

**ATTACHMENT A**

**THE PROPOSED DECISION**

**BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**  
**In the Matter of the Reinstatement from Industrial Disability**  
**Retirement of:**

**TIFFANY A. HOGUE, Respondent,**

**and**

**CALIFORNIA DEPARTMENT OF STATE HOSPITALS –  
ATASCADERO, Respondent.**

**Agency Case No. 2017-1173**

**OAH No. 2018031078**

**PROPOSED DECISION**

Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on December 13, 2019, in San Luis Obispo, California.

Kevin Kreutz, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Brittany C. Jones, Esq., Martin & Vanegas, APC, represented Tiffany A. Hogue (respondent Hogue or Hogue), who was present.

PUBLIC EMPLOYEES RETIREMENT SYSTEM  
FILED Jan. 23 2020  
Chavez

No appearance was made by or on behalf of the California Department of State Hospitals – Atascadero (CDSH-Atascadero).

At the start of the hearing, the parties stipulated to replace the first sentence of Paragraph IX of the Accusation, at page 5, lines 11-12, with the following:

“This appeal pertains to the issue of (1) whether respondent Hogue is disabled or incapacitated from performance of her usual job duties on the basis of an orthopedic (back) condition; and (2) whether respondent Hogue should be permitted, pursuant to Government Code section 20160, to amend her application to include a psychological condition as a potential basis for receiving industrial disability retirement benefits.

Oral and documentary evidence was received at the hearing. The record was held open for the parties to simultaneously file and serve written closing briefs by December 23, 2019. CalPERS timely filed and served its closing brief, which was marked as Exhibit 18. Respondent timely filed and served her closing brief, which was marked as Exhibit K.

The record was closed and the matter was submitted for decision on December 23, 2019.

The Index contained in CalPERS’s exhibit book listed Exhibit 5 as a “Jurisdictional Document.” Exhibit 5 was admitted for jurisdictional purposes. During her subsequent review of the documentary evidence, the ALJ noted that Exhibit 5 included a printout of customer reviews of Dr. Ernest Miller (pages 39-45), respondent Hogue’s appeal letter (pages 46-58), and support letters by respondent’s partner (pages 59-60), her

daughter (pages 61-62), and her mother (pages 63-64). The ALJ hereby amends the admission of Exhibit 5 as follows: Respondent Hogue's appeal letter was admitted for jurisdictional purposes, and the support letters by respondent's partner, daughter, and mother, and the customer reviews of Dr. Miller, were admitted as "administrative hearsay" pursuant to Government Code section 11513, subdivision (d).

## **ISSUES**

As noted above, the parties stipulated that the issues presented for decision are:

(1) Whether respondent Hogue is disabled or incapacitated from performance of her usual job duties on the basis of an orthopedic (back) condition.

(2) Whether respondent Hogue should be permitted, pursuant to Government Code section 20160, to amend her application to include a psychological condition as a potential basis for receiving industrial disability retirement benefits.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. Anthony Suine made and filed the Accusation in his official capacity as the Chief of the Benefits Services Division of CalPERS.

2. On January 23, 2015, respondent Hogue submitted an application for industrial disability retirement, claiming a disability resulting from an injury to her back that occurred on March 21, 2012, while she was on duty as a psychiatric technician at Atascadero State Hospital and assisting a patient-inmate who claimed to be having a

seizure. (Exh. 3.) In the application, respondent Hogue indicated her disability occurred when a "patient purposely faked a seizure" and she "lowered the patient to [the] floor from a full standing position." (Exh. 3.) The patient weighed 300 pounds. Respondent Hogue claimed her "entire back [was] permanent[ly] disabled." (*Id.*)

3. On June 24, 2015, CalPERS approved respondent Hogue's application for industrial disability retirement. (Exh. 6.) She retired for disability on the basis of an orthopedic (back) condition effective November 8, 2013. At the time of her retirement, respondent Hogue was under the minimum age for voluntary service retirement applicable to members of her classification.

4. By letter dated May 25, 2016, CalPERS notified respondent Hogue it was conducting a reexamination of her file. (Exh. 7.) Respondent Hogue was requested to provide information and documents. On February 28, 2017, CalPERS sent respondent Hogue another letter requesting additional information. (Exh. 8.)

5. By a letter dated July 12, 2017, CalPERS notified respondent Hogue that her file was under review to determine if she continued to qualify for industrial disability retirement, and that CalPERS had arranged for her to attend an orthopedic independent medical examination with Dr. Ernest Miller on August 1, 2017. (Exh. 9.)

6. Respondent Hogue attended the August 1, 2017 appointment with Dr. Miller. Dr. Miller performed an independent medical examination and prepared a written report, which he provided to CalPERS. (Exh. 12.)

7. By a letter dated September 7, 2017, CalPERS notified respondent Hogue of its decision that she is no longer "substantially incapacitated" from the performance of her duties as a psychiatric technician at Atascadero State Hospital due to an orthopedic (back) condition, and she would be reinstated to her former position. (Exh.

4.) CalPERS's decision was based on its review of medical reports. The letter notified respondent Hogue of her right to appeal the decision.

8. On October 10, 2017, CalPERS received a letter from respondent Hogue by which she requested an administrative hearing to appeal its decision that she no longer qualified for industrial disability retirement.

### **Employment History**

9. Respondent Hogue is 36 years old. She began her employment as a psychiatric technician at Atascadero State Hospital in 2007. Her last day of work was April 2, 2012.

10. Respondent Hogue testified each unit at Atascadero State Hospital houses 30 or more patient-inmates. Her duties as a psychiatric technician included working in the medication room to prepare medications (including injectable medications) for the patient-inmates, carrying or pushing a 50-pound medication cart to and from the pharmacy for distributing and administering medications, complying with physicians' orders, escorting the patient-inmates to and from their group sessions, responding to "red light" emergencies, placing patient-inmates in restraints, and subduing patient-inmates with medications if appropriate.

### **Work Related Injury**

11. Respondent Hogue's disability originated on March 21, 2012, while she was on duty as a psychiatric technician at Atascadero State Hospital. Respondent Hogue testified she was in the medication room preparing medications for the patient-inmates. As she was doing her rounds (i.e., 15-minute checks), a patient, who was in his room, indicated to Hogue he was having a seizure. Hogue unlocked his

room and directed the patient to come out. Hogue testified the patient fell on top of her, and she landed on the floor on her back. The patient-inmate weighed over 300 pounds. Respondent Hogue injured her back and required medical attention. She later returned to work but had difficulty performing her duties because of excruciating back pain and migraine headaches.

### **Job Duties, Essential Functions, and Physical Requirements**

12. Atascadero State Hospital is a maximum security forensic institution which houses patients referred from the California judicial and correctional systems, including sexually violent predators, mentally disordered offenders, and patient-inmates mentally incompetent to stand trial. (Exh. 15, p. 118.)

13. The Duty Statement for the job classification of psychiatric technician at Atascadero State Hospital states that psychiatric technicians "in addition to their custody responsibilities, provide a basic level of general behavioral and psychiatric nursing care and are expected through their attitude, knowledge and performance to facilitate the rehabilitation of clients/patients." (Exh. 15, p. 114.) Psychiatric technicians "work to maintain order and supervise the conduct of clients/patients to protect and maintain the safety of persons and property to provide a basic level of general behavioral psychiatric nursing care to clients/patients who are mentally disordered and to participate in the overall psychiatric treatment program." (*Id.*)

14. The Duty Statement summarizes the percentage of time a psychiatric technician spends on performing various tasks, duties and responsibilities as follows:

A. 25 percent: Helps to create a clean, safe and therapeutic environment for patients or inmates by, among other things, applying mental health principles and relationship security with patients or inmates; developing and encouraging

participation in and supervising patient activities; assisting rehabilitation therapists in occupational, recreational, vocational and educational therapy programs; motivating and assisting patients or inmates with activities of daily living, and protecting patients, inmates, and others from personal injury.

