# ATTACHMENT A

# THE PROPOSED DECISION

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

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| In the Matter of the Reinstatement from Disability Retirement of:<br><br>RYANN O. MULLEN<br><br>Respondent,<br><br>and<br><br>WASCO STATE PRISON, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,<br><br>Respondent. | Case No. 2015-1146<br><br>OAH No. 2016030813 |

**PROPOSED DECISION**

Administrative Law Judge Ed Washington, Office of Administrative Hearings (OAH), State of California, heard this matter on August 9, 2016, in Fresno, California.

Senior Staff Attorney John Shipley represented the California Public Employees' Retirement System (CalPERS).

Ryann O. Mullen (respondent) was present and represented herself.

CalPERS properly served Wasco State Prison, California Department of Corrections and Rehabilitation (CDCR) with the Notice of Hearing. CDCR made no appearance. This matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

Evidence was received and the record remained open through August 30, 2016, to allow respondent to submit medical reports to support her claimed incapacity by August 23, 2016, and to allow complainant to submit any objections to those reports by August 30, 2016. Respondent did not submit medical reports or any other documents to OAH by August 23, 2016. The record was closed, and the matter was submitted for decision on August 30, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED September 23, 2016
Kathie E. Schretz

## ISSUE

Is respondent disabled or substantially incapacitated from performing the usual duties of a Correctional Case Records Analyst for CDCR due to an orthopedic (right shoulder, right wrist) condition?

## FACTUAL FINDINGS

*Procedural History*

1. Respondent is 39 years old. She began working for CDCR in 2000, and last worked for them as a Correctional Case Records Analyst. About March 11, 2013, respondent filed an application for disability retirement (Application) with CalPERS, based on an orthopedic condition (right upper extremity, upper back, neck and headaches, carpal tunnel syndrome right hand/wrist, bulging disc in the cervical region C3-4, severe tendonitis in the right shoulder, chronic pain in the neck and right shoulder with radiating pain in the upper back and frequent migraine headaches). CalPERS approved the Application on May 28, 2013, based on her right shoulder and right wrist conditions. Respondent disability retired, effective December 13, 2012, at 35 years old.

2. On an unspecified date between May 28, 2013, and January 22, 2015, CalPERS initiated a re-examination of respondent to assess her ability to perform her former job duties pursuant to Government Code section 21192, because respondent was under the minimum age for voluntary service retirement. The re-examination involved a review of information obtained from medical providers, including an Independent Medical Evaluation (IME) performed by Ghol Ha'Eri, M.D., on October 21, 2014, and information obtained from respondent regarding the scope, nature, and earnings of any employment.

3. After reviewing respondent's medical and employment information, CalPERS determined that respondent was no longer substantially incapacitated from performing the duties of a Correctional Case Records Analyst for CDCR. Respondent appealed from CalPERS' determination.

*Respondent's Disability Retirement Application*

4. In the Application, respondent described her disability, as follows:

> (Right upper extremity, upper back, neck and headaches) Carpal tunnel syndrome right hand/wrist, a bulging disc in the cervical region (C3-4), severe tendonitis in the right shoulder, chronic pain in the neck and right shoulder with radiating pain in the upper back and frequent migraine headaches.

5. In response to the question on the Application that asks how the disability occurred, respondent stated that the disability was "[d]ue to repetitive motion over the course of [her] career which includes constant lifting, pushing and pulling, as well as constant and prolonged keyboarding. Additionally, the inadequate ergonomics of my immediate work station have attributed to my condition."

6. In response to the question on the Application that asks what limitations or preclusions resulted from her injury or illness, respondent described her limitations as follows:

> No lifting, pushing or pulling over five (5) pounds and for no longer than fifty (50) minutes per hour. No working for more than four (4) hours per work day and more than three (3) days per week. No repetitive pushing, pulling, reaching, or reaching above the shoulder, and no repetitive motion with the right hand/wrist and elbow, and must have ten (10) minute break per hour.

7. In response to the question asking how her injury or illness affected her ability to perform her job, respondent stated that "due to [her] physical condition and doctors restrictions, [she is] no longer able to perform the essential functions of [her] job." In response to the question asking whether she was currently working in any capacity, respondent replied "No."

*Duties of a Correctional Case Records Analyst*

8. The essential functions of a Correctional Case Records Analyst are set forth in the CDCR, Division of Adult Institutions, Wasco State Prison—Reception Center, Correctional Case Records Analyst, Essential Functions form. The form includes a list of the essential job functions of a CDCR Correctional Records Analyst, including the following 10 physical essential functions:

- Must be able to work full time 40 hours per week, days and hours as assigned.
- Ability to work over 40 hours per week, or in emergency situations.
- Physically handle offender files. The offender file is comprised of the central file (minimum weight of one file is 2 pounds and maximum weight of one file is 20 pounds). These are approximate weights; a typical offender record is approximately 17 pounds. A box of files weighs a maximum of 40 pounds.
- Maneuver (push and pull) files on and off 7-foot shelving units, in and out of carts and boxes, onto and off of desks, credenzas, copy machines, and other work areas.
- Reach and bend to retrieve and place files on the lower three shelves.
- Step on a footstool and/or reach to retrieve and place files on the top two shelves.

- Push or pull files for placement or removal from the shelf. Some file shelves are cramped requiring excessive pushing and pulling.
- Transport files by either hand carrying (individually or a box of files) or placing into a cart and pushing the cart.
- Bend and lift the file to place in cart.
- Routinely move files or boxes of files throughout the office in order to complete a function, i.e., from the file room or their desks to the Case Records Technician work area, to the Offender Based Information System (OBIS) work area for data input, to intake/shipping, other staff, etc.

9. On March 7, 2013, a CDCR representative completed a Physical Requirements of Position/Occupational Title form for the Correctional Case Records Analyst position. According to that form, a Correctional Case Records Analyst must be able to engage in the following physical activities:

- Constant (over 6 hours) sitting, twisting (at the neck and waist), reaching (above and below shoulder), pushing and pulling, simple grasping, repetitive use of hands, keyboard use, and mouse use.
- Frequent (up to 6 hours) walking, fine manipulation, and power grasping.
- Occasional (up to 3 hours) standing, kneeling, bending (at the neck and waist), and lifting or carrying up to 25 pounds.

*Duties of a Judicial Courtroom Assistant*

10. Respondent currently works as a Judicial Courtroom Assistant for the Superior Court of California, County of Kern. The Job Task Analysis form for this position specifies that a Judicial Courtroom Assistant must occasionally (up to a third of the workday) push and pull up to 50 pounds with force to perform such job duties as opening and closing file cabinets, pushing and pulling wheeled carts, and pushing and pulling chairs. The Job Task Analysis form also specifies that a Judicial Courtroom Assistant must occasionally lift up to 25 pounds, both from floor to waist and from waist to shoulder, and lift up to 10 pounds from shoulder to overhead, to lift files, documents, and small office equipment. The document also specifies that a Judicial Courtroom Assistant must occasionally carry up to 25 pounds at waist height when carrying files, documents, and small office equipment.

*Respondent's Testimony*

11. Respondent began working for the Superior Court of California in September 2013. She initially worked as a Collections Specialist prior to becoming a Judicial Courtroom Assistant. She testified that although the Job Task Analysis form for her current position provides a "general overview" of the tasks performed by a Judicial Courtroom Assistant, the task may vary from assignment to assignment.

12. Respondent testified that she cannot perform her former job duties, as a Correctional Case Records Analyst for CDCR, because she cannot perform multiple functions required for the position. She specified that she "[does] not believe [she is] able to maneuver files on and off of 7-foot shelving units because [she does] not believe [her] arm has sufficient strength." She also stated that she does not believe she can transport a box of files by lifting it to put it on a cart. Respondent testified that she could push a box of files once it was on a cart, but does not believe she could lift the box to the cart. She asserted that she is precluded from performing these functions due to "shoulder pain, lack of strength, numbness, and tingliness." Respondent added that she was told that she could no longer perform the duties of a Correctional Case Records Analyst by Physician's Assistant Kevin Groh on August 25, 2014, during a consultation at the office of Alan Moelleken, M.D., an orthopedic spine specialist. Respondent testified that during this consultation she was told that her C3-4 and C5-6 vertebrae "had some defect to them that was not repairable by surgery because it would do more harm than good."

*Ghol Ha'Eri, M.D.*

13. Ghol Ha'Eri, M.D., testified at hearing. Dr. Ha'Eri is a Diplomate of the American Board of Orthopaedic Surgery and the American Board of Neurological and Orthopaedic Surgery. He has been licensed to practice medicine for approximately 47 years and served as chief of orthopedic surgery at Kern Medical Center in Bakersfield for 11 years. Until approximately 2010, Dr. Ha'Eri operated a private practice and treated orthopedic patients. For the last six years he has primarily performed IMEs and Qualified Medical Evaluations for a variety of entities and occasionally performs out-patient surgical procedures.

14. On October 21, 2014, Dr. Ha'Eri evaluated respondent. He reviewed the Application, respondent's job description, job functions and medical records, and prepared a 9-page report. Respondent told Dr. Ha'Eri that she was experiencing right side neck pain with radiation to the right shoulder and upper arm, a tingling sensation and numb feeling from the right elbow to the right hand, and occasional headaches.

