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:

REGINA Y. EARL,
Respondent,

and

CALIFORNIA DEPARTMENT OF STATE HOSPITALS, NAPA,
Respondent.

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 20, 2018, in Sacramento, California.

Elizabeth Yelland, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Regina Y. Earl appeared on her own behalf.

Evidence was received, the record was closed, and the matter submitted for decision on June 20, 2018.

There was no appearance by the California Department of State Hospitals, Napa, and this matter proceeded as a default pursuant to Government Code section 11520.

ISSUE

The following issue is before the Board of Administration for determination:
Based upon respondent's orthopedic (neck, shoulder, and arm) condition, is respondent permanently disabled or substantially incapacitated from performing the usual duties of a Psychiatric Technician Assistant for the California Department of State Hospitals, Napa?

FACTUAL FINDINGS

Respondent's Disability Retirement Application

1. CalPERS received respondent's Disability Retirement Election Application on November 30, 2016. In her application, respondent described her disability as follows: "Herniated Disk, Ulnar Neuropathy, Carpal Tunnel."

2. Respondent stated in her application that her disability occurred on August 18, 2014, as a result of "Physical Assault & Accumulative Trauma."

3. Respondent described her limitations/preclusions as: "No pulling, pushing, grasping, lifting (20 lbs), pinching, etc."

Duties of a Psychiatric Technician Assistant

4. On November 22, 2016, respondent signed a document titled Physical Requirements of Position/Occupational Title, which described the physical requirements of the job as including three to six hours per day of standing, walking, twisting (neck), fine manipulation, simple grasping, repetitive use of hands, lifting/carrying up to 10 pounds; up to three hours per day of sitting, running, crawling, kneeling, climbing, squatting, bending (neck and waist), twisting (waist), reaching (above and below shoulder), pushing and pulling, power grasping, keyboard use, mouse use, lifting/carrying 11 to 100 plus pounds, walking on uneven ground, working with heavy equipment, exposure to excessive noise, exposure to extreme temperature or humidity, exposure to dust or gas fumes, operation of foot controls or repetitive movement, and working with bio hazards such as blood-borne pathogens and hospital waste.

5. On September 10, 2014, respondent signed a Duty Statement of a Psychiatric Technician Assistant. The Duty Statement includes: (1) major tasks and duties including provision of basic nursing care to mentally and developmentally disabled individuals, assisting individuals with activities; and (2) required competencies such as the ability to apply physical restraints.

Respondent's Evidence

6. Respondent testified that she worked for Napa State Hospital for a total of approximately 13 years. In 2010, she was injured when assisting a coworker who was being assaulted by an inmate. She was off work on temporary disability until 2012. She last
worked with no restrictions in October 2014. She would love to return to work, but can’t physically do her job, which includes helping to break up fights between inmates and assisting coworkers with combative inmates. She attempted to return to work as a Psychiatric Technician Assistant, with physical accommodations, but was not permitted to do so.

7. Respondent did not call any physician or other clinician to testify. Respondent did, however, present an Agreed Medical Examiner (AME) report dated April 19, 2018, written by Robert F. Gravina, M.D., in the context of a workers compensation evaluation. Dr. Gravina is board certified by the American Board of Psychiatry and Neurology, and the American Board of Electrodiagnostic Medicine. Dr. Gravina’s report was received in evidence as administrative hearsay, and as such may be considered to the extent that it supplements or explains other evidence. ¹

8. Dr. Gravina’s AME report states that he assessed respondent on March 26, 2018, and that the AME report should be taken in conjunction with Dr. Gravina’s previous correspondence following respondent’s visit to his office on May 23, 2016. The previous correspondence was not offered as evidence. Dr. Gravina’s AME report includes sections detailing respondent’s complaints; a review of medical records from September 2, 2016, forward; his examination of respondent; and his impressions. Dr. Gravina’s summary of his impressions states that respondent “has a complex history of traumatic symptomatology [which] is in part permanent and stationary (cervical spine, elbows and carpal tunnels) and in part still in evolution (bilateral shoulders) . . . .” These impressions reflect an analysis appropriate to a workers’ compensation evaluation. The AME report does not provide any analysis or conclusion regarding the issue in this matter, which is whether respondent is permanently disabled or substantially incapacitated from performing the duties of a Psychiatric Technician Assistant.

CalPERS’s Expert

9. CalPERS retained Hany A. Khasigian, M.D., a board certified orthopedic surgeon, to conduct an Independent Medical Examination (IME). Dr. Khasigian conducted an IME of respondent on February 22, 2017, and issued an IME report on that date. Dr. Khasigian issued supplemental IME reports on May 3 and 31, 2017, both of which reflected his review of additional records that were not provided for the original IME. Dr. Khasigian conducted his evaluation and stated his conclusions based on the standard applicable when conducting an IME pursuant to an application for industrial disability retirement, which is whether respondent is permanently and substantially incapacitated from performing the duties of a Psychiatric Technician Assistant.

10. On February 22, 2017, Dr. Khasigian took respondent’s history, conducted a physical examination, and reviewed respondent’s medical records and diagnostic studies. On

¹ Government Code section 11513, subdivision (d).
examination, Dr. Khasigian found respondent to have a normal lumbar and thoracic spine. The tissues surrounding the cervical spine were soft and supple, and there was no spasm or guarding. There was a voluntary restricted range of motion in the cervical spine, as evidenced by the fact that there was an increased range of motion when respondent was distracted. The medical records show that in November 2014, respondent had a C4-5 and C5-6 fusion. X-rays in August 2015, show a well-healed fusion and satisfactory alignment.

11. The medical records show that in November 2015, electromyography (EMG) testing was performed on respondent’s upper extremities. The EMG showed evidence of moderate right and mild left median compression at the wrist, consistent with bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. Dr. Khasigian’s clinical examination findings were not consistent with patterns of carpal tunnel syndrome or cubital tunnel syndrome. The clinical findings included that respondent’s thumbs were not atrophic and both were warm, and respondent did not have positive Tinel’s sign (tapping to detect irritated nerves) or Phalen’s (a hand maneuver to apply pressure on irritated nerves). The EMG also showed evidence of moderate right and moderate to severe left ulnar neuropathy at the elbow. Dr. Khasigian noted that the EMG showed compression neuropathies. He opined, however, that they are not inherently disabling, and do not have a significant clinical correlation at this time that would preclude respondent from her usual duties as a Psychiatric Technician Assistant.

12. Dr. Khasigian reviewed the physical requirements and essential functions of a Psychiatric Technician Assistant. He concluded in his February 22, 2017 IME report, his supplemental IME reports, and in his testimony at hearing that there are no specific job duties that respondent is unable to perform, and that respondent is not substantially incapacitated from performing the duties of a Psychiatric Technician Assistant.

Discussion

13. Respondent testified that she continues to experience pain and that she would be unable to perform tasks required of a Psychiatric Technician Assistant, such as assisting a colleague or inmate involved in a physical altercation. However, she did not offer sufficient objective medical evidence to establish that she is permanently and substantially incapacitated from performing the usual duties of a Psychiatric Technician Assistant. In the absence of such evidence, respondent failed to establish that she qualifies for disability retirement. Consequently, respondent’s disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By reason of her employment, respondent is a state safety member of CalPERS and eligible to apply for disability retirement under Government Code section 21151. To qualify for disability retirement, respondent must prove that, at the time she applied, she was “incapacitated physically or mentally for the performance of . . . her duties . . .” (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.

2. 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”].)

3. Mansperger, and Harmon 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 the usual duties of a Psychiatric Technician Assistant due to an orthopedic (neck, shoulder, and arm) condition. Respondent did not present sufficient evidence to meet this burden.

4. In sum, respondent failed to show that, when she applied for disability retirement, she was permanently disabled or substantially incapacitated from performing the usual duties of a Psychiatric Technician Assistant due to an orthopedic (neck, shoulder, and arm) condition. Her application for disability retirement must, therefore, be denied.

ORDER

The application of respondent Regina Y. Earl for disability retirement is DENIED.

DATED: July 10, 2018

TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings