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:

LATANYA P. LAIR, Respondent

and

CALIFORNIA INSTITUTE FOR WOMEN, CALIFORNIA DEPARTMENT OF CORRECTIONS, Respondent

Case No. 2019-0069

OAH No. 2019040224

PROPOSED DECISION

Robert Walker, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 5, 2019, in San Bernardino, California.

Helen L. Louie, Attorney, represented petitioner Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California (CalPERS).

No appearance was made by or for respondent Latanya P. Lair.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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No appearance was made for respondent California Institution for Women, California Department of Corrections and Rehabilitation.

Based on proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default regarding both of the respondents pursuant to Government Code section 11520.

The matter was submitted on August 5, 2019.

ISSUE

At the time Ms. Lair applied for industrial disability retirement, was she substantially incapacitated, on the basis of left knee and back orthopedic conditions, from performing her usual and customary duties as a Senior Psychiatric Technician?

SUMMARY

Petitioner sought an order affirming the denial of respondent's[1] application for industrial disability retirement. Petitioner contended that respondent was not substantially incapacitated from performing her usual and customary duties. Petitioner presented expert opinion testimony from an orthopedic surgeon who opined that respondent was not substantially incapacitated from performing her usual and customary duties.

No evidence was offered in support of respondent's claim.

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[1] The term *respondent* will be used to refer to Ms. Lair.

Respondent failed to establish by a preponderance of the evidence that, at the time she applied for industrial disability retirement, she was substantially incapacitated, on the basis of left knee and back orthopedic conditions, from performing the usual and customary duties of a Senior Psychiatric Technician.

The denial of respondent's application is affirmed.

FACTUAL FINDINGS

Background

1. Petitioner submitted a statement by respondent. Respondent wrote that she worked for Metropolitan State Hospital and California Institution for Women for over 20 years. By virtue of her position, respondent was a state safety member of CalPERS pursuant to Government Code section 21151.

2. Respondent submitted an application for disability retirement dated March 7, 2018.

3. According to an investigation report that petitioner submitted, respondent contends as follows: She has problems with prolonged sitting, standing, and walking. She has problems with repetitive bending, stooping, kneeling, squatting, twisting, lifting, and carrying. She should not lift more than 20 pounds and should not ascend or descend stairs.

4. In respondent's application, she described two incidents that she claimed resulted in injuries. She wrote:

> On 01/05/17, while walking to my worksite at the California Institute for Women and attempting to walk through a puddle of water, my right foot slipped off the edge of the sidewalk causing me to fall and strike my left knee on a concrete surface and suffer injuries. On 04/23/2008, I suffered injury to my back and neck when I was elbowed by a patient while working at Metropolitan State Hospital.

5. By a letter dated October 8, 2018, petitioner notified respondent that her application for industrial disability retirement was denied. Petitioner wrote: "We have reviewed all the medical evidence submitted." "[W]e have determined your orthopedic (left knee and back) conditions are not disabling. As a result, we find you are not substantially incapacitated from the performance of your job duties." "Therefore, we regret to inform you that your application for industrial disability retirement is denied."

6. Respondent timely appealed petitioner's determination, and this hearing followed.

Surveillance Videos

7. CalPERS investigators conducted undercover, video surveillance on four days in June 2018 and two days in July 2018. Ryan Lastra, Supervising Special Investigator, testified as to how and where the videos were made. Also, petitioner submitted the investigators' July 10, 2018, report describing what the videos depict. Portions of the videos were played at the hearing.

8. A video made on June 8, 2018, shows the following: Respondent and another woman drove up to a Dollar Rows store in a van. The other woman was driving. They got out of the van and walked into the store. They came out of the store

pushing display cases that were on casters. The display cases were approximately six feet tall and two feet in diameter. They also brought out plastic bins that were approximately two feet by two feet by 18 inches. The two women loaded these items into the back of the van. They pushed the items around in order to be able to close the door. They drove to respondent's home. Respondent got out of the van, opened the back of the van, and began unloading the items. Respondent participated fully in all of these activities. Respondent walked, moved the items, loaded the van, repositioned the items, and got in and out of the van with no apparent difficulty. Nothing about her behavior or expression suggested that she was guarding her movements or that she was in pain.

9. Videos made on June 12 and 28, 2018, show the following: Respondent went to a Coin Less Laundry laundromat. On each of those days, respondent carried large bags of laundry into the laundromat. She carried some of the bags by putting them over her shoulder. In the laundromat, respondent sat in a chair, got up, walked, and bent over to handle laundry. She took bags of laundry back to the van. Some of the bags had straps, and she put the straps over her shoulders and walked to the van. Respondent's son loaded the bags into the van. Respondent returned home. She lifted bags of laundry out of the van and walked inside the house. She handled the bags and did the laundry with no apparent difficulty. Nothing about her behavior or expression suggested that she was guarding her movements or that she was in pain.

10. A video made on July 2, 2018, shows the following: Respondent was at The Talent Factory dance studio. She sat for a substantial period. She participated in line dancing for approximately one hour. The tempo was fast. Respondent turned and moved forward, back, and side to side. She moved gracefully. Her movements were never halting. Respondent danced with no apparent difficulty. Nothing about her

behavior or expression suggested that she was guarding her movements or that she was in pain.

Internet Videos

11. Petitioner also submitted videos taken from the internet that show respondent in dance classes between October 9 and November 20, 2017. These were taken before respondent filed her March 2018 application for disability retirement but after the April 2008 and January 2017 incidents, which are two of the incident that she claims caused her to be incapacitated.

Physical Requirements of the Senior Psychiatric Technician Position

12. Respondent and her employer submitted a form to CalPERS outlining the physical requirements of respondent's job. They reported that, occasionally, a senior psychiatric technician must run; crawl; lift from 26 to over 100 pounds; drive; endure exposure to gas, fumes, or chemicals; operate foot controls; and engage in repetitive movements. They reported that, frequently, a senior psychiatric technician must sit; reach above his or her shoulders; lift 11 to 25 pounds; work with heavy equipment; and endure exposure to extreme temperature, humidity, or wetness. They reported that, constantly, a senior psychiatric technician must stand; walk; kneel; squat; bend at the neck; bend at the waist; reach below shoulders; push and pull; fine manipulate; power grasp; simple grasp; use hands repetitively; use a keyboard; use a mouse; lift up to 10 pounds; walk on uneven ground; endure exposure to excessive noise; and work with bio hazards.

13. CalPERS retained Juan A. Realyvasquez, M.D., to perform an independent medical evaluation. Dr. Realyvasquez wrote a report in which he summarized the physical requirements of respondent's job as follows:

> 1. [Respondent] must have the strength and ability to respond to stressful and emergency situations. 2. She must be able to work with inmates [and] staff and [must be able to] resolve . . . situations, including violent behavior. 3. She must stoop, bend, and reach in time to maintain order. She must walk long walks and short walks of any kind. She also has to report all the incidents that have happened.

Expert Testimony

14. Dr. Realyvasquez examined respondent on September 6, 2018, and wrote an evaluation report dated the same date. CalPERS provided him with additional medical records, and he wrote a supplemental report dated November 19, 2018. Dr. Realyvasquez testified, and both reports were received in evidence.

15. Dr. Realyvasquez is an orthopedic surgeon. He is certified by the American Board of Orthopedic Surgery. Dr. Realyvasquez obtained his Medical Degree from the University of Southern California in 1967. His post-graduate training included an internship in general surgery at the Los Angeles County/University of Southern California Medical Center from July 1967 to June 1968. He completed residencies in orthopedic surgery at Rancho Los Amigos Hospital, Children's Hospital of Los Angeles, and Los Angeles County/University of Southern California Medical Center.

16. Dr. Realyvasquez's reports were consistent with his testimony. He testified that his opinions were based on his review of the medical records, his review of documentation regarding respondent's job duties, his review of the surveillance and internet videos, and his examination.

17. Dr. Realyvasquez testified that respondent was not substantially incapacitated from performance of the usual duties of a psychiatric technician.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for disability retirement has the burden of establishing eligibility by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. '"Preponderance of the evidence' means evidence that has more convincing force than that opposed to it. [Citations.]" (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Ibid.*, italics in original.) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

Purpose of Disability Retirement

3. The Public Employees' Retirement Law is set forth in Government Code section 20000 et seq. The general purpose of the public retirement system is "to prevent hardship to state employees who because of age or disability are replaced by more capable employees. The pension system serves as an inducement to enter and continue in state service [citation], and the provisions for disability retirement are also

designed to prevent the hardship which might result when an employee who, for reasons of survival, is forced to attempt performance of his duties when physically unable to do so." (*Quintana v. Board of Administration* (1976) 54 Cal.App.3d 1018, 1021.) "Disability pension laws are intended to alleviate the harshness that would accompany the termination of an employee who has become medically unable to perform his duties. (§ 20001.)" (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1304.) "Generally, PERS legislation is to be construed liberally in favor of the employee to achieve the above objectives." (*Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 459, citing *Haywood, supra*, 67 Cal.App.4th at p. 1304.)

Statutory Authority

4. Government Code section 21151, subdivision (a), states: "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."

5. Government Code section 21156 provides:

> (a)(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 . . . .

6. Government Code section 20026 defines "disability" and "incapacity for performance of duty" as follows:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, 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.

Case Law Regarding Incapacity for Performance of Duty

7. An employee is eligible for a disability retirement if he can demonstrate that he is incapacitated from performing the duties of his position. "Incapacitated" means the employee has a substantial inability to perform the usual duties of the position. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887.)[2]

8. In *Mansperger, supra,* there was no dispute that Mansperger, who was a fish and game warden, had suffered an injury that caused him to be unable to engage in heavy lifting. The sole issue in dispute was whether his physical limitations amounted to "incapacity for the performance of duty." (*Mansperger, supra,* 6 Cal.App.3d at p. 876.) After concluding that "incapacity for the performance of duty" meant the substantial inability to perform an applicant's usual duties, the appellate court assessed the facts in that case as follows (*id.* at pp. 876-877):

> While it is clear that petitioner's disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish

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[2] The *Mansperger* decision analyzed the language then contained in Government Code section 21022, the substance of which is now contained in Government Code section 20026 (although there have since been some amendments to section 20026).

and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do occur in petitioner's job, they are not a common occurrence for a fish and game warden. A fish and game warden generally supervises the hunting and fishing of ordinary citizens. Petitioner testified that, since his accident, he was able to perform all his required duties except lifting a deer or lifting a lobster trap out of kelp.

Evaluation

9. Respondent presented no competent, medical opinion evidence that she cannot perform the essential functions of a psychiatric technician. Accordingly, respondent failed to prove by a preponderance of the evidence that, at the time she applied for industrial disability retirement, she was substantially incapacitated from performing the usual and customary duties of a psychiatric technician.

ORDER

CalPERS's denial of respondent's application for industrial disability retirement is affirmed.

DATE: September 3, 2019

DocuSigned by:
Robert W. Walker
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ROBERT WALKER

Administrative Law Judge

Office of Administrative Hearings