

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Disability Retirement of:

KERRY S. DANIS, Respondent

and

**MULE CREEK STATE PRISON, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, Respondent**

Case No. 2019-0409

OAH No. 2019061162

PROPOSED DECISION

Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on December 11, 2019, in Sacramento, California.

John Shipley, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Kerry S. Danis (respondent), appeared telephonically and represented herself.

No appearance was made by or on behalf of respondent Mule Creek State Prison, California Department of Corrections and Rehabilitation (respondent CDCR).

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED January 10 20 20
LFA

The matter proceeded as a default against respondent CDCR, pursuant to Government Code section 11520.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on December 11, 2019.

ISSUE

Whether, at the time of her application, on the basis of her psychological (anxiety, depression, and mental inability to work safely) conditions, respondent is substantially incapacitated from the performance of her usual and customary duties as a teacher for respondent CDCR.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent was employed by respondent CDCR as a Teacher (High School-General Education) (teacher). By virtue of her employment, respondent was a state safety member of CalPERS subject to Government Code section 21151.

2. On August 20, 2018, respondent filed her application for service pending disability retirement with CalPERS. She claimed disability on the basis of her psychological (anxiety, depression, and mental inability to work safely) conditions.

3. On August 30, 2018, CalPERS notified respondent that her application for service retirement was processed, and she retired for service effective July 1, 2018. She has been receiving her retirement allowance from that date.

4. On March 19, 2019, CalPERS notified respondent that it denied her disability retirement application, but she would continue receiving her service retirement benefits. Respondent appealed, and the matter was set for an evidentiary hearing before an OAH administrative law judge, pursuant to Government Code section 11500 et seq.

Respondent's Service Pending Disability Retirement Application

5. In her service pending disability retirement application (application), respondent described her specific disabilities as "[a]nxiety and depression; mental inability to work safely." Respondent wrote that her disabilities began in March 2018, when her son was hospitalized. Respondent explained in her application that her son had been "hospitalized multiple time [*sic*] over the past 4-5 years."

6. Respondent wrote that her limitations or preclusions due to her injuries or illness were:

Inability to focus or concentrate; fraught with concern over his safety and health; Being with mentally ill prisoners triggers Anxiety[.]

Respondent explained that her injuries or illness affected her ability to perform her job because "[m]y work environment triggers my anxiety, depression[, and I am] unable to do work effectively or safely."

Respondent's Job Duties

7. Respondent's Job Description as a teacher at Mule Creek State Prison describes her position as training inmates "in academic subjects and by helping them to develop socially acceptable attitudes and interests." The teacher provides individual

and group instruction, assessments and testing, and collaborates with an interdisciplinary team of professionals. The teacher is also responsible for supervising the conduct of inmates in the classroom, and "may be called upon to assume general custody responsibilities in time of emergency."

8. Essential duties and responsibilities of a teacher include, but are not limited to:

50% Provides relief coverage for off-duty Teachers and Library staff . . . ;

30% As Testing Coordinator provides testing materials, assisting in scheduling testing, records results and makes assessments . . . ;

10% Maintains order, discipline, and helps to prevent escapes, ensures that inmates do not injure themselves, others, or property, keeps work areas safe and secure, inspects both the classroom and the area of supervision daily for contraband weapons or illegal drugs, and when under declared emergency and as directed by proper authorities, performs custody duties and other job functions necessary for facility operation;

5% Attends a combination of 40 hours In-Service Training/On-the-Job Training annually

9. A CalPERS form entitled "Physical Requirements of Position/Occupational Title" (form) sets forth the physical requirements for a teacher. A teacher occasionally (up to three hours) performs the following activities: kneeling, climbing, squatting, bending (neck), bending (waist), twisting (neck), twisting (waist), simple grasping, walking on uneven ground, driving, is exposed to dust, gas fumes, or chemicals, and works with biohazards.

A teacher frequently (three to six hours) performs the following activities: sitting, standing, walking, reaching (above shoulder), reaching (below shoulder), lifting and carrying from 25 to 50 pounds, and is exposed to extreme temperature, humidity, and wetness.

A teacher constantly (over six hours) performs the following activities: pushing and pulling, fine manipulation, repetitive use of hands, keyboard use, and mouse use.

On July 18, 2018, CDCR's Return-to-Work Coordinator and respondent signed and dated the form.

Independent Medical Examination (IME)

10. On February 22, 2019, Alberto G. Lopez, M.D., performed an IME of respondent at the request of CalPERS. Dr. Lopez is a board-certified psychiatrist who has served as an expert witness since 1990, and works as a psychiatrist for Southeast Mission Geriatrics for the City and County of San Francisco, and for the Mental Health Rehabilitation Center at Zuckerberg San Francisco General Hospital and Trauma Center.

11. Dr. Lopez reviewed respondent's past medical, psychiatric, occupational, and social history, and performed a mental status examination and psychological

testing. Dr. Lopez prepared an IME Report dated February 22, 2019, and testified at hearing consistent with the contents of his report. He described respondent's complaints at the IME as follows:

At the time of this examination, [respondent] complains of stress regarding her son's situation. She denied persistent depression. There is no panic. There are no psychiatric complaints.

12. Dr. Lopez noted in respondent's history that her son made "a suicide gesture" at 21, in 2011, and that he "later developed serious mental problems with psychotic breaks requiring hospitalizations." As a result, respondent developed "a combination of work-related and environmental problems, and stress with her work situation."

Respondent was never assaulted at work, and she enjoyed her job. In 2015, her son's condition became more stressful for her, as he was hospitalized four or five times, due to psychotic breaks and difficulties taking his medications. On March 13, 2018, respondent felt she "could not go on," and filed for service retirement. Respondent moved to New Mexico in October 2018, and stopped seeing Ann Naimark, Marriage and Family Therapist (LMFT), whose practice is in Sacramento, California. Dr. Lopez noted that respondent had received psychological counseling from Ms. Naimark since 2014.

Dr. Lopez reported that respondent has not been treated with any psychotropic medications, which she would rather not take. Respondent complained of lack of concentration and focus, and she denied persistent depression or panic. She denied

symptoms of post-traumatic stress. Her sleep was intact, appetite good, and denied any episodes of "suicidal ideation and psychotic symptomatologies."

13. Respondent's primary care physician at University of California, (UC) Davis, Simone Asare Atsina, M.D., diagnosed respondent on July 9, 2018, with "an adjustment disorder." Dr. Atsina placed respondent on disability for "a number of months."

MENTAL STATUS EXAMINATION AND ASSESSMENT

14. Dr. Lopez noted that respondent's form of thought was intact, although she could "ramble on in different directions." He noted no motor abnormalities, and her speech was clear and normally paced. Respondent subjectively felt stressed by her son's current situation. Respondent cried, as well as smiled and laughed, when talking about her son. Respondent appeared alert and well oriented. Her short term memory was not of concern to Dr. Lopez.

15. Respondent completed the Minnesota Multiphasic Inventory-2 (MMPI-2) psychological test. The test is a "psychological inventory designed to assess a number of the major patterns of personality and emotional disturbances." It provides subjective scores and profiles "determined from well-documented national norms that were restandardized in 1989." Dr. Lopez opined that respondent omitted 14 items, "weakening the validity of testing somewhat." However, he determined that the test produced a "valid profile" due to respondent's cooperation with the evaluation process, and provided useful information. Dr. Lopez also determined the following:

She appears to be moody and occasionally somewhat rebellious. This may cause her problems with authority figures. She has good social skills.

Interpersonally, she is likely to be superficial. She may act out and cause strain or disruption in her interpersonal relationships. She has an average interest in being with others.

Testing suggested personality problems and potential maladaptive attitudes. Individuals such as this tend to be self-centered and do see the need for psychological therapy.

The elevated scale is that of somatization.¹

REVIEW OF MEDICAL RECORDS

16. Dr. Lopez reviewed respondent's medical records. A Physician's Report on Disability dated March 10, 2018 noted that respondent's son had a psychiatric breakdown in 2011 and was hospitalized. Respondent was diagnosed with post-traumatic stress disorder (PTSD) and unspecified depressive disorder. Dr. Atsina, respondent's primary care doctor, wrote in April 2018, that respondent requested disability given the stress of her son's psychiatric illness. Respondent needed a break for one month from work to care for her son. Respondent was diagnosed with

¹ In general, somatizing patients are characterized by abnormal illness behavior (e.g., failure to respond to treatment, excessive utilization of care) and psychological distress (e.g., depressive symptoms, psychosocial stressors). (<https://www.ncbi.nlm.nih.gov/pubmed/7647946>.)

adjustment disorder, unspecified type, and "administrative encounter." Her treatment plan consisted of following up with the UC Davis Disability Office contact person.

In May 2018, Cecilia Jojola, M.D., with UC Davis Medical Center, noted that respondent presented for a disability extension. The reason for the extension request was because respondent wanted to remain off of work until her son obtained a safe placement. Her son was on a waiting list for a group home, and respondent was not able to obtain conservatorship. Respondent stated that her lack of ability to focus due to worries about her son made her unsafe for work, as she did not have "vigilance about her and may be taken advantage of or hurt by the inmates." Dr. Jojola diagnosed respondent with generalized anxiety disorder, and healthcare maintenance. Her treatment plan was to order laboratory tests.

In July 2018, Dr. Atsina diagnosed respondent with: (1) anxiety and depression; (2) elevated blood pressure reading without diagnosis of hypertension; and (3) healthcare maintenance. Her treatment plan consisted of ordering laboratory tests, and referral to the Impact Clinic for evaluation. Respondent's laboratory results showed high cholesterol and triglycerides. Respondent was later diagnosed with diabetes, hyperlipidemia, and chronic pain of the left knee, which are not the bases for respondent's disability application.

17. Dr. Lopez also reviewed CalPERS's standards for disability retirement, the physical requirements of respondent's job, respondent's job descriptions, an undated note from LMFT Naimark noting respondent's injury occurring around 2015, and that respondent's diagnosis was "post-traumatic stress and depression unspecified." Dr. Lopez noted in his IME Report that respondent had "no psychiatric diagnosis."

FINDINGS

18. Dr. Lopez addressed CalPERS's standards for disability retirement. In response to whether respondent was, at the time of filing her application for disability retirement or presently, substantially incapacitated for the performance of her duties, Dr. Lopez opined that respondent is not so incapacitated. Respondent has anxiety and stress, but it "did not seem to rise to a diagnosable psychiatric condition." Dr. Lopez concluded, "[a]t this point, I cannot make any psychiatric diagnosis" under the Diagnostic Statistical Manual of Mental Disorders, Fifth Edition (DSM-V).

19. In response to whether there were any specific job duties that respondent was unable to perform due to a mental condition, Dr. Lopez opined, "[a]t this point in time, there are no duties in the job description provided that [respondent] is unable to do."

20. In response to whether respondent cooperated with the examination and put forth her best effort, or whether there was an exaggeration of complaints, Dr. Lopez opined that there was no element of exaggeration. In sum, he opined:

She presents with essentially normal mental status examination at this time. The MMPI-2 shows evidence of some personality maladaptive traits and some somatic (physical) preoccupations, but actually no Axis I psychiatric diagnosis was suggested by the testing.

Respondent's Evidence

21. Respondent testified. She asserted that she suffered from PTSD when her son tried to commit suicide, after she saw "blood all over the place." Due to ongoing

issues regarding her son, respondent believed that she could not fulfill her job duties and responsibilities. Another stressor was her concern that her son would end up as an inmate in a facility similar to where she worked. She would have never accepted her job had she known she was going to be assigned to a "Level 4" yard, a place she described as equivalent to Pelican Bay Prison, with ongoing and serious altercations of violence on a daily basis. Respondent asserted that she would not have quit her job if she believed that she could mentally carry out her job duties.

22. Respondent does not believe Dr. Lopez's opinion should carry any weight, because he only examined her for one hour. She asserted that LMFT Naimark diagnosed her with PTSD, and that the therapist she currently sees in New Mexico, Julianne Stroup, a Licensed Clinical Social Worker (LCSW), has worked in the prison system in New Mexico, and "knows what I am talking about."

23. Respondent submitted a letter, admitted as administrative hearsay,² from LCSW Julianne Stroup, dated June 6, 2019. LCSW Stroup wrote that respondent is her client at the Ben Archer Health Center in Truth or Consequences, New Mexico. LCSW Stroup treats respondent for "PTSD and its related symptoms." Respondent first saw LCSW Stroup on February 4, 2019 "due to trauma related to her fifteen plus years of employment with [CDCR]." Respondent told LCSW Stroup that she worked "educating the severely disabled mentally ill who had a high security acuity level." LCSW Stroup is "familiar with the stress non-correctional staff experience with the daily threat of

² Government Code section 11513, subdivision (d), provides, in pertinent part, that "[h]earsay 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."

violence due to the unpredictability of severely mentally ill inmates” LCSW Stroup’s clinical opinion is that respondent suffers from PTSD and associated symptoms of depression and anxiety related to her employment. In sum, LCSW Stroup opined that respondent is not capable of performing her job duties.

24. Respondent also submitted unsigned writings from LMFT Naimark. The first, dated March 23, 2018, is a letter “in support of [respondent] not being able to be at work recently.” LMFT Naimark wrote that respondent was “under intense emotional stress due to family issues, creating severe anxiety and depression and the necessity to reevaluate her living situation.”

The second writing appeared to be notes prepared by LMFT Naimark. She wrote that respondent suffered from stress due to her son’s psychiatric diagnoses of bipolar with psychotic features, and schizophrenia. Respondent has had to assume the role of the “primary caseworker” for her son, causing another level of frustration and stress. Respondent presented as “easily excitable and distractible,” and “her anxiety can easily move into anger.” Respondent is depressed and sad that her son may never be able to create a “normal” life for himself. She is worried that she will have to take care of him for his whole life.

LMFT Naimark then listed the specific job duties respondent is unable to perform due to her stress, such as being unable to prevent escapes and act under emergencies, take effective actions, maintain empathy and objective understanding of inmates, and being emotionally stable or maintaining tact, patience, or open-mindedness.

25. Neither LCSW Stroup nor LMFT Naimark testified on respondent’s behalf. Their letters did not address knowledge of CalPERS’s disability standards, and did not

opine as to whether respondent met those standards or not. As a result, their letters were given minimal weight.

Discussion

26. Respondent did not meet her burden to establish by competent medical evidence that she is substantially incapacitated from the performance of her job duties. No medical expert testified on respondent's behalf, answering the following CalPERS's questions regarding disability retirement: (1) whether there are any specific job duties that respondent was unable to perform because of her physical condition; (2) whether she is substantially incapacitated from the performance of her duties; (3) if yes, on what date did her disability begin; (4) if incapacitated, is the incapacity permanent or temporary; (5) did she cooperate with the examination and put forth her best effort, or was there an exaggeration of complaints; and (6) was the condition caused, aggravated or accelerated by her employment.

Ms. Naimark is a therapist and Ms. Stroup is a licensed clinical social worker. No evidence was presented regarding their background, training, and experience. While they described the cause of respondent's stress and the job duties she cannot perform because of her stress, there was virtually no objective medical evidence presented by either practitioner or respondent to establish substantial incapacity.

27. On the other hand, Dr. Lopez conducted an IME of respondent, and concluded that respondent had no psychiatric diagnoses. He noted that the only objective finding was respondent's diagnosis of adjustment disorder, a relatively mild diagnosis, and that respondent presented with "essentially normal mental status examination" Dr. Lopez persuasively concluded that respondent's stress symptoms were that of "somatization," and not supported by objective findings. In addition, Dr.

Lopez addressed CalPERS's disability retirement standards, and concluded that respondent is not substantially incapacitated from the performance of her duties.

LEGAL CONCLUSIONS

1. Respondent has the burden of proof to establish by a preponderance of evidence that she is "incapacitated for the performance of duty," which courts have interpreted to mean "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) Discomfort, which may make it difficult to perform one's duties, is insufficient to establish permanent incapacity from performance of one's position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (*Hosford, supra*, 77 Cal.App.3d at p. 863.)

2. Pursuant to Government Code section 21150, members incapacitated for the performance of duty shall be retired for disability. Government Code section 20026 provides that "'Disability' and 'incapacity for performance of duty' as a basis of retirement, means disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion."

An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697 [finding that a deputy sheriff was not permanently incapacitated from the performance of his duties, because

“aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the [the sheriff’s] condition are dependent on his subjective symptoms”). In addition, findings issued for the purposes of worker’s compensation are not evidence that respondent’s injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa*, (2004) 120 Cal.App.4th 194, 207; *English v. Board of Administration of the Los Angeles City Employees’ Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego*, (1989) 214 Cal.App.3d 563.)

3. *Mansperger, Hosford and Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date she applied for disability retirement, she was substantially unable to perform the usual duties of a teacher due to her psychological (anxiety, depression, and mental inability to work safely) conditions. Respondent failed to meet this burden. Her application for service pending disability retirement must, therefore, be denied.

ORDER

The application for service pending disability retirement filed by respondent Kerry S. Danis is DENIED.

DATE: January 10, 2020

DocuSigned by:
Danette C. Brown
ACEA0DD79CC44EF...

DANETTE C. BROWN

Administrative Law Judge

Office of Administrative Hearings