

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 Disability Retirement of:

TAWANNA R. MCFARLAND, Respondent;

and

**SOLANO STATE PRISON, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, Respondent.**

Case No. 2019-1127

OAH No. 2020020132

CORRECTED PROPOSED DECISION

Administrative Law Judge Barbara O'Hearn, State of California, Office of Administrative Hearings, heard this matter by video and telephone on June 18, 2020.

Senior Attorney Austa Wakily represented the California Public Employees' Retirement System.

Respondent Tawanna R. McFarland was present and represented herself.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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California Department of Corrections and Rehabilitation human resources representative Ricardo Delacruz was present for the hearing as observer for respondent California Department of Corrections and Rehabilitation.

The record closed and the matter was submitted for decision on June 18, 2020.

FACTUAL FINDINGS

1. The California Public Employees' Retirement System (CalPERS) filed a statement of issues by Keith Riddle, Chief, Disability and Survivor Benefits Division, acting in his official capacity. The statement of issues seeks to deny the application of respondent Tawanna R. McFarland (respondent) for disability benefits based on the determination that she was not substantially incapacitated from the performance of her job duties at the time she applied for disability retirement.

2. Respondent was employed as an office technician at the Solano State Prison, California Department of Corrections and Rehabilitation (CDCR). By virtue of her employment, respondent is a state industrial member of the California Public Employees' Retirement System (CalPERS). Respondent has service credit to qualify for retirement.

3. Respondent injured her knee at work on March 29, 2016. She had a second injury when she fell after her knee surgery. Her last day on which she was on the CDCR payroll was October 31, 2018. She submitted an application for disability retirement on April 19, 2019 with a retirement date of November 1, 2018. In her application, she reports her knee and back injuries occurred on August 29, 2016, the

date of her disability. She reports her disability as left knee injury, lower back injury and right knee acute pain from knee buckling injury.

4. In her application, respondent describes her job duties as working with convicted felons in the education department, supervising inmates, time keeping for staff and inmates, and inventorying supplies. She reports she could not walk, sit, or stand for amounts of time without pain which stops her from performing a simple task. She also reports she needs to be 100 percent because she works with inmates.

5. Respondent's written job duty statement for CDCR describes respondent's general duties as providing clerical support to multiple professional staff within the education department. The percentages of respondent's job duties comprise 45 percent preparing correspondence, reports, charts and graphs, 35 percent screening incoming correspondence, tracking that necessary action is taken, and responding with a reply from the supervisor when appropriate, 10 percent coordinating staff meetings and making arrangements for staff training, and 10 percent supervising and training inmate clerks in the proper procedures of their duties and performing other clerical duties as required.

6. Respondent acknowledged the written physical requirements of her job on March 20, 2019. She later noted an error as she occasionally had to kneel when retrieving supplies. Over six hours of her job is sitting. Other requirements while sitting include three to six hours of frequent repetitive use of hands, keyboard and mouse use, and fine manipulation. Occasional requirements up to three hours, beyond the six hours of sitting, include standing, walking, squatting, bending, twisting, reaching, pushing and pulling, grasping, lifting or carrying up to 50 pounds, walking on uneven ground, and exposure to dust, gas, fumes or chemicals.

7. At the request of CalPERS, respondent was evaluated by Howard Sturtz, M.D., a board certified orthopedic surgeon. He performed an independent medical examination of respondent on August 7, 2019. He spent one hour performing the examination and taking respondent's history, and three hours reviewing respondent's medical records. He reviewed respondent's written job duty statement which made no mention of any physical activities. At that time, he did not refer to the written physical requirements of respondent's job.

8. Dr. Sturtz relied on respondent's description of the physical requirements of her job. Her description requires her to do some teaching and handling supplies, including heavy cases of paper and bending, pushing and pulling carts. She adds her job requires a lot of walking. Respondent's complaints include limited activities to sit, stand and walk for only 30 minutes, no bending, and no lifting more than five pounds.

9. In his report and his testimony at this hearing, Dr. Sturtz summarizes the medical records of respondent. An MRI in May 2017 shows a medial meniscal tear. Dr. Gomez, who treated respondent at that time, recommended arthroscopic surgery for respondent's right knee. Respondent had surgery on June 16, 2017, followed by therapy. Dr. Gomez saw respondent twice in June 2017, and once each month from August to November 2017, and in January 2018, for progress reports.

10. On June 6, 2018, respondent sought treatment from Dr. Gomez for back pain that first occurred when she fell down several days after her right knee surgery. In addition to pain, respondent reported difficulty with activities of daily living. In July 2018, Dr. Gomez referred respondent to Dr. Razi for follow up. His diagnoses in August 2018 were chronic pain syndrome, low back pain, and pain in right knee. He recommended modified work duty for respondent with no restrictions for sitting, standing, or walking.

11. On January 5, 2019, Dr. Jennings, a chiropractor, performed a qualified medical evaluation for respondent. He made five diagnoses: status post right knee meniscus surgery, mild patellar tenderness, edema of the inferior aspect of the Hoffa's fat pad suggestive of bursitis, chronic unresolved lumbosacral sprain or strain disorder, and left knee strain as a compensable consequence for the right knee surgery. Dr. Jennings provided respondent with a return to work voucher indicating she can stand, walk, sit and keyboard for one to two hours, lift no more than 5 pounds, and perform no other work activities.

12. On April 19, 2019, Dr. Razi requested an MRI of respondent's left knee. The MRI is dated May 21, 2019. It shows mild degenerative changes of the joint spaces, a tiny tear of the meniscal capsular junction of the medial meniscus, a partial tear and thickening of the ACL, a moderate sprain and thickening of the proximal MCL, insertional tendinosis of various tendons about the knee, and a moderate joint effusion and large popliteal cyst.

13. Dr. Sturtz reviewed two other physician reports on disability in April 2019 and June 2019. He notes both reports indicate no job description for respondent was available. At the time of evaluation by Dr. Sturtz, respondent was to be seen by an orthopedic surgeon, Dr. Renbaum, in the near future.

14. On August 7, 2019, Dr. Sturtz reports that respondent did have an actual impairment in the left knee that rises to the level of substantial incapacity to perform her usual job duties. He opined that the incapacity is temporary because respondent was due to see Dr. Renbaum for evaluation and treatment to resolve the condition. Dr. Sturtz bases his conclusion on the findings in the May 2019 MRI study and painful crepitus on examination by Dr. Sturtz on August 7, 2019.

15. In the same report, Dr. Sturtz finds respondent would be incapable of prolonged standing and walking up to three hours, so she would be relegated to a strictly sedentary position. Dr. Sturtz believes the condition became substantially incapacitating on May 21, 2019, the date of the MRI, showing the findings of an effusion. He believes that respondent put forth her best effort to cooperate with the examination, although there were some elements of exaggeration and inconsistency in respondent's straight leg raising maneuver.

16. On August 27, 2019, CalPERS requested a clarification report from Dr. Sturtz to establish if respondent was disabled from her last day on payroll through the present, and to confirm the date respondent became "substantially incapacitated." Dr. Sturtz issued a supplemental report on August 27, 2019. In that report, he determines that respondent actually became disabled on January 5, 2019. He mistakenly refers to that date as when an MRI study was requested by Dr. Razi; however, it is the date that respondent was evaluated by Dr. Jennings.

17. On September 12, 2019, CalPERS requested Dr. Sturtz to submit another supplemental report to provide detailed and complete explanations for three specific findings. The report by Dr. Sturtz dated September 12, 2019, states that respondent does not have an "actual orthopedic impairment regarding the right knee and lower back." He concludes that respondent does not have an incapacity to perform her work activities.

18. Dr. Sturtz testified he changed his mind after reviewing respondent's written job duty statement and physical requirements for her office position which requires mostly sitting. He finds a lot of leeway and minimal physical activity in the range of hours that did not include sitting.

19. Respondent had knee surgery for a torn meniscus on December 20, 2019. She requested documents from her doctor, but had not received any by the date of hearing. Even if she had submitted the medical reports, the testimony under oath of a medical expert would be given greater weight as evidence.

20. Sherri Stith, respondent's family friend for 30 years, sought to verify respondent's surgeries and limited activities of daily living. Although Stith worked in a hospital in the past, she has no medical background. She could not testify as a medical expert.

LEGAL CONCLUSIONS

1. Under Government Code section 21150, a member who is credited with five years of state service may retire for a state industrial disability. By virtue of her employment described in Finding 2, respondent is a state industrial member of CalPERS.

2. As described in Finding 3, respondent applied for disability retirement authorized by Government Code section 21152, subdivision (d). A member may retire for disability if she becomes "incapacitated for the performance of duty." (*Id.*, § 21151.)

3. The burden of proving an incapacitating condition is on the applicant for a disability retirement, and the standard of proof is a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

4. Government Code section 21154 authorizes CalPERS to 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. Under Government

Code section 20026, "incapacitated for the performance of duty" is defined as "disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion." By reason of Finding 7, CalPERS provided competent medical opinion, including testimony under oath of Dr. Sturtz.

5. An applicant is "incapacitated for performance of duty" if the applicant is substantially unable to perform the usual duties of his position. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) The applicant in *Mansperger* was a warden with the Department of Fish and Game whose physician opined that he could no longer perform heavy lifting and carrying. The evidence established that such tasks occurred infrequently, and that his customary activities were the supervision of hunting and fishing. The court found that the applicant was not entitled to disability retirement. Although the applicant had diminished arm strength, he could presently perform most of his usual job duties and substantially carry out his normal duties. The conclusion of Dr. Sturtz described in Finding 18 is similar.

6. As described in Findings 14 and 15, Dr. Sturtz initially determined on August 7, 2019, that respondent was substantially incapacitated on May 21, 2019, almost one month after the date of respondent's application for disability retirement. As described in Finding 16, Dr. Sturtz later determined that respondent became disabled and substantially incapacitated from her job activity on January 5, 2019. As described in Findings 17 and 18, Dr. Sturtz reviewed respondent's records again. He concludes on September 12, 2019, that respondent does not have an incapacity to perform her work activities.

7. Despite the changes in his reports based on his examination of respondent on August 7, 2019, the opinion of Dr. Sturtz is credible, reliable, and

persuasive as a competent medical opinion required by Government Code section 21154. To form his opinion, Dr. Sturtz also reviewed respondent's medical records up to the date of his examination of respondent on August 7, 2019.

8. Respondent presented no competent direct medical evidence to contradict the opinion of Dr. Sturtz. Respondent has not met her burden of proof to show that she is substantially incapacitated for the usual duties of her office technician position as of April 19, 2019, the date of her disability application.

ORDER

The application of Tawanna R. McFarland for a disability retirement effective April 19, 2019 is denied.

DATE: July 27, 2020

DocuSigned by:
Barbara O'Hearn
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BARBARA O'HEARN

Administrative Law Judge

Office of Administrative Hearings

DECLARATION OF SERVICE

Case Name: McFarland, Tawanna R.

OAH No.: 2020020132

I, Helen C. Tsai, declare as follows: I am over 18 years of age and am not a party to this action. I am employed by the Office of Administrative Hearings. My business address is 1515 Clay Street, Suite 206, Oakland, CA 94612. On July 27, 2020, I served a copy of the following document(s) in the action entitled above:

**ORDER CORRECTING PROPOSED DECISION;
CORRECTED PROPOSED DECISION**

to each of the person(s) named below at the addresses listed after each name by the following method(s):

Tawanna R. McFarland



VIA US Mail

Katherine Minnich

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CA Dept. of Corrections & Rehabilitation
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United States Mail. I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above, and placed the envelope or package for collection and mailing, in accordance with the Office of Administrative Hearings' ordinary business practices, in Oakland, California. I am readily familiar with the Office of Administrative Hearings' practice for collecting and processing documents for mailing. Correspondences are deposited in the ordinary course of business with the United States Postal Service in a sealed envelope or package with postage fully prepaid. [by certified mail].

Electronic Transmission. Based on a court order or the agreement of the parties to accept service by electronic transmission, the document(s) were distributed to the person(s) by secure electronic transmission (OAH Secure e-File) with a notification and document link sent to the email address(es) listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration was executed at Oakland, California on July 27, 2020.

Digitally signed by

Helen C. Tsai, Declarant