

**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:

HEIDI L. LAGACHE,

Respondent,

and

HIGH DESERT STATE PRISON,  
CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION,

Respondent.

Case No. 2016-0491

OAH No. 2016060605

**PROPOSED DECISION**

Administrative Law Judge Gene K. Cheever, Office of Administrative Hearings, State of California, heard this matter on November 29, 2016, in Sacramento, California.

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

Heidi L. Lagache (respondent) appeared by telephone and represented herself.

There was no appearance by or on behalf of respondent High Desert State Prison, California Department of Corrections and Rehabilitation (CDCR). CalPERS established that it duly served CDCR with the Statement of Issues and Notice of Hearing. Consequently, this matter proceeded as a default hearing against CDCR pursuant to Government Code section 11520, subdivision (a).

Evidence was received, and the record was left open to allow respondent to submit medical records. At the hearing, CalPERS stipulated the records could be admitted as administrative hearsay. On November 30, 2016, respondent submitted medical records, which were marked for identification as Exhibit A and admitted into evidence pursuant to

Government Code section 11513, subdivision (d). The record was closed and the matter was submitted for decision on November 30, 2016.

## ISSUE

On the basis of a right wrist condition, is respondent permanently disabled or substantially incapacitated from performing her usual and customary duties as a Correctional Supervising Cook for CDCR?

## FACTUAL FINDINGS

1. Respondent was 34 years old at the time of hearing. She was employed as a Correctional Supervising Cook by CDCR. On August 18, 2015, CalPERS received respondent's Disability Retirement Election Application (application) seeking industrial disability retirement.

### *Respondent's Application*

2. Respondent did not identify a specific disability on her application, but claimed her "disability" occurred on April 4, 2014, when the wind blew an iron door shut on her right wrist. She described her limitations/preclusions due to the injury as follows, "lifting, movement, writing, typing," and also stated, "hand also has tingling, numbness, gives out easy and sharp, burning pains." She stated she was not currently working in any capacity.

3. By letter dated March 18, 2016, CalPERS notified respondent that it had denied her application. In the letter, CalPERS stated that its "review included the reports prepared by SK Uppal, M.D., George Barakat, M.D., Richard D. Tortosa, M.D., John L. Reyher, D.O., Stephen Morris, M.D., and Robert Henrichsen, M.D.," and that based on "the evidence in those reports, [CalPERS had] determined your orthopedic (right wrist and right hand) conditions are not disabling." The letter notified respondent that she had 30 days to file a written appeal from the denial. Respondent timely appealed from CalPERS's denial. On June 6, 2016, Anthony Suine, Chief of CalPERS's Benefit Services Division, signed the Statement of Issues solely in his official capacity.

### *Duties of a Correctional Supervising Cook*

4. CalPERS submitted two exhibits that described the duties of a CDCR Correctional Supervising Cook (cook): (1) CDCR's Duty Statement; and (2) a "Physical Requirements of Position/Occupational Title" signed by respondent. As set forth in the Duty Statement, the essential functions for the cook are the following:

- a. The cook prepares food trays for inmate patients in the Correctional Treatment Center (CTC) and is responsible for cleaning. The cook must follow the written rules that apply for food service in the CTC. (30 percent.)
- b. The cook receives, stores, and rotates food and supplies in the kitchen and warehouse. (15 percent.)
- c. The cook inventories storage levels of food and supplies. The cook ensures all items are utilized as required and inspects stock for quality and usage. (10 percent.)
- d. The cook prepares written and oral reports for daily production schedules, meal logbooks, meal sample reports, temperature logbooks, and food usage sheets. (10 percent.)
- e. The cook supervises inmate porters during cleaning and the preparing of food trays. The cook prepares Inmate Work Incentive reports, time sheets, performance evaluations, and disciplinary reports for inmate workers. (10 percent.)
- f. The cook provides safety and operational training for inmate workers. (10 percent.)
- g. The cook monitors equipment, safety, security, and sanitation. (10 percent.)
- h. The cook attends In-Service Training and receives On-the-Job training. (5 percent.)

5. As set forth in the Physical Requirements of Position, a Correctional Supervising Cook: (1) never runs, crawls, lifts more than 75 pounds, drives, or works at heights; (2) occasionally (up to three hours a day) sits, stands, walks, kneels, climbs, squats, bends at waist, reaches above and below shoulder, pushes and pulls, engages in fine manipulation, power grasping, simple grasping, uses hands repetitively, uses a keyboard and mouse, lifts up to 75 pounds, and works with heavy equipment; and (3) frequently (three to six hours a day) bends and twists at the neck and waist.

*Expert Opinion*

6. CalPERS retained Dr. Henrichsen, a board-certified orthopedic surgeon, to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Henrichsen examined respondent on February 16, 2016, took respondent's medical history, reviewed respondent's

medical records, including a Qualified Medical Evaluator (QME) report prepared by Dr. Morris, reviewed the Duty Statement and Physical Requirement of Position for a Correctional Supervising Cook, and watched surveillance videos taken of respondent. He prepared an IME report, and testified at hearing.

7. Respondent explained to Dr. Henrichsen that she injured herself on April 4, 2014, when a heavy door closed on her right wrist while she was carrying food trays. She did not finish work, and she saw a doctor that same day. She did not receive any sutures, and the x-ray of her wrist and hand did not show any bone injury. Respondent described her current complaints to Dr. Henrichsen as having constant dull aching in her right wrist and hand, numbness and tingling in her right thumb and index finger, and pain over her right long finger. She said she drops items with her right hand.

8. Respondent completed a written questionnaire for Dr. Henrichsen, wherein she stated she had difficulty with grooming herself, brushing her teeth, writing, lifting, grasping, pinching, and sensation. On a scale of one to 10, with 10 being the highest level of pain, she rated her pain level an eight when she engages in work around the home, a nine when writing and typing, and a five when doing daily activities.

9. Dr. Henrichsen's physical examination of respondent was restricted to her right and left upper extremities. Her shoulder and elbow range of motion and function were normal. The range of motion of her left wrist was normal, but she had limited range of motion upon flexion and extension of her right. Her right arm was positive for Tinel's sign, while her left was negative. She demonstrated less finger span on her right hand than her left. There was no visible sign of atrophy or swelling, bilaterally.

10. Dr. Henrichsen did not believe respondent put forth her best effort during the examination, because she told him that she was not able to flex her fingers down to her palm. However, according to Dr. Henrichsen:

[W]hen I gently passively flexed her fingers the fingertips would reach the mid-palm and there was no joint contracture of any DIP [distal interphalangeal], PIP [proximal interphalangeal], or MP [metacarpophalangeal] joint. That indicates that she is using those fingers into her palm on a regular basis. If she actually had the true diagnosis of CRPS or similar problem, then joint stiffness in that situation is extremely common and then a physician would not be able to gently passively flex their fingers.

11. Dr. Henrichsen considered the x-rays taken on April 4, 2014, the MRI performed on May 1, 2014, and the Electromyography (EMG) and Nerve Conduction Velocity (NCV) tests performed on June 23, 2014. The x-rays showed no evidence of bone or joint abnormality. The MRI and the EMG/NCV tests were initially interpreted by respondent's doctors as evidencing possible mild carpal tunnel syndrome, but subsequent

evaluations were inconsistent with such interpretation. Dr. Henrichsen explained that an accurate reading of the EMG/NCV test results did not demonstrate carpal tunnel syndrome.

12. In his IME report, Dr. Henrichsen summarized surveillance videos that he watched that were taken of respondent on October 26, 27, and 28, 2015, and had been provided to him by CalPERS. According to Dr. Henrichsen, the videos did not show any evidence that respondent favored her left hand to avoid the use of her right hand, experienced any pain due to the use of her right hand, or dropped items held in her right hand. The videos depicted respondent engaging in daily activities outside her home, including driving her car using both her hands, shopping at stores, lifting and carrying "reasonably large boxes" and small objects (for example, a cup of coffee) with both hands, using her cellular phone regularly with her right hand, opening and closing doors with both hands, using her right hand to engage in normal pinch activity, such as to pinch her nostrils and adjusting her hair and clothing with both hands.

13. Dr. Henrichsen diagnosed respondent as follows:

1. History of contusion right wrist.
2. No work-related carpal tunnel syndrome.
3. Unexplained persistent subjective symptoms not supported by objective findings.
4. Unfavorable power-to-weight ratio.

Dr. Henrichsen opined that respondent was not substantially incapacitated for the performance of her duties as a Correctional Supervising Cook. He found that there were no specific job duties she could not perform, and believed she could use both upper extremities without any limitations.

#### *Respondent's Evidence*

14. At the hearing, respondent testified her right wrist hurts when she drives a vehicle, writes, types, and engages in normal activities of daily living. She occasionally drops objects held in her right hand. Her right hand sometimes shakes for no reason, she sometimes feels tingling in that hand, and her right thumb is numb.

15. Ryan Lagache, respondent's husband, also testified on her behalf. He stated he regularly has to do things for respondent, such as write and type, because she is not able to do them easily due to her right wrist. Her doctors will not approve her to go back to work for full duty, and the CDCR does not have a light duty position available for her.

16. Respondent did not call an expert witness to testify on her behalf, but she submitted medical records from her doctor and her workers' compensation case. The records were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).<sup>1</sup> None of respondent's medical records demonstrate that respondent was evaluated according to the standards applicable to a CalPERS disability retirement proceeding. Furthermore, none of the providers opined that respondent is permanently and substantially incapacitated for the performance of her normal duties as a Supervising Cook.

### *Discussion*

17. When all the evidence is considered, respondent failed to meet her burden of producing sufficient competent medical evidence to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a Correctional Supervising Cook for CDCR. She did not call an expert witness to testify. There was no indication that the doctors who authored the reports respondent submitted evaluated her according to the standards applicable to a CalPERS disability retirement proceeding, as opposed to those applicable to a workers' compensation proceeding. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Kimbrough v. Police & Fire Retirement System* (1984) 161 Cal.App.3d 1143, 1152-1153; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132 [a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different].) Therefore, those reports were not persuasive.

18. On the other hand, Dr. Henrichsen's opinion that respondent was not substantially incapacitated was persuasive. His IME report was detailed and thorough, and his testimony at hearing was clear and comprehensive. The results of his physical examination and his review of the surveillance videos and respondent's medical records supported his opinion. Therefore, respondent's application should be denied.

### LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Correctional Supervising Cook for CDCR, she is a state safety member of CalPERS, subject to Government Code section 21151, subdivision (a), which provides, in relevant part:

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<sup>1</sup> Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

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.

2. To qualify for disability retirement, respondent had to prove that she was “incapacitated physically or mentally for the performance of [her] duties” at the time of her application. (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 ... on the basis of competent medical opinion.

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.) In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, the court found that discomfort, which may make it difficult for an employee to perform his duties, is not sufficient in itself to establish permanent incapacity. (See also, *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05.)

4. When all the evidence in this matter is considered in light of the analyses in *Mansperger*, *Smith*, and *Keck*, respondent did not establish that her disability retirement application should be granted. She failed to submit sufficient evidence based upon competent medical opinion that, at the time she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual duties of a Correctional Supervising Cook for CDCR. Consequently, her disability retirement application must be denied.

#### ORDER

The application of respondent Heidi L. Lagache for disability retirement is DENIED.

DATED: December 19, 2016

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*Gene Cheever*

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GENE K. CHEEVER

Administrative Law Judge

Office of Administrative Hearings