15. Dr. Ha'Eri examined respondent's neck and upper extremities and found no deformity. Respondent had normal cervical lordosis and there was no swelling or atrophy around her right shoulder. She had mild tenderness over the right trapezius muscle with palpation of her neck and right shoulder, but no spasms were noted. The report reflects that respondent's range of motion in her cervical spine and right shoulder were normal. However, she reported end of range discomfort in both the neck and right shoulder.

16. Dr. Ha'Eri also performed a neurological examination on respondent, measured her extremities, and tested her grip strength. Her neurological examination was normal with no deficits. The circumferential measurement of her extremities showed no abnormalities. Measurement of bilateral hand grip strength showed a significant disparity between the right and left hand, with differences of up to 40 pounds in measurements. In a supplemental report prepared on January 14, 2015, Dr. Ha'Eri noted that respondent's grip

strength disparity was not consistent with manual muscle testing he performed on respondent during the examination. He opined that the disparity was "more consistent with suboptimal effort rather than true objective finding."

17. At the conclusion of the evaluation, Dr. Ha'Eri diagnosed respondent with "[c]ervical strain, resolved," and "[r]ight shoulder strain/mild rotator cuff tendinitis, resolved." In response to questions posed by CalPERS, in his report Dr. Ha'Eri opined that "there are no specific job duties [respondent] is unable to perform due to her physical condition of cervical spine and right upper extremity. ... [Respondent] is not substantially incapacitated for the performance of her duties as a Correctional Case Records Analyst."

18. At CalPERS' request, Dr. Ha'Eri prepared three supplemental IME reports after receiving additional medical records or information for consideration. The additional records and information did not alter Dr. Ha'Eri's opinion that respondent was not substantially incapacitated for the performed of her duties as a Correctional Case Records Analyst.

19. Dr. Ha'Eri's testimony at hearing was consistent with his IME reports. He briefly explained his examination process and reiterated the diagnoses in his report. It was Dr. Ha'Eri's opinion that respondent's medical records include erroneous conclusions about respondent's condition because many of the conclusions were made by physician's assistants rather than orthopedic specialist. He testified that although the medical records prepared by Physician's Assistant Groh included diagnoses for disc herniation at C5-6 and C6-7 and cervical radiculopathy, Dr. Ha'Eri found no objective medical evidence to support such diagnoses. Dr. Ha'Eri also testified that he was "puzzled" that epidural steroid injections of the cervical spine were recommended by Physician's Assistant Greg Stevens and approved by Dr. Moelleken, because the previous MRI showed no abnormality to substantiate the need for this procedure. Dr. Ha'Eri reiterated that he found nothing during his examination or review of respondent's records which indicated that respondent could not perform the duties of a Correctional Case Records Analyst for CDCR.

*Discussion*

20. Incapacity for performance of duty must be based on competent medical evidence. (Gov. Code § 20026.) Dr. Ha'Eri opined that respondent is not substantially incapacitated from performing her job duties. This opinion was based on his medical experience, training and expertise, examination of respondent, and review of respondent's medical records. No other competent medical evidence was produced at hearing. Respondent produced no medical reports or other records at hearing and did not call a medical expert to testify in support her claimed incapacity. At respondent's request, the record was left open for 21 days after the hearing to allow her to submit supportive medical records. Respondent submitted no additional evidence. Her evidence of incapacity to perform her former job duties consists of her testimony that she does not believe she can perform some of the duties of a Correctional Case Records Analyst for CDCR because of "shoulder pain, lack of strength, numbness, and tingliness."

21. When all the evidence is considered, CalPERS submitted sufficient evidence to meet its burden. Dr. Ha'Eri's opinion was persuasive and respondent presented no competent medical evidence to support her claimed incapacity. As a result, CalPERS' request that respondent be involuntarily reinstated from industrial disability retirement is granted.

## 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 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. Furthermore, in *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff's subjective complaints alone, without competent medical evidence to substantiate the complaints, were insufficient to support a finding that he was permanently incapacitated for the performance of his duties.

5. When all the evidence in is considered, CalPERS established that respondent is no longer substantially incapacitated for the performance of her usual duties as Correctional Case Records Analyst for CDCR, due to her orthopedic conditions. Consequently, CalPERS' request that respondent be involuntarily reinstated from industrial disability retirement is granted.

## ORDER

Respondent's appeal is DENIED. The request of California Public Employees' Retirement System to involuntarily reinstate respondent Ryann O. Mullen from disability retirement to her former usual job duties as a Correctional Case Records Analyst for CDCR is GRANTED.

DATED: September 22, 2016

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Ed Washington
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ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings