ATTACHMENT A

THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for Industrial Disability Retirement of: ESTHER CHODKIEWITZ, Respondent, and THE DEPARTMENT OF CORRECTIONS AND REHABILITATION (CALIFORNIA INSTITUTION FOR MEN, CHINO), Employer.	CASE NO. 9333 OAH NO. 2012040611 (STATEMENT OF ISSUES)

PROPOSED DECISION

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge, Office of Administrative Hearings, in Orange, California on November 28, 2012. Oral and documentary evidence was received[1] and the record was left open so the parties could submit closing briefs. The closing briefs were received and the matter was deemed submitted on February 25, 2013.

Esther Chodakiewitz (respondent) personally appeared and was represented by Thomas J. Wicke, Esq.

CalPERS' senior staff counsel John A Mikita, Esq., represented the California Public Employees' Retirement System (CalPERS).

There was no appearance on behalf of the Department of Corrections (employer).

[1] The parties stipulated that all of the expert medical reports received in evidence could be considered as if the experts had appeared at the hearing and testified to the contents of their reports (i.e. for all purposes).

FACTUAL FINDINGS

1. Mary Lynn Fisher made and filed the Statement of Issues while acting in her official capacity as the Assistant Division Chief of the Benefit Services Division of CalPERS.

2. Respondent was employed as a Staff Psychiatrist by the Department of Corrections and Rehabilitation at the California Institution for Men, Chino, California (employer). By virtue of this employment respondent is a state safety member of CalPERS.

3. On October 10, 2007, respondent signed and thereafter submitted a completed application for service retirement pending industrial disability retirement. Respondent claimed disability due to orthopedic conditions related to injuries "to right major upper extremity, right knee, left foot [and] left shoulder as compensable consequences." (CalPERS' Exh. 3)

4. By letter, dated March 16, 2009, CalPERS notified respondent that her application for industrial disability retirement was denied because the determination was made that she was not substantially incapacitated from the performance of her job duties as a Staff Psychiatrist with employer.

5. Respondent timely appealed CalPERS' denial of her application for industrial disability retirement and the instant hearing ensued.

6. The issue to be decided in the present instance is whether, due to her orthopedic injuries, respondent is permanently disabled or incapacitated from the performance of her duties as a Staff Psychologist for employer.

Respondent's Medical History

7. On May 3, 2006, respondent was working for employer in the East Yard clinic. During her lunch break respondent decided to go to her car which was parked in the prison parking lot. Respondent was walking across a grassy area of the prison grounds, stepped into a gopher hole, twisted her left ankle and fell on a concrete area. As she fell, respondent stretched out her right hand to break her fall. As a result of the fall respondent suffered immediate injury to her left ankle, right knee and right hand. Respondent was shaken up by the fall so she entered her car and sat in her car for a few minutes before making her way back to work. Respondent immediately reported the injury to the appropriate clinic personnel and she was referred to U.S. Health Works Medical Group for evaluation. At 2:50 p.m. on the date of her injury, May 3, 2006, respondent reported to U.S. Health Works and her injuries were confirmed.

8. An x-ray of respondent's right hand and wrist area revealed a fracture. On May 4, 2006, respondent reported increased pain to her right knee and she was placed off work.

9. On June 20, 2006, respondent was examined by her primary treating physician, Dr. Soher M. Aval, Diplomate, American Board of Orthopaedic Surgery. Dr. Aval diagnosed "right fifth metacarpal base fracture, right knee contusion and left ankle inversion sprain." (Exh. R[2]-11) Dr. Aval noted that respondent's disability status was "Total Temporary Disability."(Exh. R-11)

10. On July 25, 2006, Dr. Aval conducted another assessment of respondent's condition. Dr. Aval noted that respondent "has been protecting her right hand and practically using her left hand exclusively to perform all activities, and now has begun to feel pain mainly with the overhead positions.... Her complaints on physical examination are extremely suggestive of impingement syndrome and tendonitis of the supraspinatus tendon. I believe it is reasonable that overcompensation and overuse with the left upper extremity could lead to these symptoms." As a result of the July 25, 2006 examination Dr. Aval added "left shoulder impingement syndrome with rotator cuff tendonitis" to his diagnoses. (Exhibit R-12)

11. On September 26, 2006, Dr. Aval again evaluated respondent. In his progress report Dr. Aval noted that respondent "has not resumed work activities." Dr. Aval added "rule out left shoulder rotator cuff tear" to his diagnoses. Furthermore, Dr. Aval indicated that respondent's left shoulder symptoms had worsened and "she has noted mechanical clicking and catching in the shoulder." Dr. Aval's physical examination provided clinical corroboration of respondent's subjective complaint. According to Dr. Aval, the "clicking and catching" in respondent's left shoulder was "audible and palpable" during the examination. (Exhibit R-14) Accordingly, Dr. Aval ordered an MRI of respondent's left shoulder area.

12. An October 23, 2006, MRI radiologic consultation report revealed the following: "joint effusion; probable bicipital tendinosis; and small high signal area suggesting a small partial tear versus a small acromioclavicular joint effusion." (Exhibit R-15)

13. In a December 22, 2006 progress report Dr. Aval noted the following:

> Patient [respondent] continues to experience left shoulder pain that is constant and increases with certain movements. The pain does not radiate. Concerning her right wrist, she reports constant pain with weakness noted in the right little and ring fingers. With regard to her left foot, patient reports having no pain or discomfort on today's date. The patient has remained off work since her last visit. She only attended physical therapy on several occasions, without benefit noted." (Exhibit R-18)

14. On February 15, 2007, Dr. Aval noted the following: The patient remains off work. She is performing home

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[2] "R" refers to respondent's exhibits.

exercises. The patient continues to experience constant pain in her left shoulder. There is increased pain with overhead activities. The patient avoids activities that aggravate her pain. She continues to experience right wrist pain as well, although the pain comes and goes . . . The patient avoids activities that aggravate her ankle symptoms." (Exh. R-20)

15. On May 7, 2007, respondent returned to work and was assigned to the prison hospital. In her capacity as a psychiatrist assigned to the prison hospital respondent evaluated 13 to 14 patients over a two to three day period of time. In addition to evaluating the 13 to14 patients, respondent had to "make rounds and check on patients." There was a "lot of paperwork" and the paperwork involved an "enormous, constant amount of handwriting." As a prison hospital worker respondent was required to wear a bullet-proof vest. The vest respondent was issued was oversized. Respondent was forced to wear an extra-large vest and since she is only about five-feet tall, the vest hung "almost to my knees" and weighed from 25-30 pounds. Respondent was required to wear the vest all day and it weighed heavily on her shoulders and made it difficult to walk. As respondent moved throughout the prison on her rounds she had to go through numerous heavy metal security gates which required respondent to push a button and then push against the heavy doors to open them. On May 7, 2007, respondent was experiencing pain to her right knee and left shoulder area. By May 29, 2007, respondent's pain was "constant and severe" due to the following physical "things I had to do:" "push the heavy metal doors/gates open and closed, carrying heavy files (I have to hold them in my left hand while writing with my right), retrieving and replacing files from the top of a filing cabinet [above respondent's head and shoulder area]," all while wearing the heavy bullet-proof vest. Consequently, on May 29, 2007, respondent again ceased work.

16. Dr. Aval evaluated respondent on June 25, 2007, July 9, 2007, July 17, 2007, and July 24, 2007. As a result of the July 24, 2007, extensive evaluation of respondent, Dr. Aval issued a detailed report concerning respondent. Dr. Aval reached the following diagnoses: "left shoulder impingement syndrome with rotator cuff tendonitis, left shoulder partial rotator cuff tear, status post right fifth metacarpal base fracture, healed, right wrist sprain/strain, right knee contusion, chondromalacia patella right knee, left ankle inversion sprain." (Exh. R-25) In the discussion section of Dr. Aval's July 24, 2007, evaluation report, Dr. Aval noted the following relevant findings: "My clinical examination of the left shoulder reveals multiple positive provocative tests. Range of motion is decreased. The MRI scan of the left shoulder on October 23, 2006, revealed joint effusion with biceps tendinosis and a small tear versus acromioclavicular joint effusion. I had recommended in the past that [respondent] undergo either an injection and /or surgery. . . Examination of the right wrist reveals decreased strength on flexion. . . Clinical examination of the right knee reveals multiple areas of tenderness. There is slight crepitus and pain on patellofemoral joint compression testing with a positive grind test, indicative of a possible underlying arthritis." (Exh. R-25) Dr. Aval recommended the following work restrictions:

The patient is precluded from lifting greater than 20 pounds,

> work at or above shoulder level, and forceful pushing and pulling for the left shoulder. For the right wrist, the patient requires preclusion from gripping, grasping and fine manipulation greater than 50% of her work day, which includes writing and keyboard activities. The right knee requires preclusion from repetitive kneeling, repetitive squatting, and repetitive climbing. . . (Exh. R-25)

As concerns respondent's ability to return to work Dr. Aval noted that "the patient should be provided with permanent modifications consistent with the work restrictions as noted above. It those are not able to [be] accommodated, she is entitled to a voucher." (Exh. R-25)

17. Effective October 1, 2007, respondent retired and began receiving her regular pension pending disability retirement. Respondent applied for disability retirement on October 10, 2007.

18. On December 3, 2007, respondent was evaluated by Agreed Medical Evaluator Dr. Raymond K. Zarins, an Orthopedic Surgeon. The job description considered by Dr. Zarins was consistent with respondent's description of her job duties.

Those duties are summarized in Dr. Zarins' December 6, 2007, Initial Agreed Medical Evaluation report, as follows:

> As a Staff Psychiatrist for the Department of Corrections, the patient [respondent] was required to carry charts, push open nine very heavy metal gates, turn door knobs repetitively, wear a mandatory bulletproof vest at all times, maintain order and security while being ready at all times for any possible violence. She was also to be present for any fights or riots to provide emergency psychiatric care. This required walking, standing, sitting, pushing, pulling, twisting, turning, gripping and grasping. She would lift and carry up to about 20 pounds. (Exh. R-27)

Dr. Zarins concluded, "Based on [respondent's] job description she cannot return to pre-injury work activities. . . ." (Exh. R-27)

19. On May 17, 2008, respondent was examined by Independent Medical Evaluator Dr. Neil J. Halbridge, an Orthopedic Surgeon. The discussion section of Dr. Halbridge's May 27, 2008, Independent Medical Evaluation report states, in pertinent part:

> 1 There are specific job duties that the member is unable to perform because of her physical condition. The member's job description includes essential duties and responsibilities that

include 5% of the time responding to emergencies and providing emergency psychiatric and treatment. In addition, the job has physical demands, including reaching overhead. The member is not able to perform those specific job duties in the sense that she cannot reach overhead. The job description includes the phrase, 'maintain order and supervisor [sic] the conduct of inmates and youthful offenders, to protect and maintain the safety of persons and property, and to do other related work.' The member would not be able to physically restrain inmates or youthful offenders and physically protect the safety of other persons with whom she would be working. She has a painful left shoulder impingement syndrome with a partial rotator cuff tear. She would be capable of performing the majority of her psychiatric work, but she would not be able to perform those activities of reaching overhead and any type of physical confrontation with inmates or youthful offenders.

2 In my professional opinion, the member presently is not substantially incapacitated for the performance of her usual duties. She is partially incapacitated because she has elected to avoid surgical treatment of the left shoulder. . . .

* * *

4 The member was cooperative with the examination and did appear to be putting forth her best effort. There did not appear to be exaggeration of complaints to any degree. . . . (CalPERS Exh. 11)

20. On February 13, 2009, Dr. Halbridge received a letter from Ms. Carolina C. Sadorra, Benefit Program Specialist. The letter included a list of job accommodations for respondent and Dr. Halbridge was asked for his opinion concerning the effect of the job accommodations on respondent's ability to perform her job duties. As noted by Dr. Halbridge in his March 4, 2009, Supplemental Independent Medical Evaluation report those accommodations consisted of the following:

> The accommodations for [respondent's] work have been reviewed in detail. These include no lifting greater than 20 pounds, no work at or above shoulder level, and no forceful pushing or pulling for the left shoulder. For the right wrist, [respondent] is precluded from gripping, grasping and fine manipulation greater than 50% of her work day, including writing and keyboard activities. Finally, work restrictions and accommodations for the right knee included no repetitive kneeling, squatting or climbing activities. There were no work

restrictions indicated for the left ankle. (CalPERS Exh. 13)

As a result of reviewing the work accommodations and again reviewing a description of respondent's job duties, Dr. Halbridge concluded, "After the job accommodations were reviewed, there do not appear to be any specific job duties that the member is unable to perform." (CalPERS Exh. 13)

21. Dr. Aval reviewed Dr. Halbridge's report and supplemental report and, on June 11, 2010, he wrote a letter/report in which he stated:

> Following review of these documents, I continue to find that [respondent] has permanent work restrictions. I believe that in addition to that [sic] described in my July 24, 2007, report, [respondent] should not be involved in any situation that would potentially involve physical confrontation with inmates and/or youthful offenders. It is doubtful that the Department of Corrections could modify [respondent's] position at all due to the nature of the facility and her occupation as performed for this employer. (CalPERS Exh. 28)

22. On November 24, 2010, respondent underwent an Independent Medical Evaluation conducted by Dr. Jonathan Nissanoff, a Qualified Medical Examiner. A review of Dr. Nissanoff's report reveals that he agrees with Dr. Halbridge concerning the work restrictions that would be necessary for respondent to be able to perform her job duties. Dr. Nissanoff also agreed with Dr. Halbridge that respondent "is precluded from any environment with potential contact with violent individuals such as inmates in a prison, as a confrontation of this nature would exacerbate or worsen her current condition with regard to the left shoulder and right wrist, and could cause worsening of her symptoms and disability. Based on the information provided, I believe with all medical probability that [respondent] would be permanently incapacitated from providing her services as a psychiatrist for the department of corrections such as in a prison setting. This would be on a permanent basis." (Exh. R-29)

Availability of Permanent Work Accommodations

23. By letter, dated October 2, 2007, the Return to Work Coordinator for employer memorialized an October 1, 2007, telephone conversation with respondent. The letter stated, in pertinent part: "Your supervisor, Dr. Flores-Lopez has reviewed the recommended work restrictions listed in a report authored by Soheil M. Aval, M.D., dated July 24, 2007, and advised me he can provide the accommodations(s) necessary for you to perform your regular job duties on a permanent basis." (CalPERS Exh. 17)

24. During respondent's testimony respondent acknowledged that the new bullet-proof vests are "a lot lighter material and a lot shorter-much smaller, much lighter."

25. In an October 31, 2008, letter, the Associate Government Program Analyst for employer responded to the following question posed by CalPERS: "In responding to emergency situations that would fall within this job duty, would the performance of this duty involve physical contact with inmates, youthful offenders, or others, and would it require the member to do a take-down or to physically restrain and inmate, youthful offender, or others?" Employer's Analyst replied as follows: "No. A Staff Psychiatrist's response to an emergency situation would include, but not [be] limited to Call back on day off, physically reporting to another area of the institution to perform emergency psychiatric evaluations, face to face interview[s], or interviews conducted through safety glass." (Cal PERS Exh. 19)

Evaluation of the Evidence

26. The experts all agreed that respondent is not malingering, she is not exaggerating her injuries, and with adequate accommodations she can perform all of her regular job functions as a Staff Psychiatrist for employer.

27. The evidence established that at the time respondent applied for disability retirement employer was ready, willing and able to fully accommodate respondent's limitations.

LEGAL CONCLUSIONS

Applicable Code Sections

1. California 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 . . . on the basis of competent medical opinion."

2. California 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."

3. California Government Code section 21156 provides, in pertinent part: "In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion . . ."

Evaluation of Respondent's Disability Retirement

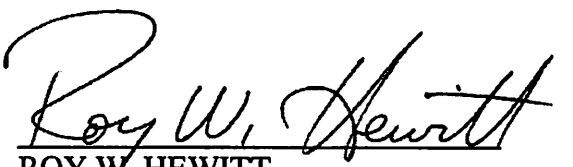
4. As set forth in Findings 26 and 27, in the present instance an evaluation of the medical evidence in conjunction with the employer's offer of permanent accommodations,

established that respondent is not permanently disabled and incapacitated from performance of her job duties within the meaning of Government Code sections 20026 and 21156.

ORDER

Respondent's appeal is denied.

Dated: March 20, 2013



ROY W. HEWITT
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Office of Administrative Hearings