

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:

MILDRED L. SMALLEY

and

**CALIFORNIA STATE PRISON, CENTINELA, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,**

Respondents.

Agency Case No. 2021-0764

OAH No. 2022010593

PROPOSED DECISION

Administrative Law Judge Traci C. Belmore, Office of Administrative Hearings, State of California, heard this matter on October 18, 2022, by videoconference.

Senior Staff Attorney Charles H. Glauberman represented complainant Keith Riddle, Chief Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS).

Respondent Mildred L. Smalley represented herself.

No appearance was made by or on behalf of respondent California State Prison, Centinela, California Department of Corrections and Rehabilitation.

The record closed and the matter was submitted for decision on October 18, 2022.

ISSUES

Is respondent Smalley no longer disabled or substantially incapacitated from performance of her duties as a dental hygienist?

FACTUAL FINDINGS

Background and Procedural History

1. On December 3, 2021, complainant Keith Riddle, Chief of the Disability and Survivor Benefits Division, CalPERS, filed an accusation in its official capacity.

2. Respondent Smalley¹ was employed as a dental hygienist at California State Prison, Centinela, California Department of Corrections (CDCR). By virtue of her employment, respondent Smalley was a state safety member of CalPERS.

¹ While employed by CDCR, respondent went by the name Mildred Cockrell. Subsequent to her industrial disability retirement, she changed her name to Mildred Smalley.

3. On July 12, 2018, respondent Smalley applied for industrial disability retirement to CalPERS with an effective retirement date of August 31, 2018.

4. In a letter dated December 18, 2018, CalPERS notified respondent Smalley that her industrial disability retirement had been approved, stating "you are substantially incapacitated from performance of your usual duties as a Dental Hygienist...based upon your orthopedic (neck) condition."

5. In a letter dated April 29, 2020, complainant informed respondent Smalley that her industrial disability benefits were under review to determine if she continued to meet the qualifications to receive them. Complainant scheduled an independent medical evaluation (IME) of respondent Smalley with Luke Bremner, M.D. on November 17, 2020.

6. In a letter dated January 29, 2021, complainant informed respondent Smalley that, after completing the reevaluation, it was determined that she was "no longer substantially incapacitated from the performance of her job duties as a Dental Hygienist" and that she would be reinstated to her former position. The letter also notified respondents of their right to appeal.

7. Respondent Smalley filed a timely notice of appeal, and this hearing ensued. Respondent CDCR did not appeal.

Industrial Disability Injury

8. On August 27, 2015, respondent Smalley was walking through an area at her job that was under construction. She ducked under some tape; when she rose, she hit her head on a wooden box that was mounted on the cement wall. She felt pain in her neck. She was diagnosed with a concussion and cervical strain which led to the

discovery of cervical stenosis. Respondent Smalley was treated with medication and physical therapy for her injury. She never returned to work after the injury.

Duties and Physical Requirements of Position

9. The duties of a dental hygienist are set forth in the job description for dental hygienist, correctional facility essential functions list. They include functioning professionally under highly stressful circumstances, having the ability to maneuver or respond quickly over varying surfaces; responding quickly and appropriately to an emergency situation; having and maintaining sufficient strength, agility and endurance to respond during stressful or emergency situations; lifting and carrying up to 20 pounds; having the ability to push, pull, and grip up occasionally to constantly; stooping, bending, kneeling, reaching, squatting, climbing, crawling, twisting and stretching occasionally to frequently; and the ability to inspect, observe, manipulate, and move objects 360 degrees horizontally.

10. The physical requirements for respondent Smalley's position are set forth in the "physical requirements of position/occupation title" CalPERS form. They include the following physical actions be done frequently (defined as "3-6 hours"): reaching above shoulder, fine manipulation, power grasping, repetitive use of hands, bending and twisting of the neck and waist, and lifting up to 25 pounds. The requirement for pushing and pulling be done constantly (defined as "over six hours").

Medical Evidence

11. Respondent Smalley underwent several evaluations, including IMEs, permanent and stationary evaluations through the workers' compensation process, and qualified medical evaluations (QMEs) both before and after her industrial disability retirement.

12. Orthopedist Scott A. Hacker, M.D., performed a QME of respondent Smalley on July 11, 2018. As part of his evaluation, Dr. Hacker reviewed medical records and physically examined respondent Smalley. In his report, Dr. Hacker noted that respondent Smalley's complaints were neck pain, left shoulder pain, left forearm pain and numbness in her right hand. Dr. Hacker opined that the industrial injury respondent Smalley suffered had aggravated her cervical stenosis. He imposed permanent work restrictions including prohibitions against repetitive neck motions, repetitive work at or above shoulder level, repetitive gripping and grasping of objects, and lifting more than 20 pounds.

13. Orthopedic surgeon Wayne Inman, M.D., performed an IME of respondent Smalley on November 16, 2018. As part of his evaluation, Dr. Inman reviewed medical records and examined respondent Smalley. Dr. Inman opined that respondent Smalley's cervical strain "lit up a previously asymptomatic cervical stenosis condition." Dr. Inman stated that respondent Smalley was substantially incapacitated for the performance of her duties.

14. After receiving a surveillance study conducted by complainant, Dr. Inman prepared a supplemental report. He noted that the surveillance study showed respondent Smalley doing activities but that she was "not in a prolonged positioning of her neck and upper extremities as would be usually required in her occupation as a hygienist."

15. Complainant tasked orthopedic surgeon Luke Bremner, M.D. with reevaluating respondent Smalley to determine if she was still substantially incapacitated from the performance of her duties due to her neck condition. Dr. Bremner wrote an IME report dated November 17, 2020, and testified at hearing on behalf of complainant.

16. As part of his evaluation, Dr. Bremner reviewed medical records and physically examined respondent Smalley. In his IME report, Dr. Bremner stated that respondent Smalley reported that she had neck and upper back pain, and right arm and hand numbness. Dr. Bremner noted that respondent had discomfort and tenderness from her cervical spine. He also noted that she had "some decreased sensation at the radial aspect of her right hand."

Dr. Bremner stated respondent had cervicothoracic strain, degenerative disc disease, and right carpal tunnel syndrome. He stated that the only diagnosis related to her injury was the cervicothoracic strain. Dr. Bremner noted that respondent Smalley had been receiving treatment for the five years post injury, but the way respondent Smalley was injured would "seem to lack the energy necessary to cause a discrete disc injury and resultant radiculopathy." Dr. Bremner opined that respondent Smalley had a simple cervical strain/sprain. He stated that a cervical strain or sprain should require no more than 12 weeks of treatment. Dr. Bremner opined that respondent Smalley was not presently incapacitated. Dr. Bremner wrote a supplemental IME report encompassing his review of surveillance video of respondent Smalley putting things in the trunk of her car. It did not change his opinion.

17. Dr. Bremner's testimony at hearing was largely consistent with his written reports. He acknowledged that respondent Smalley was in pain and that she was experiencing numbness but stated those conditions are not substantially incapacitating. He admitted that he could not know if there was enough force from the original injury to cause these symptoms. Dr. Bremner also acknowledged that respondent Smalley's MRI from September 11, 2020, showed cervical stenosis and disc degeneration but that they were not due to her injury. Dr. Bremner disagreed with the imposition of permanent work restrictions.

18. Respondent Smalley was also treated by neurosurgeon Vamsidhar Chavakula, M.D. on September 22, 2022. In a visit note, Dr. Chavakula noted that respondent Smalley complained of severe neck pain, shooting pain down her left arm and into her hands with periods of numbness. Dr. Chavakula opined that her pain is related to the industrial injury as well as her work as a dental hygienist which requires "constantly leaning over."

19. Orthopedic surgeon William Tontz, M.D., treated respondent Smalley for her injury through her worker's compensation claim. He is an orthopedic surgeon with a specialty in spinal surgery. Dr. Tontz testified on behalf of respondent Smalley. Dr. Tontz wrote a permanent and stationary report dated April 10, 2018. In it, he noted that respondent Smalley complained of chronic discomfort in her neck, headaches, and limited range of motion of neck because of pain. Dr. Tontz imposed permanent work restriction of lifting no more than 15 pounds and no prolonged neck turning, flexion or extension.

20. Dr. Tontz treated respondent Smalley most recently on February 16, 2021. During that visit, he noted that her MRI on September 11, 2020, showed "C3/4, C4/5 and C6/7 herniated discs."

21. In preparation for his testimony at hearing, Dr. Tontz reviewed respondent Smalley's medical records, his own treatment records of respondent Smalley, Dr. Chavakula's visit note, Dr. Hacker's QME, Dr. Inman's IME and supplemental report, and Dr. Bremner's IME and supplemental report.

22. Dr. Tontz testified that he agreed with Dr. Inman's opinion that the injury "lit up" a previously asymptomatic cervical stenosis and Dr. Hacker's opinion that this was an industrial aggravation of respondent Smalley's cervical stenosis. Dr. Tontz

stated that an underlying asymptomatic condition, such as cervical stenosis, can be exacerbated or aggravated. He stated aggravation is more permanent. Dr. Tontz agreed with Dr. Bremner that a simple sprain or strain of the neck should require no more than 12 weeks of treatment. He stated that respondent Smalley does not have a simple strain/sprain of the neck. She has limited motion of her neck. She was showing signs of cervical stenosis in his permanent and stationary report. There was evidence of nerve injury two years after the date of injury. Dr. Tontz stated those signs and symptoms support an aggravation of the cervical stenosis by the industrial injury.

23. Dr. Tontz treated respondent Smalley for five years while she was employed and after her industrial disability retirement. He has seen respondent Smalley more than 20 times during that time period. His opinion of respondent Smalley's orthopedic condition was informed by his treatment of her and review of her medical records. In summary, Dr. Tontz's opinion was more reliable and trustworthy regarding respondent Smalley's orthopedic condition and whether she was substantially incapacitated from the performance of her duties as a dental hygienist than that of Dr. Bremner.

Respondent Smalley's Testimony

24. Respondent Smalley stated she was unable to hold her neck in the position necessary to perform her job duties as a dental hygienist. While employed by CDCR, respondent Smalley would see six to eight patients per day. Each patient visit would require her to sit in a chair with her neck extended for 30 to 45 minutes. She admits that she can extend her neck for a few minutes but not for the time needed to treat a patient. Furthermore, the intermittent numbness in her hands leaves her unable to perform the fine motor duties of her job.

25. Respondent Smalley stated she would love to go back to work as a dental hygienist. She worked hard to obtain the skills and education necessary to be a dental hygienist. Respondent Smalley stated her disability has negatively impacted her family and finances. She is receiving far less in disability benefits than she would if she were working. Respondent Smalley testified in an open and forthright manner consistent with one who is being truthful.

LEGAL CONCLUSIONS

1. Complainant has the burden of establishing by a preponderance of the evidence that respondent Smalley is no longer incapacitated from performing her usual duties as a dental hygienist. (Evid. Code, §115.)

2. Government Code section 21060 sets the minimum age for voluntary service retirement. At the time of her disability retirement, respondent Smalley had not reached the minimum age for voluntary service retirement.

3. Government Code section 21192 allows complainant to require a recipient of a disability retirement allowance who is under the minimum age for voluntary retirement to undergo medical examination to determine if she is still incapacitated for performance of her job duties.

4. In 2018, CalPERS granted respondent Smalley's application for industrial disability retirement based on her orthopedic (neck) condition. In 2020, because respondent Smalley was below the age for voluntary service retirement, complainant requested and received medical reports concerning respondent Smalley's orthopedic condition. After review, complainant determined that respondent Smalley was no

longer substantially incapacitated from the performance of her duties as a dental hygienist. Respondent Smalley appealed.

5. To reinstate respondent Smalley to her position as a dental hygienist, complainant must establish that she is no longer substantially incapacitated from the performance of her usual duties as a dental hygienist and must do so with competent medical evidence. Both parties provided competent medical evidence albeit conflicting. Dr. Bremner concluded that respondent Smalley was no longer substantially incapacitated from the performance of her duties. Dr. Tontz disagreed. For the reasons stated above, Dr. Tontz's opinions were more credible and persuasive than Dr. Bremner's. Respondent Smalley's testimony regarding the tasks she cannot perform was credible and persuasive. Her testimony supported the opinions of Doctors Tontz, Hacker, and Chavakula.

6. Complainant did not establish that respondent Smalley was no longer substantially incapacitated from the performance of her duties as a dental hygienist. Competent medical evidence established that respondent Smalley is still substantially incapacitated from performing her usual and customary duties as a dental hygienist.

ORDER

1. Respondent Mildred Smalley's orthopedic (neck) condition are still disabling, and she is substantially incapacitated from performing her usual duties as a dental hygienist. The decision of CalPERS is reversed.

2. The appeal of respondent Mildred Smalley is granted.

DATE: November 16, 2022

A handwritten signature in cursive script that reads "Traci C. Belmore".

TRACI C. BELMORE

Administrative Law Judge

Office of Administrative Hearings