondent disputes the nature of, and degree to which Dr. Ha'Eri conducted his physical examination of her. She indicated that the two were in a relatively small office, and that he sat behind a desk interviewing her. She denies Dr. Ha'Eri ever performing a physical examination involving palpation of her spine. She denies him ever physically touching her cervical, thoracic or lumbar spine areas. She denies him ever tapping her hand/wrist area to perform the Tinel's test. She denies ever lifting her leg to perform the straight leg raising test. She showed Dr. Ha'Eri the palms of her hands, as well her shoulders, and she performed some range of motion tests. However, the only time he touched her was when they shook hands. She was in disbelief when she read the report and

saw that Dr. Ha'Eri stated he had palpated the spinal areas, and which he also testified to during hearing.

### *Discussion*

20. Respondent offered no medical evidence other than recent records from the Sequoia Family Medical Center in Porterville, California. Dr. Ha'Eri has essentially opined that in the absence of any objective medical findings to support respondent's complaints of pain, she is no longer incapacitated from the performance of her usual duties as a Psychiatric Technician Assistant. He has described a normal physical examination, generally normal range of motion, no atrophy of relevant muscle groups, no cervical/thoracic/back spasms and a grossly intact neurological examination. He characterized respondent's MRI and CT findings as demonstrating only mild degenerative changes typical of one her age.

21. Normally, such medical findings and opinion by a CalPERS IME, in the absence of medical evidence to the contrary, would support a finding that a member is no longer substantially and permanently disabled from performing the member's usual duties. In this case, however, respondent testified credibly to the nature of Dr. Ha'Eri's medical examination, or lack thereof. Dr. Ha'Eri did not palpate her spine as he reported and testified to at hearing. Such detail may not have clinical significance,<sup>3</sup> but it surely casts a cloud on Dr. Ha'Eri's overall credibility and objectivity as an IME. Respondent's recall of events was clear, consistent and detailed. She has had many physical examinations and was able to compare and contrast her experience with other orthopedic surgeon examiners. It is a matter which a patient would remember. Her account rings true that Dr. Ha'Eri never touched her except for a handshake. They were in cramped quarters which she also described in detail. She also has no recollection of performing the straight leg raising or Tinel's tests for Dr. Ha'Eri. In contrast, Dr. Ha'Eri was somewhat defensive and vague about what occurred during the examination. For all the above reasons, it does not appear that Dr. Ha'Eri ever performed palpation of respondent's spine and the other two tests as he reported and testified to at hearing. For these reasons, his medical findings and opinion must be discredited completely, and accorded no weight in these proceedings.

22. Because respondent is already receiving disability retirement, the burden was on CalPERS to establish that respondent is no longer substantially and permanently disabled from performing the usual duties of a Psychiatric Technician Assistant. It may be that respondent can return to work in her former position. However, CalPERS must refer respondent for orthopedic examination by another physician prior to making such determination. CalPERS did not present sufficient competent medical evidence at this time

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<sup>3</sup> It may, in fact, be very significant. Dr. Nijjar noted during his physical examination of respondent's cervical spine that she had "minimal paraspinal muscle spasms, more so on the right side than the left." If these spasms were present during Dr. Ha'Eri's examination they could be confirmed only through palpation of the cervical spine, which he did not do.

to meet its burden of proof. Consequently, its request that respondent be involuntarily reinstated from disability retirement should be denied.

## LEGAL CONCLUSIONS

1. In accordance with Government Code section 21192, CalPERS re-evaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

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 ... The examination shall be made by a physician or surgeon, appointed by the board... 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 ... 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.

2. Government Code section 21193 governs the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty and, in relevant part, 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.

3. Government Code section 20026 defines “disability” and “incapacity for performance of duty,” and, in relevant part, provides:

“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.

4. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.) In *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862 the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient.

5. To involuntarily reinstate respondent from industrial disability retirement, CalPERS had to establish that respondent is no longer substantially incapacitated from performing the usual duties of a Psychiatric Technician Assistant. As set forth in Findings 17 through 22, CalPERS did not offer sufficient competent medical evidence at the hearing to meet its burden of proof. Consequently, CalPERS' request that respondent be involuntarily reinstated from disability retirement should be denied.

#### ORDER

The request of California Public Employees' Retirement System to involuntarily reinstate respondent Tammie L. Short from disability retirement is DENIED.

DATED: June 28, 2016

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JONATHAN LEW  
Administrative Law Judge  
Office of Administrative Hearings