

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

**In the Matter of the Statement of Issues Against:**

**CECILIA LEBLANC and MULE CREEK STATE PRISON,  
CALIFORNIA DEPARTMENT OF CORRECTIONS AND  
REHABILITATION, Respondents**

**Agency Case No. 2020-0351**

**OAH No. 2020070980**

**PROPOSED DECISION**

Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter via telephone and video conference on May 17, and June 28, 2021, from Sacramento, California.

Dustin Ingraham, Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Respondent Cecilia LeBlanc represented herself.

There was no appearance by or on behalf of the Mule Creek State Prison (Mule Creek), California Department of Corrections and Rehabilitation (Department). CalPERS established that it served the Department with a Notice of Hearing. Consequently, this

matter proceeded as a default hearing against the Department pursuant to Government Code section 11520, subdivision (a).

Oral and documentary evidence was received on May 17, and June 28, 2021. The record was held open to allow respondent to submit a complete version of Exhibit X, and an additional document, which was marked for identification as Exhibit AA and admitted as administrative hearsay. The record closed and the matter was submitted on July 2, 2021.

## **ISSUE**

Based on an orthopedic (neck) condition, is respondent permanently and substantially incapacitated from performing her usual and customary duties as a Registered Nurse for the Department?

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. Respondent was employed with the Department as a Registered Nurse (RN). On September 23, 2019, she submitted to CalPERS an application for service retirement. Respondent retired for service effective September 21, 2019, and has been receiving a retirement allowance since that date.

2. On October 1, 2019, respondent submitted a Disability Retirement Election Application (application), specifying service pending industrial disability retirement. Respondent's application states she was last on the Department's payroll on September 20, 2019. She described her disability as "Unable to do CPR, lift, push or

pull required weight, bend or twist neck repeatedly or extensively. Unable to perform repeated over head reaching. Unable to do extended work hours per mandate as required by contract. I have severe foraminal stenosis of the neck." Her limitations include: "max lift/carry 15 lbs, max push/pull 25 pounds, not able to perform CPR. No repetitive overhead reaching work." Respondent reported her injury occurred due to an October 4, 2018 motor vehicle accident on the Mule Creek grounds.

3. By letter dated March 2, 2020, CalPERS denied respondent's application. CalPERS informed respondent that the determination was based on "reports prepared by Christina Bosserman, M.D., Prudencio Balagtas, D.O., and Robert Henrichsen, M.D." Based on these reports, CalPERS determined respondent was not substantially incapacitated from performing the usual job duties of a Registered Nurse with the Department on the basis of her orthopedic conditions. The letter notified respondent she had 30 days to file a written appeal. By letter dated March 17, 2020, respondent appealed CalPERS's findings. Between March and October 2020, respondent also submitted additional medical information to CalPERS.

4. By letter dated November 6, 2020, CalPERS informed respondent that her additional medical information from "Anoop Nundkumar, M.D., Yuiy Drofyak, P.T., Paul Newton, P.T., Christina Bosserman, M.D., Prudencio Balagtas, D.O., Joseph Sclafani, M.D., and N. Bhatia, M.D., was forwarded to the [Independent Medical Evaluator] physician, Dr. Robert Henrichsen, M.D., for his review." Following Dr. Henrichsen's review, CalPERS upheld its denial and referred the matter to hearing.

### **Job Duties of a Registered Nurse**

5. CalPERS submitted two documents to list and explain respondent's job duties. The first is the "Physical Requirements of Position/Occupational Title," that

respondent and a "Return to Work Coordinator" signed. The second is a "Mule Creek State Prison Job Description" for a Registered Nurse.

6. The physical requirements of an RN at Mule Creek entail:

Frequently (3-6 hours): Sitting, reaching below the shoulder, fine manipulation, keyboard and mouse use, and lifting/carrying 0 to 10 pounds.

Occasionally (up to 3 hours): Standing, walking, climbing, squatting, bending at the neck and waist, reaching above the shoulder, kneeling, climbing, twisting (neck), twisting (waist), pushing/pulling, power grasping, lifting and carrying 11 to over 100 pounds, walking on uneven ground, and exposure to dust, gas, or fumes.

