

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

In the Matter of the Reinstatement from Industrial Disability

Retirement of:

REBECCA A. VEGA, Respondent,

and

**CALIFORNIA SUBSTANCE ABUSE TREATMENT FACILITY AND
STATE PRISON, CORCORAN, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, Respondent**

Agency Case No. 2018-0160

OAH No. 2018060072

PROPOSED DECISION

John E. DeCure, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on August 5, 2019, in Fresno, California.

Austa Wakily, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS and Complainant).

Respondent Rebecca A. Vega was present and represented herself.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED Aug. 30 2019



There was no appearance by or on behalf of the Department of Corrections and Rehabilitation (CDCR or Department), California Substance Abuse Treatment Facility and State Prison, Corcoran (Corcoran facility). CalPERS established that CDCR was properly served with the Notice of Hearing. Consequently, this matter proceeded as a default hearing against CDCR under Government Code section 11520.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 5, 2019.

Issue

Does respondent remain substantially incapacitated from performance of her usual job duties as a Correctional Officer (CO) due to an orthopedic (right arm and right elbow)¹ condition?

FACTUAL FINDINGS

Jurisdictional Matters and Background

1. Respondent was employed by CDCR at its Corcoran facility as a CO. Her employment qualified her as a state safety member. On March 14, 2014, she submitted an application for industrial disability retirement on the basis of an orthopedic (right arm and right elbow) condition. Respondent identified the date of injury as October 7,

¹ The Accusation incorrectly referred to respondent's "left elbow" rather than her right elbow. Respondent clarified this error in a letter to CalPERS which was received in evidence as complainant's Exhibit 4.

2012. CalPERS approved the application. Following the approval, respondent retired for disability effective January 10, 2014. Respondent was under the minimum age for voluntary service retirement at the time; pursuant to Government Code section 21192, she was subject to a future medical reexamination to determine whether she continued to qualify for industrial disability retirement.

2. In 2017, CalPERS sought to reexamine respondent to reevaluate her disability. CalPERS also obtained medical reports and records concerning respondent's orthopedic condition, and treatment history. On October 18, 2017, Ernest B. Miller, M.D., performed an Independent Medical Examination (IME) of respondent on behalf of CalPERS and concluded that she no longer qualified for industrial disability retirement. By a letter dated November 30, 2017, CalPERS notified respondent and CDCR of this determination, and notified the parties of their right to appeal. Respondent timely filed a notice of appeal.

3. On May 14, 2018, complainant filed the Accusation at issue in this matter. Respondent timely filed a notice of defense. All jurisdictional requirements have been met.

Job Duties

4. As set forth in the CDCR's Essential Functions of a Correction Officer, a CO must be able to work in minimum and maximum facilities with male or female inmates, perform the duties of all posts, work overtime, and wear personal protective equipment and clothing and breathing apparatus. The CO must range qualify with weapons and fire a weapon in a combat or emergency situation, swing a baton with force, disarm and subdue and apply restraints to an inmate, and defend against an armed inmate, all while determining the appropriate use of force for a given situation.

The CO must walk occasionally to continuously, run occasionally all-out while responding to alarms or serious incidents, climb occasionally to frequently, crawl and crouch occasionally when performing searches, stand occasionally to continually, and sit occasionally to continuously while doing record-keeping and report-writing. The CO wears a 15-pound equipment belt, lifts and carries continuously to frequently objects in the 20 to 50-pound range, and occasionally heavy objects in the 100-pound-plus range. The position involves occasional to frequent pushing and pulling, reaching overhead, frequent to continuous head and neck movement, occasional to continuous arm movement, frequent to continuous twisting of the body, and frequent to continuous hand and wrist movement. The CO must occasionally brace while restraining or body-searching an inmate, or during an altercation.

5. According to the CalPERS "Physical Requirements of Position/Occupational Title" form completed by respondent's employer, the physical requirements of the CO position² are each set forth in terms of frequency, which is categorized as "never," "occasionally" (up to three hours), "frequently" (three to six hours), and "constantly" (over six hours).

6. The CO primary physical activities and their corresponding frequencies were reported as follows: sitting, standing, and walking (occasionally/frequently/constantly); running (occasionally); crawling, kneeling, and squatting (occasionally); climbing ((up to 150 steps) occasionally/frequently); bending and twisting neck (frequently/constantly); bending waist (occasionally/frequently); twisting

² Physical requirements of the job outline the frequency with which an incumbent is required to lift, carry, push, pull, move, or tolerate exposure to noise, light, or other bio-hazards.

waist (frequently); reaching above or below shoulder (occasionally/frequently); pushing and pulling (occasionally/frequently/constantly); fine manipulation (frequently/constantly); power grasping, simple grasping, and repetitive use of hands (frequently/constantly); keyboard and mouse use (occasionally/frequently/constantly); lifting and carrying 0-10 pounds (constantly), 11-25 pounds (constantly), 26-50 pounds (frequently), 51-75 pounds (occasionally), 76-100 pounds (occasionally), or 100-plus pounds (occasionally); walking on uneven ground ((up to 1-5 miles) occasionally/frequently); and driving ((frequently, up to six hours) occasionally/frequently/constantly).

