

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 Industrial
Disability Retirement of:

CARLA S. BACKLIN,
Respondent,

and

AVENAL STATE PRISON, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Respondent

Case No. 2015-0888

OAH No. 2015110196

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 16, 2016, in Fresno, California.

Terri Popkes, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Carla S. Backlin (respondent) was present throughout the hearing and represented herself.¹

Evidence was received, the record was closed, and the matter submitted for decision on May 16, 2016. The record was re-opened on June 14, 2016, to allow CalPERS to obtain and submit a supplemental independent medical examination (IME) report, and to allow respondent to submit additional documents in response to any supplemental IME report. CalPERS submitted a supplemental IME report; respondent did not submit any additional documents. The record was closed and the matter submitted on July 28, 2016.

¹ There was no appearance by or on behalf of the Department of Corrections and Rehabilitation.

ISSUE

The issue before the CalPERS Board of Administration for determination is whether at the time of respondent's application for disability retirement she was permanently disabled or substantially incapacitated because of an orthopedic and/or neurological back condition from performing the usual and customary duties of a Registered Nurse for respondent Avenal State Prison, California Department of Corrections and Rehabilitation.

FACTUAL FINDINGS

Respondent's Disability Retirement Application

1. CalPERS received respondent's Disability Retirement Election Application on March 10, 2015, describing her disability as "(Back) Herniated disc in the L5/S1 region an[d] a bulge in the L4/5 region along with possible nerve damage in my lower spine."

Respondent described her limitations/preclusions as "No lifting over twenty five lbs and prolonged bending stooping walking sitting or standing."

Respondent stated in her application that her injury or illness affects her ability to perform her job, as follows: "Due to my physical condition and physician's restrictions I am no longer able to perform the essential functions of my job."

Respondent provided other information on her application, as follows: "I now experience debilitating pain in the lower lumbar region and both hips[;] can't sit or stand for prolonged periods[;] have radiating pain down both lower extremities[;] neuropathy in the right leg[;] numbness in both lower extremities and a sensation in the bottom of my right foot that feels like I am being poked with needles."

2. Respondent retired for service effective October 1, 2014, and has been receiving her service retirement allowance from that date.

Duties of a Registered Nurse

3. The Department of Corrections, Correctional Health Care Services prepared an Essential Functions List for registered nurses. The list under the heading Physical Functions includes the following:

- Have and maintain sufficient strength agility and endurance to perform during stressful (physical, mental and emotional) situations without compromising health and well-being of self or others,
- Remain sufficiently alert and focused to effectively evaluate and respond to dangerous or emergency situations, including

sensory perception (see, hear, smell and touch) sufficient to detect clinically relevant signs and to perceive and respond to alarms warnings, or dangerous conditions,

- Move about the institution, occasionally to continuously, covering long distances indoors or outdoors in various weather conditions,
- Access all floors of facilities with multiple levels separated by flights of stairs,
- Remain stationary, occasionally to continuously, while keeping records writing reports, observing designated areas, and performing other nursing tasks,
- Stoop, and, reach, twist and stretch, occasionally to continuously, sufficiently to inspect, observe, manipulate, move and record objects 360 degrees horizontally or more, from floor through overhead levels,
- Lift and carry, frequently, light (20 pound maximum) to medium (50 pound maximum) loads,
- Lift and carry, occasionally to frequently, very heavy (over 100 pounds) loads for example when preventing patient from falling,
- Pushing and pulling occasionally to frequently,
- Perform regular duties on a wide range of working surfaces, which may be uneven or rough, or become slippery due to weather or spillage of liquids.

4. Respondent signed a document titled Physical Requirements of Position/Occupational Title, which described the physical requirements of the job as including over six hours per day of sitting, standing, bending (neck, waist), twisting (neck, waist), and reaching (above and below shoulder); from three to six hours per day of walking, pushing and pulling, fine manipulation, simple grasping, repetitive use of hands, and lifting and carrying zero to 100 plus pounds; up to three hours per day of kneeling, squatting, power grasping, keyboard use, and mouse use.

Respondent's Evidence

RESPONDENT'S TESTIMONY AND DOCUMENTARY EVIDENCE

5. Respondent testified that she suffers near constant back pain, and is unable to perform her usual duties as a Registered Nurse with the Department of Corrections. She also introduced into evidence reports regarding work-related injuries and her applications for benefits under Social Security and Workers' Compensation.²

² The documents introduced by respondent were admitted pursuant to Government Code section 11513, subdivision (d), which states: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be

6. Respondent introduced the following documents reflecting reports she made regarding work-related injuries or incidents:

- March 31, 2010 - soreness in back/right shoulder blade sustained by moving an inmate from wheelchair to bed.
- September 29, 2010 - mid and lower back pain sustained by bending over doing dressing changes; inmate's bed cannot be raised for proper body mechanics.
- October 4, 2010 - back pain/muscle spasms sustained by providing wound care; inmates bed cannot be raised for proper body mechanics.
- November 18, 2010 - lower back pain spasm sustained by sitting down in broken chair and slamming to floor.