7. The Mule Creek job description for an RN states that an RN plans and implements medical care and treatment whether independently or as part of an interdisciplinary team, assists in surgeries, observes and assesses patient inmates, documents all care, maintains a safe environment for inmates/patients and staff, and supervises inmate/patient conduct. An RN must also supervise inmates and maintain the safety of persons and property, prevent inmate escapes, and search inmates for contraband. Additional requirements include:

PHYSICAL CHARACTERISTICS: Must be reasonably expected to maintain sufficient strength, agility, and endurance to perform during stressful (physical, mental, and emotional) situations encountered on the job without compromising

their health and well-being or that of their fellow employees or that of inmates.

QUALIFICATIONS/REQUIREMENTS: Assignments may include sole responsibility for the supervision of inmates and/or the protection of personal and real property.

PHYSICAL DEMANDS: The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable persons with disabilities to perform the essential functions.

8. The job description states there are no "nonessential duties." An RN works one of three shifts, typically 40 hours per week. An RN "may commonly work overtime when available."

### **Expert Opinion, Robert Henrichsen, M.D.**

9. CalPERS retained Dr. Henrichsen to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Henrichsen issued a report regarding his IME and testified at hearing. He is a board-certified orthopedic surgeon and is also a certified Fellow of the American Academy of Orthopaedic Surgeons. Dr. Henrichsen received his medical degree from Loma Linda University in 1967. He has been in private practice since 1973. He has contracted with CalPERS to conduct IMEs since 2003.

10. Dr. Henrichsen conducted respondent's IME on January 28, 2020, and issued a report summarizing his findings on the same day. He began the evaluation by

gathering an oral history from respondent, including injuries, medical background, physical issues, and treatment. Dr. Henrichsen learned that respondent suffered an injury during a car accident on the Mule Creek grounds in October 2018. She suffered from chronic neck pain, but this incident created a "flare up." Respondent was treated with physical therapy, chiropractic treatment, acupuncture, and massage, which was the most helpful.

11. Respondent had a CAT scan following the accident, which "demonstrated no new changes," and indicated "some narrowing," but did not state whether there was a "mild or severe percentage of narrowing." She had an MRI scan in February 2019, which showed "severe and advanced neural foraminal narrowing on the right side at C3-4,<sup>1</sup> C4-5, and C5-6 and bilateral severe foraminal narrowing at C6-7 with reduction of disc space in C5-6 and C6-7." Dr. Henrichsen reviewed the MRI report, but was not provided the MRI disc to review.

12. Respondent explained to Dr. Henrichsen that if she "reaches up on a shelf sometimes quickly, that causes her to have acute neck pain." Additionally, she has neck cramping, reduced motion, and "intermittent neck attacks." Her pain is in the right deltoid and can radiate to the right upper thoracic spine. She also described "grinding" in her neck.

13. Respondent was a licensed vocational nurse from 1974 until 2007. She worked for the Department at Mule Creek State Prison as an RN from 2007 until September 2019. She explained she had an hour commute to work each way and was sometimes mandated to work overtime. At one point after her injury, her employer

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<sup>1</sup> Refers to the cervical spine.

gave her an accommodation to allow her not to do cardio-pulmonary resuscitation (CPR). Her employer later could not accommodate respondent and she was "forced out of work" based on this and the reports from the worker's compensation doctors.

14. During Dr. Henrichsen's oral history and respondent's self-reporting on a questionnaire, he learned respondent had "some concentration issues, fatigue, some social withdrawal, and sleep issues." She had "occasional burning, aching pain in the right neck, shoulder junction alongside the lateral side of the neck and to a lesser extent on the left." She also has "right lower neck and upper trapezius area symptoms."

15. Dr. Henrichsen conducted cervical spine tests on respondent's range of motion. Respondent's range of extension and flexion were normal, lateral bending and rotation were somewhat limited on the left side, and her shoulder range of motion was normal. She had no atrophy in her neck or shoulder muscles, indicating she was not under-using muscles on one side over the other. Respondent did not have muscle spasms, guarding, or trigger points in her neck and shoulder muscles, but did have pain or tenderness on the right side of her neck into the trapezius muscle on her shoulder.