7. Various other CO activities were reported as follows: working with heavy equipment (occasionally/frequently); exposure to excessive noise (occasionally); exposure to extreme temperature, humidity, wetness (occasionally/frequently/constantly); exposure to dust, gas, fumes, or chemicals (occasionally/frequently); working at heights (occasionally/frequently); operation of foot controls or repetitive movement (occasionally/frequently); use of special visual or auditory protective equipment (occasionally); and working with bio-hazards (occasionally).

8. Respondent described experiencing "constant" pain and stinging in her right arm radiating downward. She has undergone surgery and had medical treatment, but does not believe her condition has improved over the last seven years. Respondent is fearful that her condition would prohibit her from defending herself or a partner in a life-threatening incident involving inmates.

Medical Evidence and Evaluation

9. Dr. Miller conducted an IME to determine whether respondent was still incapacitated from her job duties as a CO. Dr. Miller has been licensed in California

since 1985, specializes in orthopedic medicine, and is a board-certified orthopedic surgeon. He practices in San Luis Obispo. Dr. Miller prepared an IME report dated October 18, 2017, which was submitted into evidence. He reviewed the CDCR CO-position job analysis and available medical records. Dr. Miller obtained a medical history from respondent and administered a physical examination. He testified about his findings and IME report.

10. Respondent was 43 years old when she presented for the IME. Her reported date of injury was October 7, 2012; when she was using a key to open a gate at work, she used a twisting motion and felt pain in her right forearm and right wrist. Her complaint on the date of the IME was constant pain and swelling over the right elbow. She described a burning pain and burning sensation that radiated down to the right hand and right-hand fingers. She reported that her doctors "don't say" what her diagnosis may be. Ricardo Avena, M.D., a plastic surgeon, recommended and performed surgery on her, but since the surgery, she had no relief from her symptoms and, in fact, her right elbow pain is worse. She takes four Norco per day, as prescribed by Dr. Zielsdorf, for pain relief.

11. Dr. Miller reviewed medical records to obtain a history of diagnoses and treatment. On October 8, 2012, Marc Johnson, M.D., wrote a report documenting respondent's October 7, 2012 injury. The injury was due to a twisting motion with pain in the right forearm and right wrist, rather than the right elbow. Dr. Johnson's diagnoses were right wrist strain and right forearm strain. Dr. Johnson noted no symptoms, complaints, or diagnoses regarding the right elbow.

12. A right-elbow MRI study from Mario Deguchi, M.D., dated November 20, 2012, was consistent with a common extensor tear and mild tendonitis. On December 6, 2012, Dr. Johnson made a diagnosis of right forearm and right wrist strain and pain,

with possible ligament damage of the forearm versus nerve entrapment neuropathy. Dr. Johnson recommended a steroid injection if necessary. Lancy Allyn, M.D., wrote a report dated January 9, 2013, diagnosing right-side tennis elbow. Drs. Johnson and Allyn continued treating respondent for diffuse, nonspecific symptoms and complaints involving the right elbow, right forearm, and right hand.

13. On March 21, 2013, Ricardo Avena, M.D.'s diagnosis was right lateral epicondylitis (tendon inflammation), or tennis elbow, and recommended right-elbow surgery with tendon release of the extensor carpi radialis. Dr. Avena's surgical notes document respondent's right-elbow surgery on June 21, 2013, with excision of a neuroma (a nerve tumor typically caused by a laceration). Dr. Avena did not explain the source of the neuroma, although Dr. Miller opined that with "absolute medical certainty," respondent's industrial injury did not result in the neuroma.³ Dr. Avena's September 26, 2013 report noted respondent to be "doing well."

13. A July 29, 2014 report by Alice Martinson, M.D., contained a diagnosis of: 1) persistent neuropathy of right radial nerve following release of extensor origin; and 2) mild lateral epicondylitis, left elbow. Dr. Martinson indicated that the neuropathy resulted from Dr. Avena's surgical excision of the neuroma.

14. Records from Drs. Rose Hull, James Dunn, and Luis Guzman document right-elbow treatment that apparently provided no symptomatic relief for respondent's right elbow pain.

³ Dr. Miller further opined that respondent's twisting motion to open the gate with her keys also would not cause her tennis elbow condition.

15. Dr. Miller's physical examination of respondent resulted in normal range of motion and muscle-strength findings. Respondent's grip strength was approximately one-third of normal, a finding Dr. Miller discounted because "this is subjective." Although muscle atrophy might be expected with respondent's complaints, no muscle atrophy was noted. Dr. Miller opined that her physical capabilities indicated she "cannot be a professional bowler, ping pong, or tennis player," but she is not substantially incapacitated from the job duties of a CO.

16. Dr. Miller's diagnoses following his IME were:

1. Narcotic addiction to hydrocodone.
2. Status post neuroma removal right elbow, cause unknown.
3. Status post release conjoint tendon right elbow.
4. Obscure diagnosis lateral epicondylitis not noted in contemporary medical record.

In conclusion, Dr. Miller opined that respondent was not substantially incapacitated based on a diagnosis of neuroma excision in the right elbow, or status post conjoint tendon release in the right elbow, as these conditions are not significantly disabling or (fully) disabling. He noted that "[t]here appears to be no physical requirement requiring any activity involving the upper right extremity alone," and surmised there were no CO usual job duties she was unable to perform.

Respondent's Evidence

17. Respondent testified that following her October 2012 injury, a surgeon recommended surgery on her right arm, but the surgery did not improve her condition. Another physician recommended respondent temporarily retire, but going off work also did not improve her condition. She has physically struggled to do chores, yardwork, and exercise in the gym, and her ex-husband, Edward Vega, has moved back into her community to provide assistance with their daughter who has special needs. Respondent underwent surgery⁴ in 2018 with Peter Simonian, M.D., but since then she has experienced constant pain and stinging sensations in her right arm and elbow.

18. Respondent felt Dr. Miller's IME was cursory, in that he spent only 30 minutes evaluating her. She disagrees with his assessment that she can perform all of the job duties of a CO, particularly because she is right-handed, and her right arm lacks the strength for her to defend herself and/or her partner during an inmate attack. She has no confidence that she could break up inmate fights or perform takedowns due to her condition. In sum, despite the surgeries and treatment she has undergone, her right arm has shown "no improvement." She lives with the discomfort daily, tries not to strain her right arm, and takes pain-management medication to cope with the pain. No further surgeries have been proposed, and no further treatment is ongoing.

19. Edward Vega testified that he moved back to respondent's community to help with the care of his and respondent's daughter, particularly by performing any physical work related to her care. Because respondent's right-arm capability is limited,

⁴ Respondent did not specify the type of procedure Dr. Simonian provided.

he helps with anything involving lifting, moving items, doing chores, and yardwork. He has also noticed that respondent's injury has the effect of making her mentally "tired" as well, due to the physical difficulties she faces.

Discussion

20. CalPERS sought, in its reevaluation of respondent's disabling condition, to determine whether she was still disabled. Dr. Miller's IME process, report, and testimony was competent and thorough, and his opinion that respondent is no longer substantially incapacitated from her usual job duties was supported by the evidence upon which he relied. Although respondent presented as a sincere witness who has experienced right-arm pain for years since her injury, she presented no medical evidence or medical-expert testimony to challenge Dr. Miller's opinion or refute CalPERS' evidence. In sum, based on the evidence presented at hearing, CalPERS' contention that respondent is no longer disabled was persuasive.

LEGAL CONCLUSIONS

1. By reason of her employment, respondent is a state safety member of CalPERS and eligible for disability retirement under Government Code section 21151, subdivision (a).

2. The burden of proof flows from the type of process initiated and lies with the party making the charges. (*Martin v. State Personnel Board* (1972) 26 Cal.App.3d 573, 582.) Respondent has been receiving industrial disability retirement benefits since approximately January 2014. CalPERS filed this Accusation to force her involuntary reinstatement from disability retirement. As such, the burden rests with CalPERS to

prove its contentions based on competent medical evidence by a preponderance of the evidence. CalPERS met its burden as set forth below.

3. The Board "may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her." (Gov. Code, § 21192.)

4. "If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system. If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position . . ." (Gov. Code, § 21193.)

5. The role of disability retirement is to address the needs of employees who are unable to work because of a medical disability. (Gov. Code, § 21153.) Pursuant to Government Code section 21192:

[W]hile termination of an unwilling employee for cause results in a complete severance of the employer-employee relationship [citation], disability retirement laws

contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an employee on disability retirement reaches the age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues.

An employee on disability retirement may apply for reinstatement on the ground of recovery. (*Ibid.*) If an employee on disability retirement is found not to be disabled any longer, the employer may reinstate the employee, and his disability allowance terminates. (Gov. Code, § 21193.) (*Haywood v. American Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1305.)

6. CalPERS met its burden of proving by competent medical evidence that respondent is no longer substantially disabled for performance of her duties as a Correctional Officer at a State Correctional Facility. For the reasons set forth in Findings 15, 16, and 20, Dr. Miller's professional opinion that respondent is not substantially incapacitated for performance of her usual job duties as a CO was comprehensive and persuasive. Despite respondent's credible complaints of ongoing pain, she did not submit competent medical evidence of impairment to contravene CalPERS' evidence.

ORDER

Respondent's appeal is DENIED and the Accusation is SUSTAINED. Respondent Rebecca A. Vega shall be reinstated to her former usual job duties with respondent

California Substance Abuse Treatment Facility and State Prison, Corcoran, California,
Department of Corrections and Rehabilitation, as a Correctional Officer.

DATE: August 29, 2019

DocuSigned by:
John DeCure
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JOHN E. DeCURE

Administrative Law Judge

Office of Administrative Hearings