

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:**

MILENA M. COMBARIZA, Respondent

and

**R.J. DONOVAN CORRECTIONAL FACILITY, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent**

Agency Case No. 2018-0654

OAH No. 2018081109

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 17, 2019, in San Diego, California.

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

Milena M. Combariza, respondent, represented herself.

There was no appearance by or on behalf of respondent R.J. Donovan Correctional Facility (Donovan), California Department of Corrections and Rehabilitation (CDCR).¹

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on September 17, 2019.

ISSUE

Is respondent² substantially incapacitated from performing the usual and customary duties of a Psychologist?

FACTUAL FINDINGS

Background

1. Respondent was employed by CDCR at Donovan as a Psychologist-Clinical (psychologist). By virtue of such employment, respondent is a state safety member of CalPERS.

¹ On proof of compliance with Government Code sections 11505 and 11509, this matter proceeded as a default against respondent CDCR pursuant to Section 11520.

² All future references to "respondent" are to Milena Combariza.

2. On December 4, 2017, CalPERS received respondent's application for industrial disability retirement based on a neurological (trigeminal neuralgia) condition. Respondent retired for service effective December 30, 2017, and has been receiving her retirement allowance since that date.

3. On March 19, 2018, respondent underwent an Independent Medical Examination (IME) conducted by neurosurgeon Paul Kaloostian, M.D. By letter dated April 10, 2019, CalPERS notified Respondent that based on a review of her medical records and report by Dr. Kaloostian, CalPERS determined that her neurologic condition was not disabling, and it denied her application for disability retirement.

4. Respondent timely appealed the decision. This hearing ensued.

Duties of a Psychologist

5. A psychologist at Donovan is responsible for performing psychological evaluations and associated treatment of inmate-patients. A psychologist develops treatment programs for inmates; writes reports; analyzes data from psychological testing; participates in professional development; develops and maintains therapeutic relationships; exercises judgment and decision-making; demonstrates social perceptiveness; exercises active listening; and engages in a list of duties and responsibilities of a licensed clinical psychologist. A list of essential functions for a psychologist at Donovan include: the ability to work 40 hours per week and more than 40 hours per week in an emergency situation; serve periodically as officer-of-the-day by being available on-call; travel to trainings and continuing education programs; testify as an expert witness; participate in formal/informal settings regarding mental health matters; maintain order and supervise conduct of inmates; maintain sufficient strength, agility, and endurance to perform during stressful situations; maintain

security and ability to recognize threatening situations; ability to wear personal protective equipment; ability to walk and sit continuously; ability to bend and stoop frequently; ability to lift/carry/drag light items (less than 20 pounds) frequently, maximum to medium range (up to 50 pounds) frequently, and heavy items (over 100 pounds) occasionally (such as preventing patient from falling); reaching occasionally to continuously; and twisting frequently to continuously.

Dr. Kaloostian's Independent Medical Examination

6. Dr. Kaloostian completed a report on March 19, 2018. The following is a summary of his testimony and report: Dr. Kaloostian completed a general surgery internship at the University of California, Los Angeles, and a residency in neurological surgery at the University of New Mexico Medical Center, where he held the position of neurosurgery chief resident, and completed several fellowships. After completing his residency in 2012, he completed a clinical and research instructorship and fellowship at Johns Hopkins University. From 2013 to 2015, he worked as an attending neurosurgeon at Kaiser Permanente and then worked as a locum tenens neurosurgeon at multiple practices across the country. In 2017, he became an assistant professor of neurosurgery at the University of California, Riverside. He is a Diplomate of the American Board of Neurological Surgery, a fellow of the American Association of Neurological Surgeons, and an associate fellow of the American College of Surgeons. He has multiple professional memberships relating to neurosurgery and has made numerous professional presentations concerning neurosurgery in academic settings. He is also published extensively in peer-reviewed journals and book chapters. Based on his training and experience, Dr. Kaloostian was well qualified to render an expert opinion in this matter.

7. Dr. Kaloostian performed an IME of Respondent for CalPERS on March 19, 2018. Dr. Kaloostian's evaluation of respondent's condition was based on a review of medical records, consideration of the occupation description, a physical exam, and an interview of respondent. He concluded that respondent was not substantially incapacitated from the performance of her usual and customary work duties of a psychologist.

8. Respondent, who at the time was 64 years old, reported a long history of left-sided facial pain and tongue pain. She began experiencing the pain in 1996, and after a series of tests, was diagnosed with atypical facial pain and trigeminal neuralgia. Trigeminal neuralgia is face pain associated with aggravation of the trigeminal nerve. It often results from a vascular structure compressing the trigeminal nerve. When the nerve becomes irritated it can cause an electrical lancinating pain. Respondent reported that the pain is so severe at times that she is left unable to speak and drink liquids. She has been on multiple combinations of pain medications, which have helped at some points, but have not removed the occasional lancinating pain that she has on the left side of her face and tongue. Respondent stated that being at work makes her condition worse because of the stress associated with an increased workload and decreased staffing. Respondent was treated with a glycerol injection that did not provide significant long-term relief. A second injection was attempted but was aborted due to an inability to enter the foramina. She also had gamma knife radiation that was not effective. She finally had a microvascular decompression in the area, which lasted for approximately eight months with great results, but the pain has since returned.

9. Dr. Kaloostian reviewed respondent's medical records beginning in January 2012. Respondent has been seen by a several neurologists and neurosurgeons

for her condition. Respondent has consistently been diagnosed with left-sided trigeminal neuralgia and atypical trigeminal neuralgia.

10. Dr. Kaloostian conducted a full physical examination that did not produce any significant findings. Dr. Kaloostian diagnosed respondent with left-sided facial pain, intractable to a variety of treatments. He noted the pain involved the trigeminal nerve distribution, as well as other distributions that affect the sensation along the tongue. Treatments such as glycerol injections, gamma knife radiosurgery, and microvascular decompression have helped at some times, but not at others. Respondent experiences episodic pain that can happen at work and home. Dr. Kaloostian did not believe there was any clear association between her work and the facial pain.

11. Based on his exam, his review of medical records, and review of the physical requirements of a psychologist, Dr. Kaloostian determined that there were no specific duties of a psychologist at Donovan that respondent could not perform and that she was not substantially incapacitated to perform the usual and customary duties of a psychologist at Donovan. Dr. Kaloostian found respondent's report of pain credible and had no reason to believe that she was exaggerating her pain symptoms.

Respondent questioned Dr. Kaloostian on why he did not diagnose her with trigeminal neuralgia, which she has been consistently diagnosed with since 1996. Dr. Kaloostian explained that an atypical facial pain diagnosis is a more appropriate diagnosis since she experiences pain in the tongue, which does not correspond to the trigeminal nerve. Specifically, pain in the back of the mouth or tongue is typically associated with the ninth cranial nerve, and difficulty moving the tongue would be associated with the twelfth cranial nerve.

Dr. Kaloostian also explained his conclusion that there was no evidence that job stress caused the pain. Although respondent reported a correlation between job stress and pain, Dr. Kaloostian was not aware of any scientific study establishing a relationship between the two. Finally, although there are times where respondent reported not being able to speak, which Dr. Kaloostian admitted is an essential function of a psychologist, such a condition is not permanent and ultimately resolves.

Respondent's Testimony

12. Respondent's testimony is summarized as follows: Respondent was able to work as a psychologist at Donovan without any problems from 2008 until 2015. In 2015, the Chief Psychologist increased the workload and paperwork requirements, which required respondent to work 12 to 14-hour days. Respondent had consistently been diagnosed with trigeminal neuralgia. One day, when she returned to work from vacation, there was a pile of work that had not been covered. Respondent was required to complete all the work, which was a violation of the union contract.³ August 24, 2015, had been a particularly stressful day. She suddenly felt like a lightning bolt had hit her. She could not walk and could not talk. She went to the emergency room.⁴ When she returned to work in March 2016, her employer refused her reasonable accommodations.

³ Respondent submitted a copy of the contract indicating that the normal workload should average 40 hours per week over a 12-month period.

⁴ Respondent submitted a physician note from the emergency department indicating she was seen for severe facial pain associated with her trigeminal neuralgia.

13. December 29, 2017, was the last day she worked at Donovan. She simply could not continue to work there any longer with the stress and the unsafe working environment. She had been required to work 50 to 60 hours per week because of a shortage in mental health clinicians and psychiatrists. She believed that her trigeminal neuralgia worsened because of this stress and the denial of reasonable accommodations. She was required to work 10 to 12-hour days without normal breaks. Respondent has since settled her workers' compensation claim.

14. In June 2019, respondent was on the highest amount of medication she had ever had. She underwent a second microvascular decompression. Currently, half of her face is numb. She is no longer working. She is not ready to go back to work. She still has dreams about the stressful environment at Donovan and her former supervisor. Her condition initially improved after the first microvascular decompression. However, it only lasted eight months because of the stress triggered by her job. Respondent did not believe that Dr. Kaloostian considered the effects of stress on her trigeminal neuralgia. She believed that her evidence established a relationship between stress and the worsening of her symptoms.

Testimony of Juan Espana

15. Juan Espana is respondent's husband. Dr. Espana, a research economist, testified that respondent's existing condition of trigeminal neuralgia was exacerbated to a point where she could no longer perform the job functions of a psychologist. He has witnessed her suffering for many years and noted there were times where the pain was so great she could not eat or speak. He claimed that Donovan has a history of violations and repeatedly violated his wife's employment rights and rights under the Americans with Disabilities Act.

Testimony of Cheryl Noble

16. Cheryl Noble was a licensed clinical social worker at Donovan until she left in February 2016. Her testimony and letter are summarized as follows: Donovan had once been a reasonable place to work, but things began to change when the documentation requirements increased, and management became more hostile toward employees. Respondent was forced to work 10-hour days with no lunch or bathroom breaks. Respondent was also placed in dangerous situations where she was left alone with sensitive-needs inmates. There was an increase in paperwork and pressure to do more work. Ms. Noble observed respondent function normally, but as the work-environment at Donovan changed, she observed respondent to have an increase in pain. Ms. Noble would go home exhausted from work and believed respondent experienced the same stress and dangers she did.

Additional Documents⁵

17. Respondent submitted a report by Sarah L. Ray, Psy.D., dated November 24, 2015, related to respondent's workers' compensation claim. Dr. Ray opined that respondent experienced stress and psychological injury as a result of her work at Donovan, and her symptoms were at least 51 percent a result of her work situation. Dr. Ray believed the work stress exacerbated her pre-existing medical condition, which had previously been non-debilitating. Dr. Ray recommended respondent receive psychotherapy to decrease her anxiety, depression, and stress symptoms.

⁵ All of the following documents were received as "administrative hearsay" such that they could supplement or explain other evidence, but were not sufficient in themselves to support a factual finding. (Gov. Code, § 11513, subd. (d).)

18. Respondent submitted two letters from neurologist Patrick Huott, M.D. The first, dated August 16, 2015, is summarized as follows: Respondent began treating with him in 2002 for trigeminal neuralgia. The pain can be triggered by various factors including high stress levels, weather changes, or "other" factors. The pain makes it difficult for her to speak or interact with others. Because her condition could be disabling at times, respondent required a modified work schedule with the following accommodations: that she be allowed to leave work early, have someone present her cases at the interdisciplinary team meetings, be excused from running groups; and should have a day of rest on Friday, or if need be, Monday, in order to have a long weekend to rest and recuperate.

The second letter dated August 30, 2019, is summarized as follows: Respondent's pain increased dramatically in 2013 when she was assigned to a new supervisor who was retaliatory and critical of respondent's work, creating a hostile work environment. The "abusive behavior" coupled with increased workload triggered ongoing acute trigeminal neuralgia episodes that worsened over time. Respondent underwent microvascular decompression surgery in December 2015, which resulted in pain improvement for eight months. Respondent returned to work, but when the pain returned she was forced to retire. Dr. Huott recommended reasonable accommodations that were rejected by her employer. Since severe stress can aggravate the frequency and intensity of trigeminal neuralgia episodes, it is likely that the unduly stressful work environment and rejection of reasonable accommodations exacerbated respondent's condition, forcing her to retire.

19. Respondent submitted two letters from University of California, San Diego, neurosurgeon John Alksne, M.D. The first letter, dated September 22, 2015, is summarized as follows: Respondent could return to work with accommodations that

she leave early when in severe pain, have someone present her cases when she cannot speak, and be excused from running groups when in severe pain.

The second letter dated September 3, 2019, is summarized as follows:

Respondent was Dr. Alksne's patient from 2015 to 2017. Dr. Alksne performed a vascular decompression in December 2015. The procedure has a high long-term success rate with studies indicating pain recurrence in less than two percent of cases five years after surgery. The operation was successful and without complications. After surgery, respondent returned to work, and Dr. Alksne recommended several reasonable accommodations that respondent said were denied. The pain returned eight months later. Trigeminal Neuralgia can be triggered by stress and working in a stressful environment could have exacerbated her condition.

20. Respondent submitted an abstract on the long-term outcome of microvascular decompression for trigeminal neuralgia, that appears to have been published in the *New England Journal of Medicine* in 1996. The conclusion stated that microvascular decompression is a safe and effective treatment for trigeminal neuralgia with a high-rate of long term success. Ten years after surgery, 70 percent of the patients had excellent final results, that is, they were free of pain without medication.

21. Respondent submitted several workers' compensation physician progress report notes completed by Dr. Ray's psychological assistant indicating respondent reported being overwhelmed by stress at work, which would trigger flare-ups of facial pain.

LEGAL CONCLUSIONS

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; Evid. Code, § 115.) In this matter, respondent is seeking a disability retirement. For that reason, respondent has the burden of establishing that she is substantially incapacitated from performing the usual and customary duties of a psychologist at CDCR.

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, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion.

3. On receipt of an application for disability retirement of a member, the board must 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. (Gov. Code, § 21152.)

4. Government Code section 21156, subdivision (a), provides in part:

(1) If the medical examination and other available information show to the satisfaction of the board . . . 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 . . .

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

Appellate Authority

5. "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.)⁶ Mere

⁶ 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; and serving warrants and making arrests. He suffered injury to his right arm while arresting a suspect. There was evidence that Mr. 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 Mr. Mansperger's job, they were not common occurrences for a fish and game warden. (*Id.* at p. 877.)

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.)⁷ Further, respondent 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.)

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.)

⁷ 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.

Evaluation

6. Respondent had the burden of proving she is substantially incapacitated from performing the usual and customary duties of a psychologist at CDCR. Respondent did not meet her burden. CalPERS presented competent medical evidence showing respondent was not substantially incapacitated from performing the usual and customary duties of a psychologist at CDCR. Dr. Kaloostian noted that although respondent suffered from episodic pain that could be debilitating, respondent has been dealing with this condition since 1996 and had been able to work as a psychologist throughout this time. Although respondent believed that her condition was exacerbated by job-stress, which she attributed to long work days without breaks, excessive paperwork, and a supervisor she perceived to be hostile towards her, this was insufficient to establish that she was substantially incapacitated from the performance of her usual and customary duties. It is well established that, when an applicant can perform his or her 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, supra*, at pp. 886-887.) Moreover, respondent presented no competent medical evidence establishing that she was disabled. Accordingly, the CalPERS's denial of respondent's application for an industrial disability retirement was appropriate.

ORDER

The application for industrial disability retirement filed by respondent Milena M. Combariza is denied.

DATE: October 15, 2019

DocuSigned by:

19DED247706C4FB...
ADAM L. BERG

Administrative Law Judge
Office of Administrative Hearings