16. In his review of respondent's medical history, Dr. Henrichsen found that since her accident, her doctors imposed restrictions that required accommodations at work. Most significantly was that respondent could not perform CPR. Prudencio Balagtas, D.O., evaluated respondent for her worker's compensation claim. He recommended respondent have modified duties including no lifting or carrying over 15 pounds, pushing or pulling over 25 pounds, and no repetitive overhead reaching.



17. Dr. Henrichsen found “normal wear and tear” in respondent’s neck, including degenerative disc disease and arthritis. He also found narrowing of the foramina, which is the canal through which the nerves pass. While respondent had some narrowing, there was no evidence of nerve impingement due to this narrowing. She did not have radiating pain down her arm, for example. Dr. Henrichsen opined that respondent’s symptoms exceeded the objective findings. In his examination and medical records review, he found no doctor who supported respondent’s symptoms with a physical examination. Her neck mobility is “reasonable but not perfect,” there is no evidence of nerve root impingement, her degenerative disc disease and arthritis may cause her pain, but are not disabling.

18. While respondent may experience pain when she performs CPR or assists lifting up to 100 pounds, she is physically capable of performing those duties. Because only 40 percent of respondent’s job duties involve patient care, while the rest is administrative, Dr. Henrichsen did not find her job to be physically rigorous. He opined all the work restrictions her doctors had ordered were prophylactic to avoid pain due to her neck arthritis. The CalPERS standard for disability is that an applicant has a “substantial disability from performing the usual and customary duties of the position.” In his report, he remarked:

Previous evaluators have considered her to be unable to accomplish her work because of symptoms, tenderness, and apparently her occupation description. My assessment of those medical conclusions is that it is a prophylactic determination of substantial incapacity [to do] her work. It is my medical understanding that the abnormal MRI scan and a prophylactic work preclusion because of pain then

enters into the prophylactic conclusion of occupational duties. The medical qualifications for Disability Retirement from any CalPERS System clearly indicates that prophylactic preclusions are not indication of substantial incapacity for occupational employment.

## **SUPPLEMENTAL REPORT**

19. On October 6, 2020, CalPERS provided Dr. Henrichsen with additional medical records and respondent mailed him her MRI disc. On October 7, 2020, Dr. Henrichsen wrote a supplemental report. His conclusions from the additional medical records did not change.<sup>2</sup> Her treating physicians found respondent had degenerative discs in her cervical spine and experienced pain with certain movements and exertion. The work restrictions were implemented prophylactically to avoid pain. Regarding the MRI disc, he found only one view he was able to open. In that view, he noted "right-sided foraminal narrowing in the C4-5, C5-6, C6-7." The MRI was consistent with Dr. Henrichsen's findings of foraminal narrowing with no nerve root impingement.

## **Respondent's Evidence**

### **POST ORDERS: DUTIES OF AN RN**

20. Respondent requested a duty statement from Mule Creek State Prison and was told they could not locate what she requested. She was provided with "Post

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<sup>2</sup> There was some discussion in the reports regarding possible carpal tunnel syndrome in respondent's right upper extremity. Respondent's industrial disability claim was limited to her cervical spine, however.

Orders," for an RN position within the Department and at Mule Creek State Prison, but the Chief Executive Nurse was unable to provide a duty statement or Post Order for a mental health RN, which was respondent's primary assignment. The orders state that all RNs must be able to work in any RN position and may not refuse an assignment. For this reason, the submitted Post Orders are considered to apply to respondent.

21. The Post Orders state that an RN provides nursing care, patient/inmate treatment and education, and a safe working environment. Among the required duties are:

Ability to communicate effectively, verbally and in writing, to disseminate information, respond to inquiries, to provide direction/orders to Licensed Vocational Nurses (LVNs), Psychiatric Technicians (PTs), and Certified Nursing Assistants (CNAs) as necessary, to compose memos/correspondence to staff, inmates, vendors, etc. in order to facilitate treatment of inmate-patients; to create/update desk procedures, provide training, to document in health care records; Ability to prepare and submit custody reports (e.g., Medical Report of Injury or Unusual Occurrences/California Department of Corrections and Rehabilitation (CDCR) 7219, CDCR 837-C Use of force/incident report); documentation of unusual occurrences; answering inmate appeals (602) as assigned;

Possess and maintain a Basic Life Support [BLS] Certification (Health Care Provider);

Must remain alert and focused at all times to effectively evaluate and respond to dangerous or emergent situations, including sensory perception (see, hear, smell and touch) to detect danger; may involve physical defense of self or others;

Protect and maintain safety and security of persons (self and others) as well as property, inventory control of controlled substances/medications, medical materials, tools, and equipment;

In an emergency, perform lifesaving nursing procedures that include but are not limited to BLS and first aid;

The [primary care RN] is designated as a First Responder to medical emergencies that occur in the institution. The RN is to remain alert at all times.

22. Respondent submitted a portion of the agreement between her union and the State of California. The agreement states that "involuntary overtime" will be assigned by inverse seniority. Additionally, "[m]anagement shall make every attempt" not to schedule more than four involuntary overtime shifts per month, more than 16 continuous hours, more than two shifts in a normal work week, or more than two consecutive calendar days.

### **TESTIMONY OF PRUDENCIO BALAGTAS, D.O.**

23. Dr. Balagtas specializes in physical medication and rehabilitation at the Northern California Spine and Medical Rehabilitation Center. He has practiced

medicine since 2014 as a non-surgical orthopedic specialist. After medical school, he was awarded fellowship positions in Interventional Spine Procedures and Injections. Dr. Balagtas's practice consists of private and industrial injury patients with a focus on musculoskeletal conditions of the spine and peripheral joints. He testified at hearing.

24. On April 24, 2019, Dr. Balagtas saw respondent for a Worker's Compensation Initial Consultation. He evaluated her on that day and continues to treat her. Respondent's worker's compensation doctor referred her to Dr. Balagtas, a spine specialist, because her on-going treatment was not improving the cervical condition. Dr. Balagtas explained respondent's MRI showed she had spinal spondylosis, a degenerative condition that impacts the spine, vertebral disks, and joints.

25. During his evaluation, Dr. Balagtas took respondent's oral history and report of her condition. She described chronic neck pain that was worsened following her industrial injury. Respondent believed she had improved somewhat since the motor vehicle accident, but was only approximately 75 percent of her baseline. Respondent's symptoms are constant and certain activities like typing, reaching, bending, increased activity, driving, and lifting aggravate her symptoms. Respondent's symptoms included pain, burning, and cramping in her neck and trapezius muscle.

26. When respondent first saw Dr. Balagtas, she had already received chiropractic care, physical therapy, acupuncture, massage, and pain medications. Dr. Balagtas recommended a cervical medial branch block test to address her on-going pain. The test was not successful, and the treatment was not further pursued. Dr. Balagtas stated he continues to see respondent "to try treatment." He has rated her permanent and stationary for worker's compensation purposes.

27. Dr. Balagtas reviewed respondent's job and mandatory overtime requirements. In addition to her regular work shift and tasks discussed above, respondent is subject to mandatory overtime with no adequate break between shifts. Dr. Balagtas opined respondent "would have significant difficulty performing her job requirements without causing pain." He stated that this opinion does not mean she cannot perform her duties, but that to do so would cause pain. If she were working consecutive shifts, respondent's fatigue and increased pain could distract from her patient care and impact her medical decision-making.

28. Based on Dr. Balagtas's review of respondent's MRI, he does not believe respondent can lift 100 pounds. She has "multi-level degenerative discs" and "high grade facet osteoarthropathy." The car accident in 2018 "aggravated the underlying spondylosis." The MRI showed narrowing foramina, which can impact muscles within the responsibility of the nerve related to the narrowed foramina. With these symptoms, he does not believe respondent "can perform the essential requirements of the job, particularly when it comes to prolonged repetitive or heavy work."

29. Regarding his assessment of respondent, Dr. Balagtas explained the office visits and evaluations are merely a "snapshot" of respondent's status on a particular day. The workday, where respondent must perform her regular job duties, is a better representation of respondent's symptoms' impact. His work restrictions for respondent included a bar on doing CPR because she did not have sufficient strength.

30. Dr. Balagtas opined respondent may "functionally" be able to perform CPR, but it would cause pain. Eventually the pain would not allow her to continue. Respondent has to be "ready to go into action" when needed and her limitations would impair her ability to perform in an emergency situation. He also opined

respondent's condition is permanent because of her underlying degeneration and the fact that conservative treatment failed to produce favorable results.

### **JOSEPH SCLAFANI, M.D.'S, TESTIMONY**

31. Dr. Sclafani graduated from the University of California San Diego Medical School, where he also completed a two-year surgical internship. He followed that with a spine fellowship at the Spine Institute of San Diego and a one-year residency at Georgetown University in physical medicine and rehabilitation. Dr. Sclafani also completed a fellowship in pain management at the National Institute of Health. He is board certified in physical medicine and rehabilitation and in pain medicine.

32. Dr. Sclafani evaluated respondent twice for purposes of her worker's compensation claim, once in February 2020 and again in January 2021. Dr. Sclafani reviewed several years' worth of respondent's medical records, which appear to be the same records Dr. Henrichsen reviewed. Respondent complained for several years of neck pain prior to her motor vehicle accident on October 4, 2018. Following the accident, she was treated by Christina Bosserman, M.D. for neck pain and diagnosed with a spine sprain caused by whiplash. Dr. Sclafani noted that respondent's work restrictions included no lifting over 15 pounds and no performing CPR.

33. On physical examination, Dr. Sclafani found respondent had tenderness and protective guarding in the musculature of her cervical spine. He found no pain radiating down her arms, but found she had pain in her shoulder blades and bilaterally in her trapezius muscles. From respondent's MRI, Dr. Sclafani determined respondent had "severe upper cervical foraminal narrowing." Someone with this "abnormality" may be symptomatic or not. His opinion based on his examination and medical record

review was that respondent's reports of frequent pain "flare ups," are consistent with the objective findings.

34. Dr. Sclafani reviewed the duties of an RN in a correctional facility, which include lifting and carrying 100 pounds, being certified in and performing CPR, working in any RN post as needed, responding in an emergency, and being alert and capable at any given time. The job description requires "strength, agility, and endurance in any situation, without compromising one's health and well-being and that of coworkers and inmates." He testified that when he evaluates a medical provider in corrections, he "pay[s] very close attention" to "key determinations." Dr. Sclafani considered respondent's ability to complete her job requirements without subjecting herself to pain or aggravating her symptoms, her ability to perform those duties safely for herself and others for whom she is responsible, and whether the patients she serves will receive adequate, safe medical care. An RN in a prison is subject to "occasional vigorous demands" of lifting up to 100 pounds and effectively performing CPR. The duties require an RN to be alert, awake, and able to extricate herself from and assist her coworkers in an emergency.

35. Based on these requirements, Dr. Sclafani found respondent is incapable of performing the duties of an RN. Her treating physician permanently restricted respondent from lifting over 15 pounds, pushing or pulling over 25 pounds, and performing CPR. He opined respondent "cannot safely and effectively return to her position" as an RN because she cannot perform the duties in the job description and prisons are unpredictable environments that can require physical demands at any moment. He does not believe these restrictions are prophylactic. Rather, these restrictions reflect respondent's functional limitations.



36. Dr. Sclafani also testified that respondent is substantially incapacitated based on her cervical spine condition. He stated her condition is unlikely to respond to reasonable treatment and it will persist for more than 12 months. Her condition is permanently incapacitating.

### **WORK ACCOMMODATIONS**

37. Dr. Bosserman, respondent's worker's compensation doctor, allowed her to go back to work, but with restrictions. Specifically, she could not perform CPR, lift over 15 pounds, push or pull over 25 pounds, and she could not repetitively reach overhead. On September 18, 2019, Mule Creek sent respondent a letter stating it was no longer able to accommodate her work restrictions. The permanent work restrictions her worker's compensation doctors imposed were:

Max lift/carry 15 pounds;

Max push/pull 25 pounds;

No repetitive overhead reaching/work;

She is not to apply the necessary pressure for adequate chest compressions during CPR.

38. Respondent was provided a list of options, which included filing for retirement and industrial disability retirement or being reassigned to a position that could accommodate her restrictions.

### **RESPONDENT'S TESTIMONY**

39. Respondent explained she retired from her position when she determined it would not be safe for her to continue working. She worked in the mental

health department and was subject to a change of assignment or mandatory overtime at any time. She was responsible for patients/inmates, coworkers, and herself, and her ability to be safe was compromised. Her doctors have told her and her employer that she cannot safely perform CPR or lift, pull, or push up to or over 100 pounds. Knowing this, respondent believes she is a liability.

40. Respondent believes Dr. Henrichsen “downplayed” the physical work of a nurse in a corrections facility. Emergencies arise and the RN must be able to respond, including carrying a 40-pound defibrillation machine to an emergency scene, lift a patient with assistance, and be a first responder. Emergencies are a “frequent” occurrence in the prisons and as the duty statement explains, a nurse may have “sole responsibility for the supervision of inmates and/or the protection of personal and real property.” She does not always have another person present to assist in these duties.

41. Respondent explained that overtime is mandatory. When she is assigned to an overtime shift, she is given an hour and a half’s notice. She might work an eight-hour shift, drive an hour home, try to rest and prepare for another shift for two hours, drive an hour back to the prison, and work an overnight, eight-hour shift, and then try to have a break before her regularly scheduled eight-hour shift begins the next morning. All overnight shifts involve an acute level of care because the normal clinic is closed and the overnight shift must provide emergency medical care as well as address the regular patient population.

42. Respondent stated that if faced with a patient in distress, she would not refuse to perform CPR if the option was letting a patient suffer or perish. But she does not believe she would be able to perform it effectively or for very long. She believes it would be “immoral and unethical” to return her to her job as a correctional RN.

## PRINCIPLES OF LAW

43. By virtue of respondent's employment as a Registered Nurse at Mule Creek, she is a state safety member of CalPERS subject to Government Code section 21151.

44. Respondent has the burden of proving her eligibility for disability retirement benefits by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) To be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

45. To qualify for industrial disability retirement, respondent had to prove by competent medical opinion that, at the time she applied, she was "incapacitated physically or mentally for the performance of his or her duties." (Gov. Code, § 21156.) 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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

46. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform [her] usual duties." (Italics original.) It is not necessary that the person be able to perform any and all duties since public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County Employees' Retirement Association* (1983) 142 Cal.App.3d 957, 961.) Instead, the frequency with which the duties she cannot perform are usually performed, as well as the general composition of duties she can perform, must be considered. (*Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d at pp. 876-877 [while applicant was unable to lift or carry heavy objects due to his disability, "the necessity that a fish and game warden carry a heavy object alone is a remote occurrence"].)

47. Substantial inability to perform usual duties must be measured by considering applicant's present abilities. Prophylactic restrictions are designed to prevent future injuries. A condition or injury that may increase the likelihood of further injury, as well as a fear of future injury, do not establish a present "substantial inability" for the purpose of receiving disability retirement. (*Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal. App. 3d 854, 863-64.)

48. Discomfort, which may make it difficult for one to perform her duties, is insufficient to establish permanent incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207 [mere discomfort which makes it difficult to perform one's job does not constitute a permanent incapacity]; citing, *Hosford v. Board of Administration, supra*, 77 Cal.App.3d at p. 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic

restrictions on work duties cannot form the basis of a disability retirement. (*Id.* at p. 863.)

## **ANALYSIS**

49. The weight of the evidence supported respondent's chronic, sometimes painful and debilitating, neck condition. Her 2019 MRI offered objective proof of her neck issues, which include "severe and advanced neural foraminal narrowing on the right side at C3-4, C4-5, and C5-6 and bilateral severe foraminal narrowing at C6-7 with reduction of disc space in C5-6 and C6-7." As Dr. Henrichsen persuasively testified, some people with foraminal narrowing have accompanying symptoms including nerve impingement that causes radiating pain down the arms and some people with the same condition are asymptomatic.

50. Dr. Henrichsen did not determine respondent was asymptomatic. He concluded, however, that her subjective complaints exceeded the objective findings. Based on his review of the RN job description, he concluded respondent's position was largely administrative and the physical demands were minor. Dr. Henrichsen acknowledged respondent's doctors had given her work restrictions, but determined these restrictions were not because respondent was physically incapable of performing the duties. Rather, the restrictions were prophylactic measures to prevent further injury. For this reason, Dr. Henrichsen opined respondent was not substantially incapacitated from performing her usual job duties.

51. Drs. Sclafani and Balagtas both stated that respondent's work restrictions were because CPR or lifting and carrying would exacerbate her symptoms. Both believed respondent would be able to attempt CPR, but not be able to continue due to

pain. Additionally, pain and fatigue can interfere with one's abilities to focus and provide medical care. Dr. Henrichsen's report confirmed respondent reported fatigue and concentration issues.

52. In large part, the three doctors agreed that respondent had limitations and that her work duties would exacerbate her symptoms. Restrictions would prevent future injuries. Dr. Henrichsen opined this is not a basis for disability retirement under CalPERS's standards. Dr. Henrichsen is correct that prophylactic restrictions cannot be the basis for disability retirement in most circumstances. Here, however, the job description, Post Orders, and physical description of the RN's job duties at Mule Creek specifically require an RN to be able to provide basic life support and life-saving measures in an emergency, remain alert and focused at all times, and "respond to dangerous or emergency situations," which could include "physical defense of self or others," and "protect and maintain safety and security of persons." Dr. Henrichsen's interpretation of overtime was not that it was mandatory, but that an RN could work overtime on her election. Dr. Henrichsen found that respondent's position involves "only 40 percent" patient care and is otherwise administrative. Consequently, he determined her job was not physically demanding and her condition not disabling.

53. Forty percent, however, is not a small percentage of an RN's time, especially considering the demands of the position. While she may "only" provide patient care 40 percent of the time, during that time, she may be called upon to intervene with life-saving measures including CPR, physically defend herself or others, and respond to emergency situations. Respondent's doctor restricted her from performing CPR and lifting over 15 pounds. While respondent may not be required to perform these tasks daily, the RN job description clearly states "there are no non-

essential duties." It is essential that respondent be able to perform all the listed duties as her, her coworkers', or her patients' lives may depend on it.

54. Dr. Henrichsen's opinion that respondent is not substantially incapacitated from performing her usual and customary duties was not persuasive. Conversely, even though Drs. Balagtas and Sclafani evaluated respondent for worker's compensation purposes, which applies a different standard, their opinions that respondent's condition puts her and her coworkers at risk were persuasive. Dr. Sclafani stated that with her restrictions and her pain, when she is faced with an emergency situation that is physically demanding, she will not be able to perform, or if she can, she will put herself, her coworkers, and her patients at risk. The RN job description states it is essential that nurses perform these duties "without compromising their health and well-being or that of their fellow employees or that of inmates." Respondent is unable to do this.

55. Additionally, respondent presented persuasive evidence that overtime is unpredictable and mandatory. As Drs. Balagtas and Sclafani stated, if respondent works multiple consecutive nursing shifts, she will put herself and her coworkers at further risk.

56. At the time of her application, respondent was substantially incapacitated from performing the essential duties required of a Registered Nurse in a corrections facility. Her disability is not limited to 12 months or less. Consequently, her application for industrial disability retirement must be granted.

## LEGAL CONCLUSION

Respondent established by a preponderance of the evidence that she is substantially incapacitated from performing the usual duties of a Registered Nurse at Mule Creek State Prison.

## ORDER

Cecilia LeBlanc's appeal of CalPERS's denial of her application for disability retirement is GRANTED.

DATE: July 22, 2021

*Heather M. Rowan*

Heather M. Rowan (Jul 22, 2021 15:17 PDT)

HEATHER M. ROWAN

Administrative Law Judge

Office of Administrative Hearings