

ATTACHMENT E

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:

DAISY S. CHISHOLM, Respondent

and

DEPARTMENT OF STATE HOSPITALS - STOCKTON,

Respondent

Agency Case No. 2017-0909

OAH No. 2017110952

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 10, 2019, in Riverside, California.

Austa Wakily, Senior Attorney, represented complainant, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS), State of California.

Brittney Jones, Martin & Vanegas, APC, represented respondent, Daisy S. Chisholm.

There was no appearance on behalf of respondent Department of State Hospitals – Stockton (Employer).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on June 10, 2019.

ISSUE

Did competent medical evidence establish that respondent¹ was substantially incapacitated from performing the usual and customary duties of a psychiatric technician with Employer as a result of orthopedic conditions (neck and right shoulder), along with symptoms of headache, leg pain, depression, anxiety, and high blood pressure, at the time she filed her application for service pending disability retirement on September 14, 2016?

SUMMARY

Respondent had the burden of proving that she was substantially incapacitated from performing the usual and customary functions of a psychiatric technician at the time she filed her application for service pending disability retirement on September 14, 2016. Respondent did not meet her burden.

¹ For purposes of this decision, "respondent" refers only to Ms. Chisholm. Department of State Hospitals – Stockton will be referred to as "Employer."

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent, by virtue of her employment as a psychiatric technician with Employer, is a state safety member of CalPERS subject to Government Code section 21151.

2. On September 14, 2016, respondent filed a Disability Retirement Election Application with CalPERS. Respondent alleged that her disability was a "chronic headache, chronic neck pain, chronic right shoulder and arm pain, chronic back, leg pain, chronic depression, anxiety, and high blood pressure." Respondent alleged that these disabilities occurred in 2014.

3. CalPERS required respondent to attend an independent medical examination, which was conducted by Robert Kolesnik, M.D., on February 2, 2017. Dr. Kolesnik concluded petitioner was not substantially incapacitated from performing the usual and customary functions of a psychiatric technician with Employer.

4. On April 13, 2017, CalPERS notified respondent that it had reviewed all medical reports and determined respondent was not substantially incapacitated from performing the usual and customary duties of her job based on an "orthopedic (cervical spine and right shoulder) condition"

5. Petitioner timely appealed the denial; this hearing ensued.

Job Duties of a Psychiatric Technician

6. A document entitled, "Physical Requirements of Position/Occupational Title" was submitted as evidence. The document identifies those job duties for a

psychiatric technician that are considered occasional (up to 3 hours), frequent (3 to 6 hours), constant (over 6 hours), and never. Both respondent and an administrator for Employer signed the document agreeing with its contents. The document identifies activities that are never required to be performed as crawling, climbing, lifting in excess of 51 pounds, driving, working with heavy equipment, and working at heights. The document identifies occasional activities as running, kneeling, squatting, power and simple grasping, computer use, lifting and carrying from 26 to 50 pounds, walking on uneven ground, exposure to excessive noise, exposure to extreme temperature, exposure to dust and fumes, operation of foot controls, and use special visual and protective equipment. The document identifies frequent activities as working with biohazards, sitting, bending, twisting, reaching above and below the shoulder, pushing and pulling, fine manipulation, repetitive use of hands, and lifting/carrying between 0 and 25 pounds.

7. A Document entitled, "State of California Duty Statement" for the position of psychiatric technician, safety (Rev. 3/22/12), was also submitted as evidence. That document generally describes the duties of a psychiatric technician as a person who provides a basic level of behavioral services and nursing care to mentally and/or developmentally disabled patients; conducts primary observation of routine patient movement in collaboration with custody staff; participates in psychiatric treatment programs; works with other individuals to provide psychiatric care to those in custody with Employer; performs general nursing procedures such as administering medications, injections, treatments, and taking vital signs; observes patient physical condition and reports changes as needed; creates a safe and therapeutic environment for those in custody with Employer; supervises group and individual therapy programs; protects individuals from injury; conducts security pat downs and escorts; and engages in other duties as required.

Respondent's Testimony

8. Respondent's testimony is summarized as follows: Respondent has sustained various injuries at work since 1993. These injuries have finally ended her career. Respondent first hurt herself in July 2014 when she fell after she was hit from behind by a staff member who was pushing a cart. Respondent fell backwards and hit her head on the concrete floor. At the time, she and the staff member were inside a walk-in refrigerator.

After being treated for the incident, she went back to work with no restrictions. Her coworkers helped her do the things she could not do. Respondent gave "two weeks notice" to attend jury duty, and claimed that Employer told her if she was not back in time from jury duty she would be fired. She did not provide the exact date when this occurred. Respondent said she went to the nursing station and called the program director because she began experiencing chest pain, back pain, and all her "injuries" were flaring up. A nurse examined her and determined her blood pressure was high. Employer called an ambulance. Respondent never returned to work after this occasion. Respondent said she filed for social security disability on the basis of neck pain, back pain, anxiety, and depression, and received social security.

Respondent also filed for a disability retirement because she still has a headache, neck pain, right shoulder pain, back pain, and pain in her feet. Respondent claims she has "limitations" that she "should not" lift anything over her head, should not sit, and should not push or lift anything over five pounds.

At the time she filed her application, respondent's actual job duties included working many different positions. She was responsible for 40 different rooms with different patients, and conducting 15 minute checks on those patients. The floor is the

size of a football field. Another position she performed was helping to remove inmates from rooms, if needed. The only time they were permitted to call a correctional officer was if they needed assistance. Respondent also said she would need to pat inmates down, take a patient down on the bed, if needed, force medications, and draw blood. She explained that her job, in any capacity, is very physical.

Respondent's treating physician was Dr. Max H. Matos. Dr. Matos examined her neck, right shoulder, arm, back, and leg, and declared her substantially incapacitated. Respondent submitted reports from Dr. Matos dated February 16, 2015, May 14, 2015, October 21, 2015, and September 12, 2016; a report from James Matiko, M.D., dated September 5, 2018; and a declaration from Dr. Matos dated May 30, 2019. She also submitted a functional capacity evaluation completed by a chiropractor dated June 5, 2015. However, no experts testified concerning the information in any of the reports, declaration, or the functional capacity evaluation. Additionally, all documents were admitted as administrative hearsay only. Thus, the reports, declaration, and functional capacity evaluation were of limited value.

Independent Medical Examination

9. Dr. Kolesnik is a board-certified orthopedic surgeon, and a fellow with the American Academy of Orthopaedic Surgeons. He obtained his undergraduate degree at the University of Southern California, where he graduated summa cum laude. He also obtained his doctor of medicine degree at the University of Southern California. Dr. Kolesnik completed his internship and residency at the Los Angeles County/University of Southern California Medical Center from 1979 to 1984. He completed a fellowship in hand and microvascular surgery in 1988. Throughout the years, Dr. Kolesnik has served in a variety of capacities, including staff physician in the Department of Orthopaedic Surgery at March Air Force Base in Riverside, California;

staff physician at San Antonio Community Hospital in Upland; staff physician at the Pomona Valley Hospital Medical Center; and staff physician at Rancho Specialty Hospital in Rancho Cucamonga, California. Dr. Kolesnik has also given several presentations in the field of orthopedics, and has published an original work in a peer-reviewed medical journal in the field of orthopedics. Dr. Kolesnik is an expert in the field of orthopedics.

10. The following is a summary of Dr. Kolesnik's testimony and report: Dr. Kolesnik was provided an engagement letter from CalPERS explaining precisely what he was to examine and setting forth applicable law. Dr. Kolesnik has extensive experience conducting examinations in connection with persons seeking a disability retirement under CalPERS law.

Prior to conducting the examination, Dr. Kolesnik reviewed extensive medical records concerning respondent dating back to 2013, including respondents Disability Retirement Election Application, the physical requirements of a psychiatric technician at Employer, and the Duty Statement concerning respondent's job. Dr. Kolesnik prepared a detailed summary of each and every report reviewed, setting forth the treating physician's opinions and conclusions, as well as the treatment provided. Those reports were considered by Dr. Kolesnik in reaching his conclusion.

Dr. Kolesnik interviewed respondent and obtained the following history of respondent's injury and claimed basis for a disability retirement: he noted the incident in 2014 where a fellow employee struck respondent with a cart. Following the incident, respondent was discharged to full duty. Respondent continued to do her full job duties between July and October 2014 without issue. In October 2014, respondent "noted chest pain associated with anxiety" while at work. She was taken to the

emergency room, treated, and released. Around that same time, respondent moved from Southern California to Stockton, California.

Respondent complained of a constant burning pain on the right side of her neck, which increases with any motion of the right shoulder or any lifting activities. Respondent also complained of "really bad" pain in her right shoulder and right arm, as well as "pain" in her neck.

Dr. Kolesnik completed a thorough physical examination of respondent. He noted diffuse tenderness in her right cervical spine, but nothing on the left. There was no spasm noted, and when he compressed her cervical spine, pressure was noted – but no pain. Dr. Kolesnik also examined respondent's shoulders, upper arms, and elbows. He explained that respondent complained of pain every time he touched her, and seemed to be exaggerating symptoms. He did not note any atrophy, which would normally be expected if someone was in such a degree of pain that they were not using a particular body part (i.e., shoulder, arms, etc.). Specifically, he noted respondent's biceps and triceps were intact, with no atrophy, defects, or deformity. Similarly, respondent's elbows had normal alignment, and no angular or rotatory deformities. Respondent reported diffuse pain in her right shoulder when moving her right elbow. No atrophy, deformities, or defects were observed in respondent's forearms, wrists, or hands, although respondent complained of pain about her right wrist with all motion. Respondent had full range of motion of all fingers and thumbs. On the grip strength test, respondent put forth poor effort on the right and he could not even obtain a grip strength. The left was normal.

Ultimately, Dr. Kolesnik's diagnostic conclusions by way of history and observations during examination were that respondent had chronic cervical strain; multilevel cervical degenerative disc disease and bulges; right shoulder strain/sprain;

tendinitis and partial thickness tears of the right shoulder; and borderline right carpal tunnel syndrome. Despite these conclusions, Dr. Kolesnik concluded there was no job duty of a psychiatric technician that respondent was physically incapable of performing.

Dr. Kolesnik also wrote:

The patient did not cooperate with the examination and did not put forth her best effort. She demonstrated poor effort during manual muscle testing and in the performance of Jamar grip measurements. There was markedly limited active range of motion of the right shoulder, yet there was increased passive range of motion and she actively resisted this. She demonstrated no atrophy in the right upper extremity despite her multiple subjective complaints and markedly limited range of active motion of the right shoulder. There was exaggeration of complaints.

Accordingly, Dr. Kolesnik concluded respondent was not substantially incapacitated from performing the usual and customary duties of her job.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving that he or she is entitled to it by a preponderance of the evidence. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) In this

matter, petitioner is seeking an industrial disability retirement. For that reason, petitioner has the burden of establishing that she is substantially incapacitated from performing the usual and customary duties of her job.

Applicable Statutes

2. Government Code section 20026 provides in part:

"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. Government Code section 21151, subdivision (a), provides in part:

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.

4. Government Code section 21152 provides that an application to the board for retirement of a member or disability may be made by:

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

(b) The university if the member is an employee of the university.

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

(d) The member or any person in his or her behalf.

5. Government Code section 21154 provides:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

6. An application to the board for retirement of a member for disability may be made by the governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency. (Gov. Code, § 21152. An employer is required to file an application for retirement for any member it believes to be disabled. (Gov. Code, § 21153.)

7. Government Code section 21156 provides:

(1) If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

(2) In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

(b) (1) The governing body of a contracting agency upon receipt of the request of the board pursuant to Section 21154 shall certify to the board its determination under this section that the member is or is not incapacitated.

(2) The local safety member may appeal the determination of the governing body. Appeal hearings shall be conducted by an administrative law judge of the Office of Administrative Hearings pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of this title. Government Code section 21166 provides that if member is entitled to a different disability retirement allowance according to whether the disability is industrial or nonindustrial and the member claims that the disability is industrial and the claim is disputed, the Workers' Compensation Appeals Board, using the same procedure as in workers' compensation hearings, shall determine whether the disability is industrial. The jurisdiction of the Workers' Compensation Appeals Board shall be limited solely to the issue of industrial causation.

Appellate Authority

8. "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 customary duties, even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887.) The applicant

in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and to apprehend violators; issuing warnings and serving citations; serving warrants and making arrests. He suffered injury to his right arm while arresting a suspect. There was evidence that Mansperger could shoot a gun, drive a car, swim, row a boat (but with some difficulty), pick up a bucket of clams, pilot a boat, and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry the prisoner away. The court noted that although the need for physical arrests did occur in Masperger's job, they were not common occurrences for a fish and game warden. (*Id.* at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding the applicant was not incapacitated for the performance of his duties, the court noted the activities he was unable to perform were not common occurrences and he could otherwise "substantially carry out the normal duties of a fish and game warden." (*Id.* at p. 876.)

9. Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854.) In *Hosford*, the court held that in determining whether an individual was substantially incapacitated from his usual duties, the courts must look to the duties actually performed by the individual, and not exclusively at job descriptions. Hosford, a California Highway Patrol Officer, suffered a back injury lifting an unconscious victim. In determining eligibility for a disability retirement, the court evaluated Hosford's injuries according to the job duties required of his position as a sergeant, as well as the degree to which any physical problem might impair the performance of his duties. Thus, the actual and usual duties of the applicant must be the criteria upon which any impairment is judged. Generalized job descriptions and physical standards are not controlling, nor are actual but infrequently performed duties to be considered. The *Hosford* court found that although Hosford suffered some physical impairment, he

could still substantially perform his usual duties. The court also rejected Hosford's contention that he was substantially incapacitated from performing his usual and customary duties because his medical conditions created an increased risk of future injury.

10. Further, a person seeking a disability retirement must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Id.* at p. 863.)

Evaluation

11. A public employee has a fundamental vested right to a disability pension if he or she is, in fact, disabled. (*Beckley v. Bd. of Administration* (2013) 222 Cal.App.4th 691, 697, citing *Quintana v. Bd. of Administration* (1976) 54 Cal.App.3d 1018, 1023.) Government Code section 20026 defines disability as "disability of permanent or extended and uncertain duration. . . on the basis of competent medical opinion." The courts have typically relied on medical expert opinion in determining whether a respondent should be granted disability retirement. (See, e.g., *Hosford, supra*, 77Cal.App.3d at p. 864; *Haywood v. American River Fire Protection District* (1998) 61 Cal.App.4th, 1292,1299.) A respondent's opinion of his or her physical condition does not constitute competent medical evidence within the meaning of Government Code section 20026.

Additionally, the type of medical opinion an administrative law judge may rely on in rendering his/her decision is further restricted by the rules of evidence in CalPERS proceedings. Medical reports submitted by a respondent, without corresponding medical expert testimony, constitute administrative hearsay. In administrative proceedings, hearsay evidence may supplement or explain other

evidence; however, hearsay evidence is itself insufficient to support a finding of fact. (Govt. Code, § 11513, subdivision (d).) Put another way, where a respondent testifies about his or her medical condition - and relies on medical reports admitted as administrative hearsay to supplement or explain his or her opinion that he or she is substantially incapacitated – a respondent, under applicable law, has not met his or her burden or standard of proof.

Neither Dr. Matos or Dr. Matiko testified, so the reports, declaration², and functional evaluation constituted administrative hearsay under Government Code section 11513, subdivision (d), and can only be used to supplement or explain other evidence properly admitted. Although Dr. Matos's report and declaration supplement and explain respondent's position, respondent is not a competent medical expert. Put another way, Dr. Matos's report and opinion cannot be used to render a finding of fact and cannot serve as the competent medical opinion required to meet respondent's burden. Similarly, no medical expert testified to interpret the functional capacity evaluation or Dr. Matiko's report. Thus, they do not serve to contradict Dr. Kolesnik's competent medical opinion that respondent is not substantially incapacitated from performing the usual and customary functions of her job.

In this case, respondent was required to prove by a preponderance of the evidence that she was substantially incapacitated from performing the usual and customary duties of a psychiatric technician, at the time she filed her application for a disability retirement, by presenting an admissible competent medical opinion that reached such a conclusion. Respondent did not meet her burden. The only competent medical opinion provided was by way of testimony and reports from Dr. Kolesnik, an

² There was no evidence presented that the declaration complied with Government Code section 11514.

expert orthopedic surgeon with extensive experience in conducting orthopedic examinations. Dr. Kolesnik conducted a thorough examination of respondent, and other than her subjective complaints of pain, there was no corresponding objective evidence of any limitations. Specifically, given the level of pain respondent complained of, atrophy would have been expected – but was completely nonexistent. Further, respondent exaggerated her complaints of pain; her range of motion, hands, and wrists were noted as normal, yet she exhibited no grip strength whatsoever in her right hand. Finally, even assuming respondent’s complaints of pain were not exaggerated, pain is not enough to grant a disability retirement.

Accordingly, the competent medical evidence established that respondent is not physically incapable of performing the duties of a psychiatric technician and respondent is not entitled to a disability retirement.

ORDER

Petitioner, Daisy S. Chisholm, is not substantially incapacitated from the performance of the usual and customary duties of a psychiatric technician with the Department of State Hospitals – Stockton. Respondent’s application for a disability retirement is denied.

DATE: July 5, 2019

DocuSigned by:
Kimberly Belvedere
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KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings