

ATTACHMENT E

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:**

MARIBETH D. ARAGONES, Respondent,

and

**PELICAN BAY STATE PRISON, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, Respondent,**

Agency Case No. 2020-0067

OAH No. 2020040236

PROPOSED DECISION

This matter was heard before Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, via videoconference from Sacramento, California, on January 14, 2021.

Staff Attorney Charles Glauberman represented the California Public Employees' Retirement System (CalPERS).

Maribeth D. Aragones (respondent) represented herself.

CalPERS properly served Pelican Bay State Prison, California Department of Corrections and Rehabilitation (CDCR), with the Statement of Issues and Notice of Continued Hearing. CDCR made no appearance. This matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on January 14, 2021.

ISSUE

Was respondent permanently disabled and substantially incapacitated from performing her usual and customary duties as a Licensed Vocational Nurse (LVN) for CDCR based on orthopedic (cervical and lumbar spine) conditions when she applied for industrial disability retirement?

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent worked for CDCR as an LVN. On June 6, 2019, respondent signed and filed with CalPERS a Disability Retirement Election Application (application).
2. On her application, respondent specified that her disability occurred on two dates: "November 30, 2017 injury – Lumbar Spine (protruding discs L4-L5, and L5-S1, and annular tear) July 23, 2018 injury – Cervical spine (protruding discs on C3-4, C4-5, C5-6, C4-5 strain and significant discopathy, central disc protrusion, right foramina, with central canal stenosis)."

3. Respondent specified that her disability occurred as follows:

I was injured carrying the emergency backpack when I worked a mandatory overtime in B-Yard at Pelican Bay State Prison during sick call [illegible] pick up from housing units. I worked mandatory overtime on November 30, 2017 from 3 p.m. to 10 p.m., I also worked from 7 a.m. to 3 p.m. at my regular post that day. The pain on my lower back, right thigh and leg started the next day.

4. Respondent described her limitations and preclusions due to this condition as: "No heavy lifting, twisting, repetitive use of upper extremities or lower extremities, feel pain when bending, kneeling, walking on uneven ground, walking for more than a mile, sitting for more than [an] hour and standing for more than 15 minutes." Respondent specified that her condition affected her ability to perform her job because "pain affects [her] focus and concentration at work. Pain slows [her] down from accomplishing [her] tasks and most of the duties of an LVN aggravates [her] injury because [she is] injured. [She poses] a risk to [herself and her] co-workers also, and the chance to get another injury is high."

5. When asked to describe her current job duties, respondent specified:

Spend hours on the computer to chart, to assist providers, to do research, responds to emergency alarms, dispenses medications, check vital signs of patients and perform LVN skills (wound care) etc. Assist tele-med providers and other providers at work. Do inventories, attends trainings and

meetings, coordinates with custody regarding safety in the facility.

6. By letter dated December 2, 2019, CalPERS notified respondent that her application for industrial disability retirement had been denied. Respondent timely appealed from the denial.

Duties of an LVN

7. CalPERS submitted two exhibits that describe the duties of an LVN: (1) a California Correctional Health Care Services LVN (Safety) Essential Functions List (essential functions list); and (2) a completed CalPERS Physical Requirements of Position/Occupational Title form for an LVN assigned to CDCR's Pelican Bay State Prison (physical job requirements form), signed by respondent and a CDCR Return to Work Coordinator on June 7, 2019.

8. According to the essential functions list, the duties of an LVN include assisting in the delivery of basic patient care services within the scope of LVN practice in a state correctional facility. Among other things, the LVN must: work long hours in security institutions, including weekends and holidays as the needs of the institution dictates; remain alert, focused and effectively evaluate and respond to dangerous or emergency situations to maintain a safe and secure environment and anticipate problems (e.g., harm to self or others, escapes, changing in inmates mental functioning, etc.); communicate effectively both orally and in writing; document, prepare and maintain reports and records; inspect, lock and secure clinical areas and medical materials; observe and report contraband and dangerous or self-injurious inmate behavior; and wear personal protective equipment, clothing and breathing apparatus to prevent injuries and exposures to blood and airborne pathogens.

9. The LVN must maintain sufficient strength, agility, and endurance to perform during stressful situations without compromising the health and well-being of self and others; access all floors of multi-level facilities separated by flights of stairs; stoop, bend, reach, twist and stretch, occasionally to continuously, to allow the LVN to observe and manipulate objects around them; frequently lift and carry up to 50 pounds and occasionally lift and carry over 100 pounds; walk occasionally to continuously up to long distances indoors and outdoors in various weather conditions; sit occasionally to continuously while performing record keeping; and perform regular duties on a wide range of working surfaces, which may be uneven or rough or become slippery due to weather or spillage of liquids.

10. According to the physical job requirements form, an LVN occasionally (i.e., up to three hours) runs, crawls, kneels, squats, pushes and pulls, engages in power grasping, lifts and carries between 51 and 100 pounds, walks on uneven ground, and drives. An LVN is also occasionally exposed to excessive noise, extreme temperatures, humidity and wetness, dust, gas, fumes, or chemicals, and works with biohazards. An LVN frequently (three to six hours) sits, stands, climbs, bends the neck and waist, twists the neck and waist, reaches above and below the shoulder, engages in simple grasping, repetitively uses the hands, uses a computer keyboard and mouse, and lifts or carries between 11 pounds and 50 pounds. An LVN constantly (over six hours) walks, engages in fine manipulation, lifts or carries up to 10 pounds, and works with biohazards such as blood-borne pathogens, sewage, and hospital waste.

Respondent's Testimony

11. Respondent is 50 years old and worked as an LVN for CDCR since January 2012. She injured her lumbar spine on November 30, 2017, and injured her cervical spine on July 23, 2018. Respondent last reported to duty on August 6, 2018.

12. Respondent testified that LVN's are "front-liners" performing critical duties at CDCR's institutions. They provide patient medications, assist physicians with examinations and procedures, draw blood, and maintain critical patient information in computer databases. The most challenging part of the job for respondent has been responding to emergencies and alarms. Emergencies and alarms may result from an inmate experiencing cardiac arrest, drug overdoses, fights and riots. When responding to emergencies, an LVN must frequently run across large yards at the institution, sometimes pushing medical carts in harsh weather. When responding to fights or riots, an LVN is sometimes exposed to powder grenades used by correctional officers to control and submit inmates.

13. An LVN can be mandated to work overtime hours "whether [they] like it or not." Respondent was working as an LVN care coordinator when she was first injured in November 30, 2017. She carried a heavy backpack containing medical equipment that weighs approximately 20 pounds, in addition to wearing a utility belt that weighs approximately one pound and a "stab-proof" vest that weighs approximately five pounds. After responding to an emergency on that date, respondent experienced a dull pain in her lower back, right leg and hip. The pain increased over time and spread to her right knee and right ankle.

14. In early July 2018, while working in CDCR's Administrative Segregation Unit, respondent was typing on her computer with one hand while talking on the telephone and holding the telephone in her other hand. She suddenly experienced a "shooting pain" in her back she assumed would relent with time. Approximately three weeks later, on July 23, 2018, she reinjured or exacerbated this injury when responding to an inmate fight. While running across the yard carrying her medical equipment, she experienced extreme back pain. Later that night, she woke up with severe right hand

pain. Respondent was unable to return to work for approximately two days. She received physical therapy to treat her symptoms, but still experiences pain. Respondent continues to treat her symptoms with physical therapy, cortisone injections, and functional restorative therapies that include, aqua-therapy and acupuncture.

15. Respondent finds working in a prison is very stressful, which exacerbates her symptoms. She has attempted to reduce her stress by engaging in tai chi, yoga, and other holistic relaxation techniques.

16. Respondent testified that she cannot perform her job duties because she cannot sit for over three hours without experiencing pain and having to "move and shift" while sitting and massaging her back. She testified that she cannot stand for three to six hours because it "triggers" her sciatica. She testified that she cannot run, climb stairs, reach above her shoulders, lift over 11 pounds, or twist at the neck because those activities cause her so much pain she is unable to work. She also stated that she is unable to crawl, as required by her job, because when she does she cannot get up.

17. Respondent testified that she is unable to work mandatory overtime or respond to emergencies while working because those activities cause her to experience disabling pain. She testified that wearing her protective gear and equipment belt causes her pain because it's too heavy. She stated that performing CPR training also causes her severe pain and that her general level of pain while working is so severe that she is unable to remain alert and focused, which causes a risk to herself and others.

Documents Submitted by Respondent

18. Respondent did not call a medical expert to testify on her behalf. Instead, she submitted a UC Davis online healthcare medical note related to a bone scan she received on or about December 14, 2020, and a written statement, prepared by her, dated January 11, 2021. These documents were admitted into evidence as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).¹ The "Assessment" portion of the medical note reflects that respondent has "chronic neck pain, refractory to conservative treatments; C4-5 disk osteophyte complex; C3-4, C4-5 central canal stenosis; and Osteopenia." The "Plan" section of the medical note states: "Request surgical case; Anterior cervical discectomy and fusion C3-4 and C4-5." Respondent's written statement, in part, specifies:

While working mandated over time at Pelican Bay State Prison I was injured on November 30, 2017, on my lumbar spine, at L3-4, and L4-5 levels, and on July 23, 2018 on my cervical spine, C3-4, C4-5, and C5-6 levels. The last MRI for lumbar spine which was completed October 30, 2019, shows mild loss of height and signal on L3-4, decreased disc signal consistent with desiccation and bulging annulus

¹ Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

with central and right paracentral disc protrusion on L4-5.
There is a small annular tear in the bulging disc.

The latest MRI for cervical spine was completed on February 20, 2020. The result shows: 4 mm annular bulge of the posterior margin indenting the thecal sack without central canal stenosis or foraminal stenosis on C3-4, loss of disc height and central disc protrusion [illegible] the thecal sack and projecting 8.6 mm from the posterior margin, appears to be slightly compressing and effacing the spinal cord on C4-5.

Expert Opinion

19. CalPERS called Robert K. Henrichsen, M.D., as its expert at hearing. Dr. Henrichsen is a board-certified orthopedic surgeon and a certified Fellow of the American Academy of Orthopaedic Surgeons. He obtained his medical degree from Loma Linda University in 1967. He was in private practice with Auburn Orthopaedic Medical Group from 1973 until 2011. His practice currently involves performing Independent Medical Evaluations (IMEs) and Qualified Medical Evaluations for a variety of entities. On October 22, 2019, Dr. Henrichsen performed an IME on respondent to determine whether she was substantially incapacitated from performing her former job duties, based on the conditions of her back and cervical spine. Dr. Henrichsen's evaluation included interviewing respondent, conducting a physical examination of respondent's spine and extremities, and reviewing her job functions and medical records. Dr. Henrichsen detailed his evaluation, along with his findings and conclusions, in a 17-page IME report.

20. During the interview, respondent reported pain in her lower back, sciatic-like symptoms into her knee, legs and toes, mostly on the right, neck pain, pain in her right shoulder and arm with tingling, occasional numbness in her hands and feet, and pain so severe at times, after prolonged standing, that she is unable to perform many activities. She reported pain with walking, lifting over 10 pounds, and sitting for more than an hour, and reported that her symptoms are aggravated with twisting, doing laundry and grocery shopping.

21. Dr. Henrichsen's physical examination revealed that respondent had normal strength in her heels and toes. She exhibited no signs of hip muscle weakness. She could squat 40 percent of normal without overt knee crepitus.² Respondent appeared to have equal leg length and had no symptoms of femoral nerve damage. Respondent's lumbar spine curvature was normal while standing, but she did experience more pain with flexion and lateral bending to the right than with other motions. The examination of respondent's hips and knees with full extension revealed a small amount of tenderness in the right and left side of her paraspinal musculature. There was no tenderness of the sacroiliac identified. She reported back pain with active straight leg raises and with hip motion, that was more on the right than the left. There was no evidence of knee or ankle effusion or instability.

22. Evaluation of respondent's cervical spine revealed some pain with rotation to the right, and downward pressure on the top of her head produced some

² A grating sound or sensation produced by friction between bone and cartilage or the fractured parts of a bone.

neck pain. Respondent's biceps and triceps and brachial radiology reflexes were equal to normal, and her upper extremities were similar in circumference.

23. Dr. Henrichsen reviewed several medical records provided for review as part of his evaluation. Those records covered reported injuries and treatment, dating back to December 11, 2017. He also reviewed a CD left by respondent of her cervical spine MRI scan of October 11, 2018, which showed there is degenerative disease at several levels of her cervical spine. The scan reflected there were some degenerative changes at C2-3 and at C3-4. However, Dr. Henrichsen noted in his report that, upon his review of the MRI results, the foramina were clear and he did not see a destructive process. After completing the interview, physical examination and reviewing respondent's medical records, Dr. Henrichsen reached the following diagnostic impressions:

Degenerative disc disease lumbar spine with symptoms of radicular syndrome right lower extremity, degenerative disc disease, degenerative arthritis cervical spine with upper extremity symptoms.

24. In the "Discussion" section of his report, Dr. Henrichsen noted that his examination demonstrated there is some reduced mobility of respondent's spine. She has some discogenic changes as seen on her MRI scan and has some reduced motion in the cervical spine. But, there were no findings that were overtly abnormal except the reduced motion. Dr. Henrichsen noted that respondent symptoms are significantly greater than her overall findings. Her reported significant pain and symptoms were not well supported by his examination findings, nor were they supported by the findings of other physicians in the medical records he reviewed.

25. Dr. Henrichsen testified that although there was evidence that respondent has degenerative disc disease of the lumbar spine, there was no evidence of an existing significant pathology or traumatic injury to respondent's lumbar or cervical spine that supported her claimed incapacity. Based on his review of respondent's essential job functions and physical job requirements, Dr. Henrichsen opined that there were no specific LVN job duties or physical job requirements that respondent was unable to perform. Accordingly, he concluded that respondent was not substantially incapacitated from performing her usual and customary duties as an LVN for CDCR.

26. At CalPERS' request, Dr. Henrichsen prepared three supplemental IME reports, dated October 30, 2019, June 3, 2020, and December 18, 2020, after receiving additional medical records and information about respondent's conditions and symptoms for consideration. The additional records and information did not alter Dr. Henrichsen's opinion that respondent was not substantially incapacitated from the performance of her duties as an LVN for CDCR.

Analysis

27. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, when she applied for industrial disability retirement, she was substantially and permanently incapacitated from performing the usual duties of an LVN for CDCR. Dr. Henrichsen testified in detail about his evaluation and review of respondent's medical history and records. His opinion that respondent was not substantially incapacitated from performing her usual job duties was persuasive. His IME report was detailed and thorough, and his testimony at hearing was clear and comprehensive. The results of his physical

examination and his assessment of respondent's medical records supported his opinion.

28. The burden was on respondent to offer sufficient competent medical evidence at hearing to support her industrial disability retirement application. Respondent did not meet her burden. Her testimony was primarily a recitation of her subjective complaints of pain, treatment methods, and complaints about working extended hours under difficult conditions. She did not produce supportive objective medical findings. She did not call a medical expert to testify at hearing to provide competent medical evidence based on objective findings to support her claimed incapacity. While she did provide hearsay evidence that she had been assessed at her doctor's office for "chronic neck pain," in December 2020, she did not present sufficient evidence to support her claim that she is unable to perform her usual and customary duties.

29. Because respondent failed to offer sufficient competent medical evidence at hearing to establish that, when she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of an LVN for CDCR, her industrial disability retirement application must be denied.

LEGAL CONCLUSIONS

1. To qualify for disability retirement, respondent had to prove that, when she applied, she was "incapacitated physically or mentally for the performance of [her] duties in the state service." (Gov. Code, § 21156.)

2. "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as

determined by the board . . . on the basis of competent medical opinion. (Gov. Code, § 20026.)

3. 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 his usual duties." (Italics in original.) The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 863, explained that prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, the court found that discomfort, which may make it difficult for an employee to perform his duties, is not sufficient in itself to establish permanent incapacity. (See also, *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.)

4. When all the evidence is considered in light of the analyses in *Mansperger, Hosford, Smith, and Keck*, respondent did not establish that her industrial disability retirement application should be granted. She failed to submit sufficient evidence based upon competent medical opinion that, at the time she applied for industrial disability retirement, she was permanently and substantially incapacitated from performing the usual duties of a Licensed Vocational Nurse for CDCR. Consequently, her industrial disability retirement application must be denied.

ORDER

The application of respondent Maribeth D. Aragonés for industrial disability retirement is DENIED.

DATE: February 17, 2021

Ed Washington
Ed Washington (Feb 17, 2021 14:05 PST)

ED WASHINGTON

Administrative Law Judge

Office of Administrative Hearings