B. 25 percent: Performs custody tasks including supervision of patient activities; escorting patients or inmates in the facility and in the community; distributing and inspecting patients' or inmates' mail for hazardous contraband; shakedown (i.e., searching for drugs, contraband, weapons) and inspecting facilities to identify security breaches that could lead to the escape of a patient or inmate; observing and intervening in patient behavior that may injure people, damage property, or signal impending escape attempts; and applying and demonstrating knowledge of correct methods in the prevention and management of assaultive behavior, including patient containment, heavy lifting (over 50 pounds), applying restraints, and responding to emergency situations throughout the hospital.

C. 25 percent: Performs nursing procedures such as administering medications, including oral medication and hypodermic injection; observing patients or inmates physical condition and behavior and reporting significant changes to a supervisor or physician; recording nursing notes in the patient's or inmate's record; preparing and caring for patients or inmates during treatment; giving first aid and CPR; and following infection control procedures are needed.

D. 25 percent: Work with other disciplines as part of the treatment team to provide an overall treatment program for the patient; perform other duties as assigned; and may assist in training or supervision of psychiatric technician candidates and other ancillary staff.

15. A document entitled "Physical Requirements of Position/Occupational Title," pertaining to the psychiatric technician position at Atascadero State Hospital, was presented. The physical requirements of the psychiatric technician position include "constantly" (over six hours) pushing and pulling, fine manipulation, repetitive use of hands, and lifting or carrying up to 10 pounds; "frequently" (three to six hours) standing, walking, bending (waist), twisting (neck), reaching (below shoulder), simple grasping, and lifting or carrying 11 to 25 pounds; and "occasionally" (up to three hours) sitting, crawling, kneeling, climbing, squatting, bending (neck), twisting (waist), reaching (above shoulder), power grasping, keyboard and mouse use, and lifting or carrying 26 to 50 pounds. (Exh. 14.)

16. A document from Atascadero State Hospital setting forth the "Essential Functions" of a psychiatric technician was presented. (Exh. 15, pp. 122-123.) The document lists 39 essential functions including, but not limited to, the following:

1. Standing – medications, patient supervision.
2. Walking – up to two miles per shift, at a brisk pace in response to emergencies . . . ability to run ¼ mile unit rounds, patient activities and escort.
3. Sitting – in meetings, patient groups, sedentary recreational games with patients, recordkeeping.
4. Lifting – up to 50 pounds from ground level in four-person lift of 200 lb patient, patient care activities.

[¶] . . . [¶]

6. Pushing and pulling – up to 80 lbs (bed), 20 pounds of pressure to open door between 30 and 50 times per shift.

[¶] . . . [¶]

13. Fingering, feeling, handling and grasping – medication administration, injections, treatments, emergency care equipment, handling keys, writing utensils, average grip strength.

14. Ability to respond quickly to emergency situations.

[¶] . . . [¶]

22. Ability to work and deliver patient care in a maximum security facility which houses criminally committed patients whose behavior can be irrational, manipulative, threatening, violent and unpredictable. The possibility of physical injury is present.

23. Ability to display a professional demeanor in stressful situations within a supportive work environment.

24. Ability to comprehend and follow instructions.

25. Ability to maintain a work pace appropriate to the given workload.

[¶] . . . [¶]

32. Administer medications and treatments.

33. Respond to emergencies and provide emergency care as required.

[¶] . . . [¶]

37. Ability to deliver care and treatment to patients regardless of their behavior, physical or mental diagnosis, sexual preference or legal status.

(Exh. 15, pp. 122-123.)

### **Testimony of Dr. Miller**

17. At the request for CalPERS, Ernest B. Miller, M.D., performed an independent medical examination of respondent Hogue, in the field of orthopedics, on August 1, 2017. Dr. Miller reviewed medical records and documents regarding respondent Hogue's job duties provided by CalPERS. He conducted a clinical interview and performed a physical examination of respondent at his office in San Luis Obispo. Dr. Miller spent one hour with respondent Hogue for the examination and interview. Dr. Miller prepared a written report dated August 1, 2017, and a supplemental report dated February 5, 2018. (Exhs. 12 and 13.)

18. Dr. Miller has been licensed as a physician in California since 1985. He has worked as an orthopedic surgeon since 1978. Dr. Miller has performed medical evaluations for workers' compensation, CalPERS, insurance companies, and attorneys. Over the past seven or eight years, CalPERS has requested Dr. Miller to perform orthopedic evaluations of CalPERS members for the purpose of determining eligibility for disability retirement benefits.

19. Respondent Hogue's orthopedic complaint at the time of Dr. Miller's examination was ongoing continuous pain in the lower back, both on the left and the right side, with the pain shooting down the front and back of her legs to the feet. She reported numbness in the left side of her back that radiates into her extremities, and that her back pain has altered her gait and causes her to limp. Respondent Hogue told Dr. Miller that "she injured her lower back and lower extremity on or about 3/21/2012 when a patient fell onto her lower back, causing lower back pain." (Exh. 12, p. 89.) She explained she was on disability retirement because it was "too dangerous to work as a psychiatric technician." (*Id.* at p. 91.)

20. Dr. Miller performed a physical examination of respondent Hogue. Dr. Miller found, among other things, that, in a standing position, Hogue's pelvis was level and her leg lengths were equal, and her extremity alignment was normal. He also found Hogue's range of motion of the lumbar spine was severely limited secondary to pain, and that palpation of the lumbosacral spine demonstrated no evidence of muscle spasm or tenderness. Dr. Miller explained that when a patient complains of lower back pain, a physical examination is completed to see if there is muscle weakness or atrophy. If there is suspicion of a herniated disk, then an MRI of the lumbar spine is taken. In his physical examination of respondent Hogue, Dr. Miller found no objective evidence of any problem with her lower extremities, given that her measurements were normal, her muscle strength was normal, and there was no muscle atrophy.

21. Dr. Miller reviewed respondent Hogue's medical records that were provided to him. Dr. Miller found respondent Hogue was given multiple diagnoses for her condition, and she received various treatments including pain medications, physical therapy, and epidural injections. Dr. Miller also reviewed an MRI study of the lumbar spine dated June 19, 2012. Dr. Miller noted the MRI study was normal with no

evidence of spinal stenosis, no evidence of a herniated lumbar disc, and no evidence of root compression. Dr. Miller also reviewed an MRI study dated July 17, 2017, that respondent Hogue brought to the examination. Dr. Miller found the July 17, 2017 MRI study was unchanged from the MRI study of June 19, 2012. He noted there was no disc herniation found on either of the MRI studies.

22. Dr. Miller's opinion is that respondent Hogue "has no substantial impairment from [the] physical requirements of her duty statement," and she "is not presently substantially incapacitated for the performance of her duties" as a psychiatric technician. (Exh. 12, p. 104.) Dr. Miller found that respondent Hogue "appears as cooperative; however, the symptoms and complaints are noted to be nonphysiologic and nonanatomic and somewhat exaggerated." (*Id.* at p. 103.) Dr. Miller opined: "Ms. Hogue must be concluded to have resolved any injury sustained 3/21/2012 and is fit for duty. Her statement that the reason she cannot return to work as a psychiatric technician as 'too dangerous' is not, in my opinion, a reason for disability retirement from an orthopedic stand point." (*Id.* at p. 104.)

23. Dr. Miller testified that his Supplemental Report dated February 5, 2018, was requested by CalPERS and was for the purpose of reviewing the MRI study dated July 17, 2017, and additional medical records. As stated in the Supplemental Report, Dr. Miller's opinion is that the July 17, 2017 MRI study "is completely normal and represents absolutely no evidence of any injury whatsoever, no evidence of any clinical problems absent objective evidence of lower extremity radiculopathy." (Exh. 13, p. 107.)

24. As part of the Supplemental Report, Dr. Miller reviewed a medical record by Dr. Mary Eanes<sup>1</sup> dated January 11, 2018, which he thought seemed to “overreact” to the normal MRI study. “The report of Dr. [Eanes] indicates absolutely no objective evidence of any back injury whatsoever. There is objective evidence of lower extremity radiculopathy, [but] no objective evidence of muscle atrophy, no objective evidence of reflex abnormality, no objective evidence of muscle weakness. In fact, the back and lower extremity examination reported by Dr. [Eanes] is absent any objective findings whatsoever. [¶] A careful review of the additional medical records provides no basis to conclude that the injury in question of the lower back is nothing more than a lumbar strain.” (Exh. 13, p. 108.) In the Supplemental Report, Dr. Miller reiterated his opinion that respondent Hogue is not substantially incapacitated from the performance of her job duties as a psychiatric technician.

### **Testimony of Dr. Mohlenbrock**

25. William C. Mohlenbrock, M.D., testified on behalf of respondent Hogue. Dr. Mohlenbrock has been an orthopedic surgeon since 1973. He currently has an orthopedic surgical practice that is primarily based at Scripps Memorial Hospital in La Jolla. He has not previously been retained by CalPERS to conduct medical evaluations of its members.

26. Dr. Mohlenbrock performed an independent medical evaluation of respondent Hogue on May 4, 2019. He evaluated her lower back, shoulders, cervical spine, and neck. Dr. Mohlenbrock reviewed medical records and other documents, including CalPERS documents and Dr. Miller’s August 1, 2017 report, and conducted a

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<sup>1</sup> The Supplemental Report mistakenly refers to Dr. Eanes name as “Dr. Eaves.”

clinical interview and performed a physical examination of respondent Hogue. Dr. Mohlenbrock prepared a written report dated May 4, 2019. (Exh. A.)

27. Respondent Hogue's orthopedic complaints at the time of Dr. Mohlenbrock's examination were chronic and constant pain in her neck, back and shoulder. She estimated that 80 percent of her pain comes from her lower back. In his written report, Dr. Mohlenbrock noted that Hogue described occurrences "in which her back freezes up with sharp pains in her low back that will 'drop her to the floor' and from that position, she has a very difficult time getting back up, though the spasm, as she describes it, will subside and she is able to stand back up with difficulty. The left lumbar spine is more painful than the right side. [¶] It is these symptoms that she states that prevent her from going back to work." (Exh. A, p. 4.) Dr. Mohlenbrock noted that, at the time of his examination, Hogue was taking Norco four times a day, Dilaudid five times a day, Xanax two times a day, and ibuprofen two times a day.

28. During his physical examination of respondent Hogue, Dr. Mohlenbrock found Hogue's shoulders and pelvis were symmetrical, and she was "negative" for the presence of muscle atrophy. (Exh. A, p. 6.) He noted that her gait was abnormal and that she "guards her back as though in pain when getting from sitting to standing and standing to lying positions, definite hesitation and apparent discomfort." (*Id.*) Dr. Mohlenbrock found "no paraspinous muscle spasm, but there is definite tenderness throughout her lumbar spine." (*Id.*)

29. Dr. Mohlenbrock found a significant reduction in Hogue's range of motion in the lumbar spine. Her flexion (bending forward) was 30 degrees with discomfort, when normal is 60 degrees. Her extension (bending backwards) was 10 degrees with discomfort, when normal is 25 degrees. Her lateral abduction (side to side) was 15 degrees with discomfort, when normal is 25 degrees.

30. Based on his evaluation, Dr. Mohlenbrock concluded that respondent Hogue suffers from, among other things, chronic lumbar strain, with reported evidence of degenerative changes in the lumbar spine, and chronic cervical strain, with reported evidence of degenerative changes in the cervical spine. (Exh. A, p. 10.)

31. Dr. Mohlenbrock's opinion is that, at the time of his examination of respondent Hogue on May 4, 2019, respondent Hogue was "substantially incapacitated" for the performance of her duties as a psychiatric technician because of the constant and chronic pain in her back and neck conditions. He testified he is unable to quantify the amount of pain she is experiencing.

32. (A) In his written report, Dr. Mohlenbrock opined that Hogue is not able to perform the following essential functions, job duties, and physical requirements of a psychiatric technician:

Essential Functions: walking 2 miles per shift; lifting 50 lbs; lifting 200 lb patient; pushing 80 lb objects; bending, crouching, kneeling; delivering care to violent patients.

Job Duty Analysis: Lift or carry violent patients; restrain patients; counsel patients (Ms. Hogue's chronic use of narcotics for pain is but one reason.)

Physical Requirements and Demands: Lift or carry violent patients less than 10% of the time; inability to work at or

above her right shoulder level due to the recurrent dislocations and two surgical repairs.<sup>2</sup>

(Exh. A, p. 10.)

(B) On cross-examination, Dr. Mohlenbrock clarified that respondent Hogue "could probably do" the activities mentioned above, but it would be uncomfortable or difficult for her to do so, given her limited range of motion and her pain. Dr. Mohlenbrock explained that his opinion that respondent Hogue is disabled to perform her job duties was based on her condition when he examined her on May 4, 2019, including significant reduction in her range of motion and the amount of her discomfort and pain when he examined her. Dr. Mohlenbrock was "critical" of the amount and duration of the medications she was taking. He felt the duration of her pain and the amount of medications she was taking would not allow her to perform her job duties.

33. Dr. Mohlenbrock testified he does not know if respondent Hogue's chronic lumbar strain will ever resolve. Because it has been seven years since the condition was diagnosed, he tends to doubt if it will be resolved.

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<sup>2</sup> As part of his examination, Dr. Mohlenbrock evaluated and reviewed records regarding Hogue's shoulders. In his written report, he noted that Hogue has had several surgeries on one shoulder, but they were "minimally relevant to the present claims" because there was no evidence Hogue dislocated her shoulder during the March 21, 2012 incident. (Exh. A, p. 1.)

## **Other Findings Regarding Expert Testimony**

34. Dr. Miller testified he read Dr. Mohlenbrock's report. He agreed with Dr. Mohlenbrock's diagnosis of chronic lumbar strain and his finding that the MRI studies from June 19, 2012, and July 17, 2017, indicated no spinal stenosis or nerve root compression. Dr. Miller, however, disagreed with Dr. Mohlenbrock's conclusion that respondent Hogue is not able to perform the job duties and essential functions specified in his report. Dr. Miller testified that, in his opinion, respondent Hogue can perform her job duties and functions "as well as any normal person could." Dr. Miller did not recall if, during his evaluation, he asked respondent Hogue about the duties she could not perform. Dr. Miller testified that, during an evaluation, he typically looks for evidence of a musculoskeletal problem that would affect the person's job performance. He testified that he also asks the person why they cannot go back to work. In this case, when he asked respondent Hogue, she responded that it would be "too dangerous."

35. Dr. Mohlenbrock testified he reviewed Dr. Miller's report. He noted they were both in agreement with a diagnosis of lumbar strain. Dr. Mohlenbrock noted that Dr. Miller's opinion placed more emphasis on the absence of evidence of a herniated disc in the MRI studies. Dr. Mohlenbrock agreed that nothing in the MRI studies indicated Hogue had a herniated disc. But Dr. Mohlenbrock's opinion is that a herniated disc is not needed to have the symptoms that respondent Hogue was demonstrating. Dr. Mohlenbrock noted that even if there is an abnormal MRI, a person can still be asymptomatic.

## **Respondent Hogue's Testimony**

36. Respondent Hogue testified that before the March 2012 incident, she could perform all of the job duties and essential functions of a psychiatric technician. (See Exh. I.) Since the incident, respondent Hogue struggles with daily activities. For example, she has difficulty putting on her bra, socks and shoes. Hogue needs her mother or minor daughter to go with her to the grocery store because she is unable to lift or carry, or push a shopping cart. Simple tasks like loading dishes into the dishwasher or just walking normally cause her "extreme pain." Respondent Hogue testified she has difficulty sleeping because of her pain.

37. Respondent Hogue testified that, if she is reinstated to her position as a psychiatric technician at Atascadero State Hospital, she feels she cannot effectively care for the patients at the hospital. She could not display a professional demeanor in stressful situations. She would have difficulty comprehending or following instructions.

38. Respondent Hogue presented letters from her partner, her mother, and her minor daughter. (Exh. 5, pp. 59-64.) In general, the letters attest to respondent Hogue's difficulty with activities of daily living due to her constant pain, and her inability to participate in previous activities like camping, riding bicycles, and playing basketball. In her letter, Hogue's daughter notes that her mother cries for hours because her back is in so much pain, and she cannot stand for even 20 minutes without crying. The letter by Hogue's mother similarly described Hogue as having constant back pain, and that she and her husband help Hogue with things she is unable to do because of her limitations. The letter by Hogue's partner describes how Hogue's injury has changed her life and made daily living very difficult. She describes Hogue as unable to engage in activities, such as school activities for their daughter, because of severe back pain and weakness, and stiffness and pain caused from sitting

for too long. Hogue's partner has had to assist her with self-care needs, such as showering and dressing.

## LEGAL CONCLUSIONS

### Burden and Standard of Proof

1. Generally, the party asserting the affirmative in an administrative hearing has the burden of proof by a preponderance of the evidence (See, *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044; Evid. Code, § 500), and typically, the party seeking to change the status quo bears the burden of proof.

2. In *McCoy v. Bd. of Retirement, supra*, 183 Cal.App.3d at p. 1051, and footnote 5, the court found "the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence."

3. "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations omitted.] . . . 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 evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325; italics in original.)

4. In this case, CalPERS seeks to change the status quo by cancelling respondent Hogue's entitlement to receive industrial disability retirement benefits. Accordingly, CalPERS has the burden to prove, by a preponderance of the evidence, the grounds necessary to cancel respondent Hogue's industrial disability benefits.

## **Applicable Law**

5. Government Code section 20026 provides, in pertinent 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.
  
6. Government Code section 21060, subdivision (a), provides in part:  
  
A member shall be retired for service upon his or her written application to the board if he or she has attained age 50 and is credited with five years of state service.
  
7. Government Code section 21151, subdivision (a), provides:  
  
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.
  
8. Government Code section 21156, subdivision (a)(1), provides, in part:  
  
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. . . .

9. Government Code section 21156, subdivision (a)(2), provides, in part: "In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion . . . ."

10. Government Code section 21192, provides, in pertinent part:

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, . . . . The examination shall be made by a physician or surgeon, . . . . Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency . . . where he or she was employed and in the position held by him or her when retired for disability . . . .

11. Government Code section 21193 provides, in part:

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 . . . , 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 . . . and is so determined to be not incapacitated for duty in the position

held when retired for disability . . . , he or she shall be reinstated, at his or her option, to that position.

12. Courts have interpreted "incapacitated for the performance of duty" to mean "substantial inability of the applicant to perform [her] usual duties," as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.) An increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of present disability. (*Hosford, supra*, 77 Cal.App.3d at pp. 862-863.)

13. "The weight to be given to the opinion of an expert depends on the reasons he [or she] assigns to support that opinion; its value rests upon the material from which his [or her] opinion is fashioned and the reasoning by which he [or she] progresses from his [or her] material to his [or her] conclusion[.] Such an opinion is no better than the reasons given for it." (*White v. State of California* (1971) 21 Cal.App.3d 738, 759-760.) "It is the material from which expert opinion is fashioned and the reasoning of the expert in reaching his [or her] conclusion that is important." (*In re Marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1345.)

### **Substantial Incapacity**

14. Grounds do not exist for CalPERS to cancel respondent Hogue's entitlement to continue receiving industrial disability retirement benefits. The preponderance of the evidence established that respondent Hogue continues to be "substantially incapacitated" for the performance of her usual job duties as a psychiatric technician for Atascadero State Hospital.

15. The parties each presented compelling expert witness testimony, i.e., Dr. Miller for CalPERS and Dr. Mohlenbrock for respondent Hogue, on whether respondent Hogue continues to be “substantially incapacitated” for the performance of her usual job duties. In the end, respondent Hogue’s evidence was found to be more persuasive than CalPERS’s evidence.

16. A significant factor in respondent Hogue’s favor is CalPERS’s decision on June 24, 2015, approving her application for industrial disability retirement. In approving the application, CalPERS determined that respondent Hogue was, in fact, substantially incapacitated for the performance of her usual job duties as a psychiatric technician based on the injuries she sustained in the March 21, 2012 incident. That determination of “substantial incapacity” was based on many of the same medical records summarized and listed in Dr. Miller’s report (i.e., records that pre-date CalPERS’s June 24, 2015 decision). (See Exh. 12, pp. 92-102.) The medical records that pre-date the June 24, 2015 decision reflect respondent Hogue’s complaints of back pain following the March 21, 2012 incident and include the June 19, 2012 MRI study of her lumbar spine.

17. Subsequent medical records, i.e., those that post-date CalPERS’s June 24, 2015 decision up to the August 1, 2017 medical evaluation by Dr. Miller, show no change in respondent Hogue’s condition that CalPERS relied on for its prior determination of “substantial incapacity.” The subsequent medical records show respondent Hogue having the same complaints of back pain, being treated with the same medication regimen (i.e., Norco and Dilaudid), and include the July 17, 2017 MRI study that CalPERS’s expert, Dr. Miller, found “unchanged from the earlier MRI study of June 19, 2012.” (Exh. 12, p. 103.) A reasonable inference to be drawn from all of this evidence is that respondent Hogue’s orthopedic (back) condition, which supported

CalPERS's previous finding of "substantial incapacity," has not changed. Respondent Hogue remains "substantially incapacitated" for the performance of her usual job duties as a psychiatric technician.

18. Additionally, respondent Hogue's position that she remains "substantially incapacitated" was supported by the expert testimony of Dr. Mohlenbrock, and her own testimony, which was supplemented by letters of support from family members who are aware of the difficulties in her current functioning.

19. Based on the foregoing, the preponderance of the evidence established that respondent Hogue continues to be substantially incapacitated for the performance of her usual duties as a psychiatric technician at Atascadero State Hospital. Her industrial disability retirement benefits shall remain in place. (Factual Findings 1-38; Legal Conclusions 1-18.)

### **Amending Application**

20. At the hearing, the parties stipulated to amend the Accusation to include the issue of whether respondent Hogue should be permitted, pursuant to Government Code section 20160, to amend her January 23, 2015 application to include a psychological condition as a potential basis for receiving industrial disability retirement benefits. In its closing Brief, CalPERS indicated that it "takes no position on her request to amend her IDR application to include PTSD as a potential disabling condition." (Exh. 18, p. 3.)

21. Given that respondent Hogue shall continue to be entitled to receive industrial disability benefits, the issue of whether she may retroactively amend her disability application to include a psychological condition is moot. Additionally, the issue is not yet ripe for administrative adjudication, as respondent Hogue has not

made any application to CalPERS seeking disability retirement on the basis of a psychological condition. For these reasons, the ALJ declines to make a ruling on any claim by respondent Hogue seeking CalPERS disability benefits on the basis of a psychological condition.

## **ORDER**

The appeal of respondent Tiffany A. Hogue is granted. Her industrial disability retirement benefits shall not be cancelled and shall remain in place.

DATE: January 23, 2020

DocuSigned by:  
*Erlinda Shrenger*  
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**ERLINDA G. SHRENGER**

**Administrative Law Judge**

**Office of Administrative Hearings**