On April 6, 2015, Kenneth Melashenko, M.D., signed a CalPERS document entitled Physicians Report on Disability, based on diagnoses of lower back pain and lumbar disc disease with radiculopathy, and the incidents described above. Dr. Melashenko's report states that respondent is permanently incapacitated from performing the usual duties of a Registered Nurse. Specifically, the document states that respondent is "not able to stand; lift; carry; walk for a long period of time."

7. Respondent submitted a letter from the Social Security Administration dated February 26, 2015, notifying her that "[d]octors and other trained personnel decided that you are disabled." The medical evaluation by C. Bullard, M.D., dated January 15, 2015, states respondent is limited to sedentary work, with exertional limitations of standing and/or walking for a total of two hours per workday; lifting or carrying up to 20 pounds for one third or less of each work day.

8. Respondent submitted a Qualified Medical Evaluation (QME) report signed by David G. Surdyka, M.D., on November 27, 2013. Dr. Surdyka is board certified in orthopedic surgery. He diagnosed respondent with lumbar spondylosis with aggravation; non-radicular bilateral lower extremity dysesthesias; myofascial pain dysfunction; thoracic compression fractures; polyneuropathy non-industrial. He recommended that respondent be precluded from lifting greater than 10 pounds on more than an occasional basis; prolonged bending or stooping; and walking, standing, or sitting for more than one hour at any given time.

sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

9. Respondent submitted an Initial Comprehensive Pain Management Consultation report dated September 2, 2014, prepared by Gregory A. Smith, M.D. Dr. Smith is board certified in anesthesiology and pain management. Dr. Smith diagnosed respondent with lumbar radiculitis; mechanical low back pain; herniated lumbar disc; chronic pain syndrome; prescription narcotic dependence; myofascial syndrome; chronic pain related insomnia; and neuropathic pain.

10. Respondent submitted a QME signed by Michael G. Klassen, M.D., on April 11, 2016. Dr. Klassen is board certified in orthopedic surgery and sports medicine. He diagnosed respondent with lumbago with L4-5, L5-S1 radiculopathy; and bilateral trochanteric bursitis. He recommended work restrictions including no repetitive bending, stooping, or squatting; limit lifting to 25 pounds occasionally and 10 pounds frequently.

LALINA CALDERON'S TESTIMONY

11. Lalina Calderon is respondent's daughter-in-law, and has known her for 21 years. To Ms. Calderon's observation, respondent has difficulty performing many activities of daily living, including getting dressed and cooking. Some days are better than others, but respondent is never just fine.

MARYANN SERNA'S TESTIMONY

12. MaryAnn Serna has been respondent's neighbor for the past five or six years. She has observed that respondent is not out and about as much as she used to be, that she no longer does yardwork, and that she does not drive very much.

13. Ms. Serna attended respondent's examination by Dr. D'Amico. Ms. Serna attended respondent's examination by Daniel D'Amico, M.D., the board certified orthopedic surgeon retained by CalPERS to perform an IME on respondent. To the extent of her recollection, Dr. D'Amico had respondent lay on an examination table and raise her legs, and walk on her heels and toes.

CalPERS's Expert

14. Dr. D'Amico conducted an IME of respondent on May 11, 2015, and issued an IME report of the same date. Dr. D'Amico issued a Supplemental Report dated June 15, 2016, summarizing his findings and conclusions regarding respondent's ability to lift/carry 100 plus pounds as listed among the physical requirements of a Registered Nurse.

15. Dr. D'Amico took respondent's history, conducted an orthopedic examination focused on respondent's back, and reviewed respondent's medical records and diagnostic studies. Respondent presented at the IME with complaints of pain in her lower back and upper right buttock radiating to her right thigh. The records reviewed by Dr. D'Amico included a June 28, 2013 MRI report of respondent's lumbar spine. Based on the MRI, Dr. D'Amico stated in his IME report that respondent had disc degeneration evidenced by a mild

annular bulge at L4 5, and a 3 millimeter by 12 millimeter bulge at L5 S1, with normal bilateral facet joints and normal central canal. Dr. D'Amico did not see any evidence of pressure on the nerves at the point of exit from the spinal canal. Based on the objective evidence, Dr. D'Amico did not see an orthopedic reason for the level of pain asserted by respondent. Dr. D'Amico listed his impressions relevant to respondent's back condition in his IME report as follows:

1. Very mild degenerative disc disease at L4 5 and L5 S1
2. Mild cervical degenerative disc disease
3. History of hypothyroidism treated
4. Mild central obesity with poor abdominal muscle tone
5. Referred pain to the right sacroiliac area without evidence of radiculitis or radiculopathy. Referred pain to the posterior iliac crest and posterior thigh without true evidence of radiculopathy
6. Medical somatoform pain disorder of the low back

Dr. D'Amico reviewed the physical requirements of a Registered Nurse with the Department of Corrections. In his May 11, 2015 IME report, he concluded that there are no specific job duties respondent is unable to perform, and that respondent is not presently substantially incapacitated from performing the work of a Registered Nurse. In this report, Dr. D'Amico discusses his findings, as follows:

[Respondent] may have a severe somatoform pain problem but this is not something I can evaluate. I am not an expert on pain or pain management.

Based on my physical findings and the contrast I have provided from my evaluation [respondent] does not have significant back discogenic or neurologic findings that would render her disabled from performing her work on an orthopedic basis

16. In a Supplemental Report dated June 15, 2016, Dr. D'Amico clarified his opinion regarding respondent's ability to meet the physical requirement that a Registered Nurse be able to frequently lift/carry 100 pounds. Dr. D'Amico opined that respondent could lift 100 pounds "a few times" during a three to six hour timeframe, but could not lift 100 pounds "many times" in the same span of time. The Physical Requirements of Position/Occupational Title of a Registered Nurse state that the nurse must be able to lift/carry 100 plus pounds "Frequently 3-6 hours" per work shift. The Essential Functions List for a Registered Nurse includes the ability to lift and carry "occasionally to frequently" loads over 100 pounds. The most reasonable reading of stated requirement is that a nurse must be able to lift and carry 100 plus pounds many times during a full work shift. Based on Dr. D'Amico's Supplemental Report, respondent could not satisfy such a requirement.

Discussion

17. Respondent testified convincingly that she continues to experience pain. However, taking into account all of the evidence, she did not establish that her pain has a physiological basis. Dr. D'Amico specifically stated that respondent may have a severe somatoform (non-physiological) pain problem, but there are no discogenic or neurologic findings that would render her disabled. Respondent's documentation of prior examinations and findings of disability by other physicians was considered only to supplement or explain other direct evidence, and is not sufficient standing alone to support any factual findings.³ Taken together, Dr. D'Amico's testimony, IME report, and Supplemental Report are persuasive. With respect to the requirement in the Position/Occupational Title and the Essential Functions List that a Registered Nurse must be able to lift and carry over 100 pounds, there is no evidence that respondent's usual and customary duties actually include frequent lifting or carrying of 100 pounds. Absent evidence of any physiological basis for respondent's perceived disability, and absent evidence that respondent's usual and customary duties include frequent lifting or carrying of over 100 pounds, respondent's disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By reason of her employment, respondent is a member of CalPERS and eligible to apply for disability retirement under Government Code section 21150.⁴
2. To qualify for disability retirement, respondent must prove that, at the time she applied, she was "incapacitated physically or mentally for the performance of his or her duties in the state service." (Gov. Code, § 21156.) As defined in Government Code section 20026,

"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 *Ibid.*

⁴ 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 or 21077.

3. 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.) An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of the application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697 [finding that a deputy sheriff was not permanently incapacitated from the performance of his duties, because "aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the [sheriff's] condition are dependent on his subjective symptoms"].) In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 860-861, the court applied the *Mansperger* standard, and held that it is necessary to examine the duties actually performed by the applicant to determine whether the applicant is substantially incapacitated from performing her usual duties. The list of duties prepared by the employer is informative but not the exclusive basis for determining the applicant's "usual job duties."

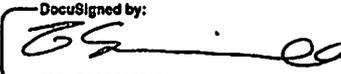
4. *Mansperger*, *Harmon*, and *Hosford* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date she applied for disability retirement, she was substantially unable to perform her usual duties as a Registered Nurse due to her physical condition. Respondent did not present sufficient evidence to meet this burden.

5. In sum, respondent failed to show that, when she applied for disability retirement, she was permanently and substantially incapacitated from performing her usual duties as a Registered Nurse due to her physical condition. Her application for disability retirement must, therefore, be denied.

ORDER

The application of respondent Carla S. Backlin for industrial disability retirement is denied.

DATED: August 25, 2016

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TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings