

**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:

BRUNO M. BRITO,  
Respondent,

and

DEPARTMENT OF CORRECTIONS  
INSTITUTION FOR WOMEN,  
Respondent.

Case No. 2014-1201

OAH No. 2015041186

**PROPOSED DECISION**

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on September 29, 2016.

Christopher C. Phillips, Senior Staff Attorney, represented petitioner Diane Alsup, then the Acting Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Bruno M. Brito, respondent, represented himself.

There was no appearance by Department of Corrections Institution for Women (DOCIFW). Upon proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default against DOCIFW pursuant to Government Code section 11520.

The record remained open to allow Mr. Brito to submit additional medical records and the transcript of the deposition testimony of his evaluating physician. Those records were marked and received in evidence collectively as Exhibit A. On October 13, 2016, the record was closed and the matter was submitted.

## ISSUE

Was Mr. Brito permanently disabled or incapacitated from performing the regular and customary duties of a psychiatric technician with DOCIFW due to his psychological conditions? Although Mr. Brito submitted a letter on December 21, 2015, expanding the scope of his claim for disability, and submitted some records in support of those claims, on March 3, 2016, and again on August 9, 2016, CalPERS advised Mr. Brito of the insufficiency of those documents and why those claims were being denied. CalPERS also noted that many of Mr. Brito's new claims arose long after he left state employment. Accordingly, at the start of this hearing, the administrative law judge ruled that those new matters were not at issue in this hearing. The denial of consideration of those issues was without prejudice to Mr. Brito properly asserting those claims in the future.

## SUMMARY OF DECISION

Mr. Brito had the burden to prove that he was permanently disabled or incapacitated from performing his regular and customary job duties due to his mental condition. Although the evidence established he does suffer from an adjustment disorder and a depressive disorder, the evidence did not support his claim that he was permanently disabled or incapacitated from performing the regular and customary duties of a psychiatric technician due to those conditions. Mr. Brito's claim for disability retirement is denied.

## FACTUAL FINDINGS

### *Preliminary Matters*

1. Mr. Brito was employed by DOCIFW as a psychiatric technician. By virtue of his employment, Mr. Brito was a state safety member of CalPERS subject to Government Code section 21151.

2. On December 27, 2013, Mr. Brito filed a Disability Retirement Election Application with CalPERS. He was not working when he filed his application. Mr. Brito claimed the right to receive a disability retirement because he suffered a "depressive disorder with anxiety, PTSD" that began on April 6, 2012, when he was assaulted by an inmate with a liquid substance. Mr. Brito claimed that his injury caused him "difficulty with memory, tolerance for stress is severely low, irritability in coping with dangerous violent gang inmates would overwhelm my functioning and my anxiety would bring anger to me [*sic*]." Mr. Brito wrote that the injury affected his ability to perform his job because he has "anger with intense fear for my life, difficulty concentrating, recurrent intrusive distressing recollection of the assault." Mr. Brito identified Barry Halote, Ph.D., as his treating psychologist.

3. CalPERS obtained medical records and reports related to Mr. Brito's mental condition and selected Lawrence Warick, M.D., Ph.D., a board certified psychiatrist, to

perform a disability evaluation. Dr. Warick provided CalPERS with narrative reports of his findings and conclusions. After reviewing all of those documents, CalPERS determined that when Mr. Brito filed his application for a disability retirement, he was not permanently disabled or incapacitated from performing the usual and customary duties of a psychiatric technician.

4. On September 11, 2014, CalPERS notified Mr. Brito that his application for disability retirement was denied. CalPERS advised him of his right to appeal that adverse determination.

5. On September 23, 2014, Mr. Brito timely filed his appeal.

6. On April 20, 2015, petitioner filed the statement of issues in her official capacity. The statement of issues and other jurisdictional documents were served on all respondents. Mr. Brito requested a hearing. DOCIFW did not respond to the statement of issues or appear in this matter and the matter proceeded against it as a default.

7. On December 21, 2015, Mr. Brito served petitioner's attorney with a letter advising that he wanted to "amend my Dr's application due to I'm still on Workmen's Comp. and will finish all of my Dr's Final reports and to include reports of PTSD.post traumatic disorder, depressive and anxiety disorder, hepatitis-C, neck pain, bilateral left and right shoulder pain and stiffness, upper back sprain strain, cervical sprain strain, right eye difficulty opening, difficulty sleeping, gastrointestinal problem, headache, hypertension [sic]." Mr. Brito referenced his treating physicians and their reports in his letter.

