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: ANA MARIE VALENZUELA, Respondent, and DEPARTMENT OF CORRECTIONS, CALIFORNIA MEDICAL FACILITY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondent.	Case No. 2018-0093 OAH No. 2018030052

PROPOSED DECISION

This matter was heard before Administrative Law Judge (ALJ) Ed Washington, Office of Administrative Hearings (OAH), State of California, in Sacramento, California, on October 31, 2018.

Senior Attorney Preet Kaur represented the California Public Employees' Retirement System (CalPERS).

Ana Marie Valenzuela (respondent) represented herself.

CalPERS properly served Department of Corrections, California Medical Facility, California Department of Corrections and Rehabilitation (CDCR) with the Statement of Issues and 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, the record was closed, and the matter was submitted for decision on October 31, 2018.

ISSUE

Was respondent permanently disabled and substantially incapacitated from performing her usual and customary duties as a registered nurse for CDCR based on an orthopedic (low back, left hip, left leg and left groin) condition when she applied for service pending industrial disability retirement?

FACTUAL FINDINGS

1. Respondent is 52 years old. She worked as a registered nurse for CDCR. On August 17, 2017, respondent signed a Disability Retirement Election Application (Application), seeking service retirement pending industrial disability retirement, and subsequently filed the Application with CalPERS.

Respondent's Application

2. In the Application, respondent described her disability as "Pain in [her] lower back, left hip to left leg, left groin." She stated that her disability occurred on April 25, 2013, when she was "kicked by [her] patient on [her] left leg [and] groin after [she] gave [the patient a] Narcan injection."

3. Respondent described her limitations and preclusions due to her condition as, "Unable to lift more than 20 lbs., no repetitive bending/stooping, no repetitive pushing and pulling." Respondent also added that "because of [her] restrictions, [her] employer cannot accommodate [her]."

4. CalPERS gathered and reviewed medical information regarding respondent's described condition. By way of a letter dated November 27, 2017, CalPERS notified respondent that her Application had been denied. Respondent timely appealed from the denial.

Duties of a Registered Nurse

5. As specified in the Duty Statement for CDCR Registered Nurse, California Medical Facility (Duty Statement), a registered nurse at California Medical Facility "provides direct and indirect patient care to inmate patients collaborating with providers and other members of the interdisciplinary team." The essential duties of the position provide that 65 percent of the time, a registered nurse must coordinate clinic operations and direct patient care, including processing and sorting all sick call appointments, performing nursing assessments and triage for inmates requiring care; monitor disease status and the degree of disease control; and collect specimens. Fifteen percent of the time, a registered nurse must perform assessment and ongoing monitoring of inmate patient's physical and psychological status and provide nursing care within the parameters of the Registered Nursing Standard Practices.

6. The Duty Statement specifies that a registered nurse must constantly (two thirds or more of the workday), stand at office machines; walk throughout the institution on uneven sometimes rough terrain, including up and down ramps and slopes; sit at a desk or computer table with flexibility for movement on a frequent basis; lift files weighing a few ounces and rarely weighing up to 50 pounds; carrying, stoop, bend, kneel and crouch to pull file documents from the lower shelves of file cabinets; reach in front of body to utilize a keyboard and to reach for items such as telephone files and supply boxes; push and pull to open file drawers, desk drawers, carts and racks; use fingers to write, type and manipulate fax machines and telephones; and to use hands and wrists to handle documents, files, and perform typing and data entry. The Duty Statement also specifies that a registered nurse must frequently (involving one third to two thirds of the workday) reach overhead to retrieve objects from a shelf; climb when using a stepstool to reach objects; climb steps throughout the institution during the performance of regular duties; and balance when using a stepstool or stairs.

7. CDCR submitted to CalPERS a completed "Physical Requirements of Position/Occupational Title" form (Physical Requirements) for respondent's position, signed by respondent on May 16, 2017. According to the Physical Requirements a registered nurse must constantly (over six hours each workday) stand, walk, squat, bend at the neck and waist, twist at the neck and waist, reach above and below shoulders, push and pull, engage in fine manipulation of the fingers, power grasp, simple grasp, and repeatedly use their hands; frequently (three to six hours each workday) sit, climb three flights of stairs, lift up to 100 pounds, and work on uneven ground; occasionally (up to three hours each workday) kneel, use a keyboard and mouse, lift more than 100 pounds, and work with heavy equipment; and never crawl or drive.

Respondent's Testimony

8. Respondent worked for CDCR as a registered nurse for almost 10 years. She worked exclusively at the California Medical Facility in either the emergency room or the B-1 Unit, which also attends to urgent patient needs. On April 25, 2013, respondent was called in to work on her day off because the emergency room was extremely short staffed. During the course of her duties, she responded to the B-1 Unit to provide relief for other nurses. She discovered that a patient had fallen to the floor from his wheelchair. As the patient was large in stature, she obtained the assistance of two correctional officers and returned the patient to his wheelchair. The patient was lethargic and again slid out of the wheelchair and onto the floor. The officers helped respondent transport the patient to a gurney, where the patient laid unresponsive. The staff physician directed respondent to give the patient a Narcan injection, which respondent described as "an opioid antagonist," to wake the patient. Respondent testified that when patients receive Narcan injections, they generally awaken in a very agitated and aggressive state.

9. After awaiting the arrival of additional officer to secure the patient, respondent administered the Narcan. The patient awoke in a very agitated state, resisted the officers' control and shouted profanities at everyone. During the incident, the patient kicked

respondent hard on her left groin while he was being transported back to custody. Respondent believes that the blow was of sufficient force that she would have been "paralyzed or dead" had she turned and been kicked in her spine. Respondent's groin immediately throbbed in pain from the blow. She went to the breakroom, applied ice to her groin, and completed an incident report. Shortly thereafter, respondent's lower back also began to hurt. Respondent's husband picked her up from work and drove her to the emergency room at Sutter Hospital, where she was prescribed ibuprofen and Norco for pain.

10. On April 29, 2013, she saw Brian E. Knapp, M.D., an occupational medicine specialist, and was diagnosed with lumbar pain, left buttock pain, and a left groin strain and sprain. Dr. Knapp instructed respondent to continue taking the Norco and ibuprofen for pain and to also engage in physical therapy. Dr. Knapp felt that respondent had no physiological condition that prevented her from returning to work, however, he was concerned with the level of anxiety respondent exhibited related to the workplace altercation. He referred respondent to a psychologist for psychological assessment prior to returning to work to determine whether she had an adjustment disorder or other psychological condition or impairment. After receiving a psychological assessment and participating in two therapy sessions, respondent was released to return to work without restriction on August 12, 2013.

11. On or about November 1, 2013, while at work, respondent responded to several "man down" calls, which were used during patient emergencies and usually indicate that a patient in need is immobilized. While responding to the fourth man down call that day, respondent's left leg "locked up" and she experienced left leg pain and pain in her left groin and left hip. She went to the breakroom and treated her pain with ice. Her injury was examined by a physician on November 6, 2013. X-rays revealed that there was no leg injury, such as fractures or dislocations, however there was inflammation. Respondent continued to treat her pain with ice and medication. She was also approved to receive six additional session of physical therapy, and referred to a pain management clinic.

12. In November or December 2015, respondent returned to work in the medical center's hospice unit as an alternating charge nurse. On June 6, 2016, respondent and another nurse transported a patient to the commode. While placing the patient's diaper on the patient, the patient grabbed respondent to stabilize himself, placing his weight on her. The patient's actions caused responded to experience pain in her lower back, right shoulder and right arm. She continued to work until sometime in July 2016 when her right shoulder "became frozen" at work and she experienced lower back pain. Respondent did not recall what caused this incident. Respondent returned to her treating physician for examination. She received work restrictions for her right shoulder, preventing her from lifting more than 20 pounds, engaging in activities involving pushing or pulling or repetitive use of her right shoulder, right arm, and right hand.

13. Respondent attempted to return to work thereafter. She requested to be placed on modified duty and receive workplace accommodations, but was denied in July 2016. According to respondent, she participated in several "return to work meetings," regarding her ability to perform her duties, but CDCR never permitted her to return due to the restrictions

related to her right shoulder, right arm, and right hand. Respondent did not specify any condition in her right shoulder, right hand, or right arm as a basis for disability retirement in the Application.

14. Respondent testified that she cannot lift more than 10 pounds, and cannot sit, or stand for extended period. She testified that she cannot run, walk, or kneel. She also testified that she can stand for extended periods, with pain, and that she can walk, but must do so slowly. She can sit for extended periods if she is allowed to stand periodically. She can carry light objects, and climb, slowly, and can push and pull lighter weights of approximately 10 to 15 pounds.

Respondent's Medical Records

15. Respondent did not call a medical expert to testify on her behalf. Instead, she submitted medical records and reports prepared by Integrated Pain Care pain management clinic. These documents were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).[1]

16. Natalia Balytsky, M.D., is a board-certified anesthesiologist employed by Integrated Pain Care. On February 14, 2014, she performed an initial medical evaluation on respondent and prepared a nine-page Initial Evaluation Report. The report reflects that the evaluation included a history of respondent's injury, complaints, medical history, family and social history, review of symptoms, and physical examination.

17. Dr. Balytsky's report reflects that respondent complained of pain in the lower back, left hip, and left groin with radiation to the left leg. Respondent reported that she had constant pain of moderate intensity which usually measured between a five and a seven on a zero to ten pain scale. Respondent described the pain as throbbing, dull, aching, pressure-like, and cramping with muscle pain. She also told Dr. Balytsky that her pain was aggravated when bending forward, bending backward, reaching, kneeling, crawling, doing exercises, lying down, pushing shopping carts and leaning forward, and prolonged standing, sitting, and walking.

18. Dr. Balytsky's exam of respondent's lumbar spine revealed no asymmetry or scoliosis. She had normal alignment and lumbar lordosis. Respondent had tenderness to palpation over her left lumbar paraspinal muscles and sciatic notch tenderness. Respondent reported pain in the low back on the left side with straight leg raise testing. The examination of respondent's hip revealed limited range of motion with pain during internal and external

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[1] 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.

rotation. There was no atrophy noted and there was bilateral symmetry throughout the lower extremities. Respondent's motor strength measured at 3 out of 5 on left hip flexion.

19. As a result of this examination, Dr. Balytsky diagnosed respondent as follows:

(1) Low back pain with radiculopathy;
(2) Hip pain, and
(3) Sacroiliac joint arthropathy.

20. The Case Status portion of Dr. Balytsky's report reflects that she placed respondent on "modified duty with restrictions of no lifting or carrying over 10 pounds, no bending, crawling, or kneeling."

Expert Opinion

21. Harry A. Khasigian, M.D., testified at hearing. Dr. Khasigian is a board-certified orthopedic surgeon and certified Fellow of the American Academy of Orthopedic Surgeons with training and experience in the diagnosis and treatment of orthopedic conditions. On November 10, 2017, he performed an Independent Medical Evaluation (IME) on respondent and prepared an eleven-page report. Dr. Khasigian's evaluation included an interview of respondent, a physical examination, a review of respondent's medical records and history, and diagnostic test results. Dr. Khasigian's physical examination of respondent included an examination of his lumbar, thoracic and cervical spine, shoulders, and upper and lower extremities, in addition to a neurological examination.

22. During the evaluation, respondent told Dr. Khasigian that her lumbar spine symptoms were constant pain of a moderate level at the L5-S1 area. Respondent reported no radiation to her legs, no numbness, tingling, or weakness in her legs or feet as a result of her back symptoms. Respondent also reported intermittent left groin pain at a level three to five, on a one to ten pain scale, with activities, which produced a slow walk. According to Dr. Khasigian, what respondent identified as her left hip, was actually her left superior lateral buttock. Respondent described her pain in this area as usually a level five to six, on a one to ten pain scale that increases to level eight with lifting.

23. Lumbar spine range of motion was within the normal range. The tissue in this area was not hard, sore or angulated, nor showed any signs of injury. Respondent walked normally without limp, restricted movement, or signs of musculoskeletal aberration. His examination of the thoracic spine produced normal results, with normal kyphosis and no wing scapula. Range of motion of the cervical spine was also normal and there were no abnormal finding during the examination of respondent's upper extremities. When examining respondent's lower extremities, he noted that her gait was normal, but she would intermittently limp on the right. The limp did not occur during every step and had no precipitation event. Respondent was able to complete a normal "heel and toe" walk, but did so in a "herky-jerky," manner that was "non-physiologic." Dr. Khasigian opined that it

appeared the action was "produced to try to show disability." The measurements of respondent's thighs and calves revealed there was no sign of disuse atrophy due to injury.

24. Dr. Khasigian testified that range of motion was slightly decreased. He testified that this limitation was "probably voluntary," as he could find no basis for the limitation. The part of the examination that shows rotator cuff function and specialized testing was normal.

25. He reviewed her medical history. X-rays of her lumbar spine were completely normal. No arthritis, deformities, or any other abnormalities. There was a minor bulge at L5-S1, which is normal for a female in her fifties. There was no finding on any of the diagnostic testing which indicated that there was any type of trauma. Dr. Khasigian also testified that his review of respondent's medical record revealed multiple physicians who evaluated respondent, including her treating physician, Dr. Martinovski, and Qualified Medical Evaluator, Aldan Clark, M.D., concluded that respondent's injury was psychiatric rather than physiological. There were no findings consistent with orthopedic disabilities or limitations in the medical records.

26. After conducting the physical examination and reviewing respondent's medical records, Dr. Khasigian reached the following diagnostic impressions:

1. Contusion of groin, resolved.
2. Normal Lumbar Spine.
3. No evidence of an anatomic hip condition.
4. Diabetes.

27. Dr. Khasigian opined that neither his examination nor review of respondent's medical records revealed any condition that would restrict her activity or preclude her from performing her job duties. There was no evidence that respondent has any anatomical hip condition and there were no spinal, hip, or leg abnormalities noted in respondent's medical records that would preclude usual and customary unrestricted function. Dr. Khasigian also testified that it appeared that respondent attempted to artificially influence the results of the evaluation to produce a disability result, by unsuccessfully attempting to present herself as having a limp, despite having been observed outside of Dr. Khasigian's office window walking to and from the building after the examination with no limp at all. For these reasons, Dr. Khasigian concluded that respondent is not substantially incapacitated from the performance of her usual job duties. Dr. Khasigian thoroughly summarized the basis for this opinion in his evaluation report, as follows:

> [Respondent] presents with a lengthy amount of subjective pain which has been recalcitrant to treatment, has continued symptomology despite ongoing treatment, disability has failed to respond to customary measures, and has no physical evidence of injury. She is four years post injury and still has the same symptomatology despite ongoing treatment. There are clinically

> no neurological deficits, and this has been reiterated by her treating physician as well as the PM&R physician who did the QME, all showing normal physical exam. Her subjective complaints are unabated and do not relate to appropriate clinical findings. She does not have any diagnostic tests that indicate a traumatic lesion, or any lesion which would produce impairment. Presently, she has restrictions placed upon her which do not have any correlative impairment or anatomical abnormalities. All of her findings in her records are based upon subjective complaints. . . . Her current physical examination is normal but definitely shows evidence of elaboration and psychological overlay . . .

Discussion

28. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, when she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a registered nurse for CDCR. Dr. Khasigian's opinion that respondent was not substantially incapacitated from performing her usual job duties 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 respondent's medical records supported his opinion.

29. Respondent had the burden to offer sufficient competent medical evidence at hearing to support her disability retirement application. She failed to do so. She called no medical expert to testify on her behalf at hearing. Respondent produced no competent medical evidence to support her claimed incapacity. While she complained of frequent pain, her subjective complaints are insufficient without correlative objective medical findings. By her own testimony, she can perform almost all of her regular job duties, although she may experience discomfort while performing those duties.

30. Respondent submitted an evaluation report from her pain management clinic, which placed respondent on modified duty with certain work restrictions. The report does not specify that respondent is unable to perform her job duties. There was also no indication in the report that Dr. Balytsky evaluated respondent according to the standards applicable to a CalPERS disability retirement proceeding.

31. Significantly, respondent's doctors released her to return to work without restriction in August 2013, approximately four months after she was kicked in the groin by an inmate, and began complaining of lower back, left hip, left leg, and left groin injury. Respondent returned to her duties as a registered nurse for CDCR and continued to perform her duties until approximately June 6, 2016, when she injured her right shoulder and right arm at work. Respondent's right arm and right shoulder were not listed as a basis for disability retirement on the Application. Respondent returned to work for nearly three years

and performed her job duties without restriction, prior to injuring her right shoulder and right arm in June 2016. There is no evidence that respondent stopped performing her job duties or is unable to perform those duties due to the condition of her low back, left hip, left leg, and left groin.

32. Because respondent failed to offer sufficient competent medical evidence at hearing to establish that, when she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a registered nurse for CDCR, her disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a registered nurse for CDCR, respondent is a state safety member of CalPERS subject to Government Code section 21151.[2]

2. To qualify for disability retirement, respondent must prove that, when she applied, she was "incapacitated physically or mentally for the performance of 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 . . . 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.) The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 863, explained that prophylactic restrictions imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature.

4. When all the evidence is considered in light of the courts' holdings in *Mansperger* and *Hosford*, respondent did not establish that her disability retirement application should be granted. She failed to submit sufficient evidence based upon

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[2] Government Code section 21151, in relevant part, provides:

> (a) 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.

competent medical opinion that, when she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual duties of a registered nurse for CDCR. Consequently, her disability retirement application must be denied.

ORDER

The application of respondent Ana Marie Valenzuela for disability retirement is DENIED.

DATED: November 30, 2018

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Ed Washington
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ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings