

**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:**

**BENJIE M. CORTEZ and SAN QUENTIN STATE PRISON,  
CALIFORNIA DEPARTMENT OF CORRECTIONS AND  
REHABILITATION, Respondents**

**Agency Case No. 2021-0832**

**OAH No. 2022050280**

**PROPOSED DECISION**

Matthew S. Block, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on October 3, 2022, by videoconference from Sacramento, California.

Helen L. Louie, Staff Counsel represented the California Public Employees' Retirement System (CalPERS).

There was no appearance by or on behalf of Benjie M. Cortez (respondent) at hearing. A Notice of Hearing was properly served on respondent. Consequently, this

matter proceeded as a default against respondent under Government Code section 11520, subdivision (a).

There was no appearance by or on behalf of San Quentin State Prison, California Department of Corrections and Rehabilitation (CDCR). A Notice of Hearing was properly served on CDCR. Consequently, this matter proceeded as a default against CDCR under Government Code section 11520, subdivision (a).

Oral and documentary evidence was received, the record was closed, and the matter submitted for decision on October 3, 2022.

## **ISSUES**

(1) Whether respondent was substantially incapacitated from the performance of her usual and customary duties as a Case Records Technician for CDCR at the time of her application for Industrial Disability Retirement (IDR); and (2) If so, whether her disability is "industrial" as defined by Government Code section 20048.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. CalPERS is the state agency responsible for administering retirement benefits to eligible employees. (Gov. Code, § 20000 et seq.) Respondent was employed by CDCR as a Case Records Technician at San Quentin State Prison. By virtue of her employment, respondent is a state industrial member of CalPERS subject to Government Code sections 20048, 21150, and 21151.

2. On December 18, 2019, respondent signed and thereafter filed an application for service retirement pending IDR. In the application, respondent claimed disability based on "both hands, arms, shoulders and neck" conditions. Respondent retired from service, effective August 31, 2019.

3. In a letter dated July 29, 2020, CalPERS denied respondent's application for IDR. In a second letter, dated August 13, 2020, CalPERS reiterated the denial of respondent's application for IDR, and denied respondent's application for regular disability retirement. The letters stated that after a review of the medical evidence submitted, CalPERS determined that respondent's orthopedic and psychological conditions did not render her substantially incapacitated from performing her usual duties as a Case Records Technician.

4. In a letter dated May 21, 2021, respondent acknowledged CalPERS's denial of her application for IDR, and appealed the denial of her application for regular disability retirement. She wrote, in pertinent part:

I am writing this letter to appeal the denial of my regular disability application. I previously filed for Industrial Disability. This appeal was denied in a letter dated July 29, 2020. Because I clearly did not qualify for industrial disability, I did not appeal that determination . . . .

5. On April 8, 2022, Keith Riddle, in his official capacity as Chief of CalPERS's Disability and Survivor Benefits Division, signed and thereafter filed a Statement of Issues for purposes of the appeal. The matter was set for an evidentiary hearing, pursuant to Government Code section 11500 et seq.

## **Duties of a Case Records Technician**

6. CalPERS submitted two documents explaining the duties of a Case Records Technician. The "Job Description" indicates that 40 percent of the duties are to assess inmate, parolee, and discharged offender files. 30 percent of the duties are to access, evaluate, enter, update, and retrieve and maintain accurate data and create and print reports. 15 percent of the duties are to coordinate interacting in person via telephone, fax machine, or written communication with a variety of individuals. 10 percent of the duties are to provide training to other developmental staff, and 5 percent of the duties are to coordinate gate clearance, schedule conference rooms, schedule certain file reviews, and attend in-service training.

7. The "Physical Requirements of Position/Occupational Title" (Physical Requirements) describe the frequency of a Case Records Technician's tasks. A Case Records Technician is physically required to complete activities of movement, including: sitting for over six hours (constantly); bending at the neck and waist, using a computer mouse and keyboard, and reaching below the shoulder (frequently); and standing, walking, reaching above the shoulder, simple grasping, and lifting up to 10 pounds (occasionally).

## **Henrichsen IME**

8. CalPERS sent respondent for an Independent Medical Evaluation (IME) with Robert Henrichsen, M.D. Dr. Henrichsen received his medical degree in 1967. He received his Orthopedic Board Certification in 1974 and has been a fellow of the American Academy of Orthopedic Surgeons since 1977. He is a member of several professional organizations, including the California Orthopedic Association and the American Association of Orthopedic Surgeons. Dr. Henrichsen maintained a private

practice in Auburn, California, from 1973 to 2011. He has performed IMEs for CalPERS for approximately 20 years.

9. On May 12, 2020, Dr. Henrichsen performed respondent's IME at his office in Rancho Cordova, California, using the CalPERS substantial incapacity standard. Dr. Henrichsen obtained respondent's history and symptomology, reviewed her medical records, and physically examined respondent. He issued an IME report dated May 12, 2020.

10. During the IME, respondent told Dr. Henrichsen that she began experiencing elbow pain in January 2017. She received a plate rich plasma injection in her right elbow, which relieved the pain for approximately two months. In November 2018 she began experiencing pain in her neck and shoulder, which eventually progressed to her arms and hands. She also experienced tingling and swelling in her hands. She last physically worked in June 2019, and her symptoms have not improved since she retired.

11. Respondent reported dramatically reduced grip strength and was unable to make a fist with her left hand. She self-treated her symptoms with hot or cold compresses, medication, a Thermacare device, and musculoskeletal taping. Respondent told Dr. Henrichsen that "[she] hate[s] surgeries." However, she also stated she had never had surgery, and said she learned that she hated them from doctors.

12. Dr. Henrichsen concluded that respondent was likely suffering from minor arthritis in the neck and tendonitis in the elbow. However, respondent's multiple other reported symptoms were unsupported by his objective medical findings. In fact, the only real abnormality that Dr. Henrichsen noted from the physical examination was respondent's reduced grip strength in her left hand. She said she was unable to make

a complete fist with her left hand, and experienced pain when attempting to touch her left thumb to her left little finger. Dr. Henrichsen suspected respondent was putting forth minimal effort during the examination, and reasoned, in part:

The grip strength she identified is not consistent with a person being able to provide adequate self-care. This amount of grip strength is not sufficient for a person to use a key to open a door, to open a refrigerator, or to use an electric can opener. They would also be unable to push a button to open a microwave.

13. A review of respondent's medical records revealed a history of complaints of vague and generalized symptoms but very little competent medical evidence of a cause. Multiple attempts at treatment were unsuccessful. Prior medical diagnoses were also conflicting. For instance, some physicians previously diagnosed respondent with carpal tunnel syndrome, while others, including Dr. Henrichsen, did not.

14. In the absence of objective medical evidence to support more specific diagnoses, Dr. Henrichsen diagnosed applicant with: (1) neck and upper extremity pain; (2) hyperreflexia; (3) markedly reduced grip strength; and (4) psychological symptoms. In concluding that she is not substantially incapacitated from performing her usual duties as a Case Record Technician, he explained:

My assessment is that [respondent] has symptoms far greater than her objective findings support. She is a nice lady but when one looks at the entire evaluation including the history, it can be seen that there is a component of

depression and there is a large component of symptoms not supported by objective findings.

## **Lopez IME**

15. Respondent was also referred for a psychiatric IME. It is unclear what prompted the referral, since respondent did not allege disability based on a psychiatric condition in her application for IDR. However, Alberto G. Lopez, M.D., who was appointed to perform the psychiatric IME, stated in a letter acknowledging the appointment that the alleged psychiatric condition was major depressive disorder.

16. Dr. Lopez performed the psychiatric IME using the CalPERS substantial incapacity standard on July 9, 2020, and detailed his findings in a report dated the same day. Dr. Lopez received his medical degree in 1979. He taught in the psychology department at the University of California at San Francisco for nearly 26 years and worked as a psychiatrist for the City of San Francisco, Division of Mental Health and Substance Abuse, for over 20 years. Dr. Lopez obtained respondent's past medical and psychiatric history, reviewed her medical records, and administered a battery of psychological tests.

17. Respondent told Dr. Lopez that she became depressed when she was no longer able to work. Her mood became irritable, her self-esteem depreciated, and she began experiencing occasional nightmares. She denied any previous psychiatric history, suicidal or homicidal ideation, or psychotic symptomology. Dr. Lopez found respondent's form of thought to be intact, and her speech normally paced and clear. However, he found respondent to be socially withdrawn and tense.

18. Dr. Lopez was asked whether respondent has an actual and present psychiatric disorder that rises to the level of substantial incapacity to perform her usual job duties as a Case Records Technician. He concluded, in pertinent part:

The answer is no. [Respondent] does have depression. This depression, however, arose only after she stopped working because of her orthopaedic [*sic*] musculoskeletal problems. She was not taken off work for the depression. The depression does not arise to the level of being incapacitating. Indeed, the psychological testing is within normal limits.

### **Subsequent IME Reports**

19. After they authored the IME reports discussed above, both Dr. Henrichsen and Dr. Lopez were asked to review additional medical records that they were not previously provided. Both doctors reviewed the additional records and drafted subsequent IME reports, stating that the new information did not change their opinions that respondent was not substantially incapacitated from performing her usual and customary duties as a Case Records Technician at the time she applied for IDR.

### **Analysis**

20. Respondent bears the burden of proving, by competent medical evidence, that she was substantially incapacitated from performing her usual and customary duties as a Case Records Technician at the time of her application for IDR. Respondent failed to appear at hearing or produce any evidence to meet her burden. Moreover, the persuasive medical evidence introduced at hearing established that

respondent was not substantially incapacitated from the performance of her usual and customary duties as a Case Records Technician for CDCR at the time of her application for IDR. As such, respondent's application must be denied.

## LEGAL CONCLUSIONS

1. By virtue of her prior employment, respondent is a state industrial member of CalPERS subject to Government Code sections 20048, 20382, 21150, and 21151. To qualify for IDR, respondent must prove that, at the time she applied, she was "incapacitated physically or mentally for the performance of [her] duties . . . ." (Gov. Code, § 22156, subd. (a)(1).)

2. As defined in Government Code section 20026, "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion.

3. An applicant seeking service-connected disability retirement has the burden of proving her eligibility for such benefits. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn. 5.) Although pension legislation must be liberally construed in favor of the applicant, this liberal construction "does not relieve a party of meeting the burden of proof by a preponderance of the evidence." (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) A preponderance of the evidence means "the evidence on one side outweighs, preponderates over, or is more than, the

evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed. (*People v. Miller* (1916) 171 Cal. 649, 652.)

## **Determination**

4. As discussed in Factual Finding 20, respondent failed to provide competent medical evidence sufficient to meet her burden of demonstrating that she was substantially incapacitated from performing her usual and customary duties as a Case Records Technician at the time she filed her application for IDR. As such, as set forth in the Factual Findings and Legal Conclusions as a whole, respondent is not entitled to IDR, pursuant to Government Code section 21150, subdivision (a).

5. As discussed in Legal Conclusion 4, respondent did not prove her medical conditions permanently incapacitated her from performing her job duties. Consequently, the issue of whether such conditions were industrial is moot and is not decided in this matter.

## **ORDER**

The appeal of respondent Benjie M. Cortez is DENIED.

DATE: October 28, 2022

*Matthew Block*

MATTHEW S. BLOCK

Administrative Law Judge

Office of Administrative Hearings