8. On March 3, 2016, and again on August 9, 2016, CalPERS sent letters to Mr. Brito evaluating the documents sent, the claims being made and advising him of the insufficiency of the evidence he was providing. CalPERS denied his request to amend his disability application.

#### *Job Description Documents*

9. The Essential Functions of a psychiatric technician and the Physical Requirements of that position outlined the tasks and physical requirements of that position. Dr. Warick relied upon those records in formulating his opinions.

#### *CalPERS's Medical Evaluation Conducted by Dr. Warick and His Supplemental Report*

10. CalPERS obtained Mr. Brito's medical records and sent those to Lawrence Warick, M.D., Ph.D., to review. Dr. Warick authored a report on July 25, 2014, discussing the psychiatric disability evaluation he performed for CalPERS. In his report, Dr. Warick noted that he "performed a complete psychiatric disability evaluation . . . in [his] Ontario office on July 24, 2014, for two face to face psychiatric hours (psychiatric hour being 45 minutes)." Dr. Warick took a history noting that on April 6, 2012, while talking to one inmate through the door, another inmate in a nearby cell threw some liquid on Mr. Brito. At

the time, Mr. Brito refused medical attention. Mr. Brito told Dr. Warick that other staff had been assaulted in a similar manner. Mr. Brito continued working “possibly another month or two,” stating that the liquid assault “was the final straw.” Mr. Brito reported that for the past several months a more violent group of inmates had been transferred to the prison and that ““corruption abuses and bad management by various”” employees caused some of the problems. Mr. Brito referenced threats by inmates who were “gang members associated with the prison mafia.” Mr. Brito described his unit as being out of control, and he filed a workers’ compensation claim. Mr. Brito reported he was treated for anxiety and depression with medication and group therapy. When asked if he could return to work if he worked in a different location, Mr. Brito replied that given his age, 64 years old, he did not want to return to any work.

Dr. Warick reviewed Mr. Brito’s past medical history, personal history, educational history, military history, occupational history, marital and social history, and performed a mental status examination. Mr. Brito relayed an early 1990s low back injury with his former employer resulting in a workers’ compensation claim. He filed for bankruptcy in October 2013. Dr. Warick wrote that Mr. Brito’s brother died in 2006 of a heroin overdose and his sister died in 2011 of pancreatic cancer. Another brother was noted to be a heroin addict who does not have much contact with Mr. Brito. His wife has been disabled for approximately 10 years with lower back symptoms and severe fibromyalgia. Dr. Warick administered the Multiple Choice Concept Map III (appended), a psychological assessment tool intended to provide information on personality traits and psychopathology, including specific psychiatric disorders and testified about how it supported his opinions.

Dr. Warick also reviewed the available records sent to him. In his report, Dr. Warick made several notations regarding the inconsistencies between what Mr. Brito stated during the evaluation and what Dr. Warick observed in the records, as well as inconsistencies he observed in the records among the various treaters. Mr. Brito argued at hearing that Dr. Warick did not perform an examination of him and, instead, derived his opinions from various medical records but those records were not available to Dr. Warick when he examined Mr. Brito, and Dr. Warick specifically noted in his first report that it “would be helpful” to get “records from Dr. Dell.” Thus, the information in Dr. Warick’s first report could not have come from anywhere other than the discussions he had with Mr. Brito.

Dr. Warick’s diagnostic impression<sup>1</sup> was Axis I: Adjustment disorder with mixed features, bereavement reaction, dysthymia; Axis II: Diagnosis deferred; Axis III: History of hernia, ear canal, and tonsil surgery, history of low back symptoms, workers’ compensation, litigated; Axis IV: Problems with primary support group death of sister and brother, crippling illness of wife, occupational problems; and Axis V: GAF 70. Dr. Warick opined that Mr. Brito was not substantially incapacitated for performance of his usual duties.

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<sup>1</sup> Dr. Warick used the former edition of the manual, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, (DSM-IV), and not the current edition, the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5). The current edition no longer uses Axes.

11. On September 17, 2015, Dr. Warrick authored a supplemental report because he was provided with a July 23, 2014, record from Dr. Halote, records from Dr. Swerdlov, a 70-page Agreed Medical Evaluation prepared as part of the workers' compensation case by Dr. Dell, and volume one of Dr. Dell's deposition. Dr. Warick wrote that these records did not change his opinions, noting that Dr. Dell agreed with Dr. Warick that Mr. Brito was not substantially incapacitated and could work in his profession. However, Dr. Dell opined that Mr. Brito should not work in a prison population. Dr. Dell also referenced numerous non-work-related stressors that Mr. Brito experienced, many of which Dr. Warick had identified in his initial report.

*Records Mr. Brito Produced Post-Hearing*

12. Portions of records from High Desert Heart Institute, signed by Subherwal Yash, M.D., noted that Mr. Brito "was exposed to work-related injury in 2012" for which he has been seeing Dr. Dell who performed a workers' compensation evaluation and recommended Mr. Brito "be permanently retired due to his psychological conditions which caused him a lot of emotional problems in addition to headaches." Dr. Yash noted that Mr. Brito has hepatitis C "due to exposure" at the prison and posttraumatic stress disorder "also due to the trauma at work in 2012" at the prison, causing depression and anxiety, bilateral shoulder and neck pains, as well as headaches and sleep disturbances and, from time to time, lower gastrointestinal symptoms. Dr. Yash highly recommended that Mr. Brito "permanently retire." Another note from Dr. Yash indicated, "I concur with a psychiatrist that the patient may be permanently disabled or retired" from the prison "because of the exposure from the violent behavior of the inmates. Due to his emotional instability, the patient will not be able to handle the situations and the patient has been advised to be permanently retired."

13. An October 23, 2013, portion of a note from Dr. Halote, indicated that the psychological testing revealed that "Mr. Brito is withholding negative feelings, anger in particular. By doing so, his physical symptoms worsen by way of somatizations and his depression worsens. His isolation allows time to mull over negative feelings, and his anxiety and fear, the latter being related to further injury and greater pain."

14. Dr. Halote's curriculum vitae and his November 26, 2012, initial treatment report and psychological testing report, as well as his October 23, 2013, permanent and stationary evaluation report were among the documents provided post-hearing. Those reports had been reviewed and referenced by Dr. Warick in his reports.

15. Volume one of Dr. Dell's deposition, taken in the workers' compensation matter on March 20, 2015, was also reviewed and referenced by Dr. Warick in his supplemental report and referenced it while testifying in this hearing. As Dr. Warick noted, Dr. Dell testified that Mr. Brito was able to work as a psychiatric technician, although he did not think he should work with incarcerated patients. Dr. Dell noted different hospital settings where psychiatric technicians do not work with incarcerated populations.

### *Dr. Warick's Testimony*

16. Dr. Warick obtained his medical degree in 1960 from Albert Einstein College of Medicine. He did a rotating internship at Los Angeles County General Hospital and residencies in neurology and psychiatry at USC School of Medicine. He is board-certified in psychiatry. Dr. Warick has a private practice, and also performs workers' compensation, independent medical, and social security evaluations.

Dr. Warick testified consistent with his reports. Dr. Warick believed Mr. Brito could return to work as a psychiatric technician. Although Dr. Warick initially testified that Mr. Brito had been spit on by an inmate, he later corrected that testimony when shown his report referencing liquid being thrown on Mr. Brito. Dr. Warick testified that both he and Dr. Dell disagreed with Dr. Halote's diagnoses and conclusions, stating that Dr. Dell agreed with Dr. Warick that Mr. Brito could return to work as a psychiatric technician. Dr. Warick explained that Mr. Brito's desire not to return to work was more like one who, at age 64, "wanted to hang up his spurs." Dr. Warick agreed that he did not cover much of the physical requirements of the job with Mr. Brito because Mr. Brito did not indicate to Dr. Warick that he was physically unable to return to work.

On cross-examination Dr. Warick stated that he receives between \$2,000 and \$4,000 to review records and will receive \$4,000 for testifying. Although Mr. Brito made an issue of this amount, this fact was neither persuasive nor did it establish that Dr. Warick was biased against Mr. Brito. Dr. Warrick testified that his face-to-face examination of Mr. Brito lasted approximately an hour and a half and that he then spent additional hours reviewing the records provided.

### *Mr. Brito's Testimony*

17. Mr. Brito disputed Dr. Warick's testimony and reports regarding the evaluation. Mr. Brito claimed that Dr. Warick examined him at a satellite office, shared by others, and that that when he went into Dr. Warick's office and sat down Dr. Warick asked him what happened. After Mr. Brito explained what had happened, Dr. Warick said in a very loud voice, "So what if they threaten you? So what? I work in prisons." When Mr. Brito asked, Dr. Warick told him he had worked in the Los Angeles County prison. Dr. Warick then "handed paper" to Mr. Brito on which he was to answer questions. Mr. Brito testified that that was the sum total of their discussion; Dr. Warick never examined him. Although it was obvious that Mr. Brito passionately believed this version of events, it was difficult to accept that this was what transpired in light of Dr. Warick's detailed report containing information he could only have gained from asking Mr. Brito questions, especially as Dr. Warick did not have the information in those reports that Mr. Brito asserted Dr. Warrick used to form his opinions until several months later when CalPERS provided those records to him.

Mr. Brito described the assault he suffered. The substance thrown at him covered most of his left side getting in his hair, eyes, and smelled like urine/feces. Mr. Brito testified that when he described that to Dr. Warick, Dr. Warick responded, "So what?" Mr. Brito also

testified that after Mr. Brito completed the paperwork, he went back to the office to give it to Dr. Warick who told him that he could have just left it up at the front desk. Mr. Brito testified that Dr. Warick was “very rude” to him, yelled at him, and treated him “horribly.” Even assuming, arguendo, that to be true, it would be insufficient to refute the competent medical opinions rendered by Dr. Warick.

Mr. Brito disputed the findings of Dr. Warick’s report regarding his brother’s death, producing a death certificate at hearing demonstrating that his brother died of AIDS. This discrepancy was insufficient to refute Dr. Warick’s opinion regarding bereavement due to his brother’s death as it was not established that the cause of death was a factor in that opinion.

Mr. Brito asserted that the opinions of Dr. Halote, his treating psychologist for the past four years, are more persuasive and should be relied upon to conclude that Mr. Brito is substantially incapacitated for performance of his duties.

## 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. The determination of incapacitation shall be based on competent medical opinion.

### *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; *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1057.)

6. Government Code section 21156 has been interpreted not simply to refer to the employee's *last employing department* but to *state service*. Government Code section 20069 defines "state service" as "service rendered as an . . . officer . . . of the state, the university, a school employer, or a contracting agency, for compensation . . ." When sections 21156 and 20069 are read together, it becomes clear that "state service," for the purposes of section 21156, means *all forms* of public agency service that render an employee eligible for the benefits of section 21156. Thus, to qualify for disability retirement under section 21156, an applicant for a disability retirement must not only show he is incapacitated from continuing to perform his usual duties for his employing agency, but also that he is incapacitated from performing the usual duties in his classification for other California agencies covered by the Public Employees' Retirement Law. (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 341-342.) Thus, Dr. Dell's opinion that Mr. Brito can perform his job, even though he may not be able to perform it at DOCIFW, was insufficient to establish that Mr. Brito was incapacitated from performing his job duties because no evidence refuted Dr. Warick's testimony that there is other state service for psychiatric technicians that does not involve working in a prison.

7. Although the Public Employees' Retirement Law and the workers' compensation law are aimed at the same general goals with regard to the welfare of employees and their dependents, they represent distinct legislative schemes. Courts may not assume that the provisions of one apply to the other absent a clear indication from the Legislature. (*Pearl v. W.C.A.B.* (2001) 26 Cal.4th 189, 197.)

8. Mr. Brito's receipt of any type of disability in a related workers' compensation proceeding does not establish his qualification for a disability retirement in this disability retirement proceeding. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) Nor does the issuance of prophylactic work restrictions or Mr. Brito's reasonable fear of injury justify granting him an industrial disability retirement. (*Hosford, supra.*) Workers' compensation appeal board determinations do not apply to industrial disability retirement proceedings. (*English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal. App. 3d 839, 844-845; *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

#### *Evaluation*

9. In order to qualify for a disability retirement, Mr. Brito must demonstrate that he was permanently disabled or incapacitated from performing the regular and customary duties of a psychiatric technician when he filed his application. Any award Mr. Brito may have received in his workers' compensation case does not establish eligibility for a CalPERS disability retirement. The evidence demonstrated that Mr. Brito has mental health diagnoses, has received treatment for those conditions, and is currently undergoing treatment, but his conditions did not establish that he was permanently disabled or incapacitated from

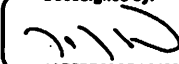
performing his regular and customary job duties. As such, his application must be denied.  
*Cause Exists to Deny the Application*

10. Cause exists to deny Mr. Brito's application for a disability retirement. A preponderance of the evidence did not establish that Mr. Brito was permanently disabled and incapacitated from performing the regular and customary duties of a psychiatric technician as a result of his mental condition when he filed his application for a disability retirement with CalPERS.

### ORDER

The application for a disability retirement filed by Bruno Brito with the California Public Employees Retirement System on December 27, 2013, is denied. CalPERS's denial of Mr. Brito's application is affirmed.

DATED: November 9, 2016

DocuSigned by:  
  
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MARY AGNES MATYSZEWSKI  
Administrative Law Judge  
Office of Administrative Hearings