

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Reinstatement from Disability

Retirement of:

LEANNE M. TORNOW, Respondent

and

CALIFORNIA STATE UNIVERSITY, LONG BEACH

Agency Case No. 2021-0223 (Accusation)

OAH No. 2021050914

PROPOSED DECISION

Cindy F. Forman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on January 5, 2022.

Austa Wakily, Senior Attorney, represented the California Public Employees' Retirement System (Complainant or CalPERS).

Neither Leanne M. Tornow (Respondent) nor California State University, Long Beach (CSULB) appeared at the hearing.

The ALJ received testimony and documentary evidence. The record was closed and the matter was submitted for decision on January 5, 2022.

SUMMARY

CalPERS terminated Respondent's disability retirement benefits and ordered her reinstatement to her former position as a CSLB police dispatcher based on the findings of an independent medical examiner (IME) and a review of Respondent's medical records. Respondent appealed CalPERS' decision but offered no evidence at hearing to rebut the findings by the IME that she was no longer substantially incapacitated from performing the duties of a police dispatcher. Accordingly, the decision of CalPERS to terminate Respondent's disability retirement benefits and reinstate Respondent to her former position as a CSULB police dispatcher is affirmed.

FACTUAL FINDINGS

Procedural Background

1. Respondent was employed by CSULB as a police dispatcher. By virtue of her employment, Respondent was a state miscellaneous member of CalPERS.

2. On October 18, 2018, Respondent submitted an application to CalPERS for disability retirement based on frozen shoulder and shoulder-hand syndrome. In a letter dated November 5, 2018, CalPERS approved Respondent's request, finding Respondent substantially incapacitated from the performance of her usual duties as a Police Dispatcher with CSULB based upon her orthopedic (frozen left shoulder) condition. The letter further stated that if Respondent was under the minimum age for

service retirement, CalPERS had the right to reexamine her periodically to verify her continued eligibility for retirement. (Ex. 4.) Respondent immediately retired for disability effective November 5, 2018, based on an orthopedic (left shoulder) condition.

3. In a letter dated November 27, 2019, CalPERS informed Respondent that it was initiating a review to determine if she remained eligible to receive disability retirement benefits pursuant to Government Code section 21192. As part of that review, CalPERS asked Respondent to complete a retiree questionnaire and to provide records from her treating physician regarding her continued disability status. The letter informed Respondent that CalPERS would schedule Respondent to be examined by an IME if it found the submitted medical information to be insufficient. (Ex. 5.)

4. At the request of CalPERS, Michael J. Chuang, M.D., performed an independent medical examination of Respondent on March 6, 2020, to evaluate whether Respondent could resume her duties as a CSULB police dispatcher. At the time of the examination, Respondent was 49 years old, below the age for voluntary service retirement applicable to members of her classification. Dr. Chuang prepared a report of his examination on March 23, 2020. (Ex. 10.)

5. In a letter dated December 30, 2020, CalPERS informed Respondent that it had completed a reevaluation of her qualifications for disability retirement and reviewed reports prepared by her treating physician as well as by Dr. Chuang. Based on those reports, CalPERS determined Respondent was no longer substantially incapacitated from the performance of her job duties as a CSULB police dispatcher due to her orthopedic (left shoulder) condition. In accordance with Government Code section 21193, the letter informed Respondent she would be reinstated to her former

position with CSULB. The letter also informed Respondent of her right to request a review of the medical file upon which CalPERS had made its determination.

6. In a letter dated January 22, 2021, Respondent appealed the decision by CalPERS to terminate her disability retirement. The letter states that she has not recovered from Complex Regional Pain Syndrome that resulted from shoulder surgery. In support of her appeal, Respondent included a copy of the Qualified Medical Evaluation report prepared by Aaron R. Allen, M.D., Q.M.E., assessing the condition of Respondent's left arm and shoulder. (Ex. 4.)

7. Keith Riddle, Chief of the Disability and Survivor Benefits Division of CalPERS, filed the Statement of Issues on May 28, 2021, while acting in his official capacity.

8. On November 5, 2021, Respondent and CSULB were properly served notice of the instant hearing date, time, and access information by first class U.S. mail and certified mail under Government Code section 11509.

9. Considering the absence of any appearance on behalf of or by Respondent despite the timely and proper service of notice, this matter proceeded as a default prove-up pursuant to Government Code section 11520.

Respondent's Job Duties

10. Respondent was employed as a police dispatcher with the CSULB Police Department for 10 years. Her job involved answering emergency calls, radio traffic control, customer service, data entry, and monitoring security cameras and alarms. She normally worked 12 hours per day and 26 to 40 hours per week.

11. The regular physical demands of Respondent's job as a police dispatcher included constant (over six hours) sitting, repetitive use of hands, keyboard use, and mouse use, and occasional (up to three hours) standing, walking, squatting, bending from the neck and waist, twisting the neck and waist, lifting and carrying objects weighing up to 10 pounds, and driving. The position did not entail running, crawling, kneeling, climbing, reaching above or below the shoulder, pushing or pulling, fine manipulation, power grasping or simple grasping, carrying or lifting any objects weighing more than 10 pounds, working with heavy equipment, or walking on uneven ground. (Ex. 15.) In her disability retirement application, Respondent disputed the description of the physical demands of her job. She wrote that the position required reaching because she needed to reach to touch a computer monitor screen. (Ex. 3, p. A23.)

August 28, 2017 Incident

12. On August 28, 2017, Respondent, while performing her usual duties as a CSULB police dispatcher, reached over to touch the computer screen with her left arm and developed pain in her shoulder. She was able to finish her job duties that day. The injury was witnessed by a co-worker and reported to her supervisor.

13. According to Dr. Chuang's IME report, Respondent stopped working as a police dispatcher on September 11, 2017, because of her injury.

Respondent's Medical Treatment

14. The only medical report regarding Respondent's medical condition admitted into evidence was the IME report prepared by Dr. Chuang on March 6, 2020. (Ex.10.) Dr. Chuang's report contains a section titled "Review of Records," which cites

pertinent records from Respondent's medical providers. The following description of Respondent's medical history is gleaned from Dr. Chuang's report.

15. On September 11, 2017, Juan A. Escobar, M.D., diagnosed Respondent's injury as frozen shoulder, a disease process where a minor trauma to the shoulder leads to inflammation in the capsule causing pain and loss of motion. An MRI of her shoulder confirmed Respondent had developed a frozen shoulder from chronic impingement. The MRI revealed no other abnormalities or tears. Dr. Escobar recommended Respondent start a course of physical therapy (PT).

16. On October 31, 2017, Ralph Venuto, M.D., an orthopedic surgeon, took over Respondent's care. Dr. Venuto administered a steroid injection into Respondent's shoulder and ordered her to attend PT three times a week for four weeks to address her shoulder pain. The initial prescribed course of PT proved insufficient, and Dr. Venuto prescribed additional PT sessions over the next several months.

17. After Respondent's shoulder showed no improvement from PT, Dr. Venuto performed surgery on Respondent's shoulder in February 2018. The surgery revealed a labral tear in the shoulder. During the surgery, Dr. Venuto surgically repaired the tear and performed closed manipulation, arthroscopy, and extensive debridement of Respondent's shoulder. Dr. Venuto then prescribed additional PT, muscle relaxants, and pain medication.

18. In April 2018, Respondent continued to complain of pain in her left shoulder. Dr. Venuto diagnosed Respondent with shoulder-hand syndrome resulting from the surgery. He administered two injections or blocks, and he reported some improvement. He also continued Respondent's PT.

19. After April 2018, Respondent continued to complain of increasing pain in her shoulder and hand. Dr. Venuto observed that her hand and wrist were swollen. Dr. Venuto referred Respondent to a pain management consultant, who administered medication. Respondent continued to undergo PT. In December 2018, Dr. Venuto observed that Respondent's passive range had increased significantly.

20. In January 2019, Respondent complained of burning in her left hand that intermittently radiated to her upper arm. She continued to undergo PT and continued to receive medication for her shoulder and hand pain.

21. On March 5, 2019, Respondent still complained to Dr. Venuto of burning pain in her left hand and shoulder. She also reported tending to drop things with her left hand. However, Dr. Venuto noted in his progress report that day that Respondent showed significant improvement in her shoulder's range of motion. His treatment plan was for Respondent to finish her course of PT and then go on a home exercise program. (Ex. 10, p. A70.)

22. On April 9, 2019, in his Physician's Re-Evaluation of Current Disability, Dr. Venuto noted Respondent's continued pain in her left shoulder, burning pain down her arm into her left hand, and intermittent feelings of cold in her left hand. Dr. Venuto reported that Respondent should be restricted as follows: no repetitive movement above the level of the shoulder and no lifting over 15 pounds. Dr. Venuto stated that respondent may need care in the future by a neurologist or orthopedist and also require nerve blocks. (Ex. 10, pp. A70–A71.)

Dr. Chuang's Examination

23. Dr. Chuang testified at hearing regarding his IME examination and report. Dr. Chuang is a board-certified orthopedic surgeon with a board-certified subspecialty

in sports medicine. He is a fellow of the American Orthopaedic Society for Sports Medicine and a Fellow of the American Academy of Orthopaedic Surgery. He has been in private practice since 2014. He graduated from Drexel University College of Medicine in 2008, interned and did his residency in orthopedic medicine at State University of New York Downstate from 2008 to 2013, and was a fellow at the Sports Clinic Orthopedic Medical Associates in Laguna Hills, California, from 2013 through 2014.

24. To prepare his IME Report, Dr. Chuang spent an hour examining Respondent and another hour reviewing her records. At the examination, Respondent listed her chief complaints as neck pain; upper back pain; left shoulder, upper arm, elbow, and forearm pain; left wrist, hand, and finger pain; and numbness, tingling, and weakness in arms and hands. (Ex. 10, p. A56.) Respondent also complained of weakness in her left hand and arm; stiffness in the left shoulder; swelling in the wrist and hand; pain at night in the entire shoulder and arm; and pain at rest. (*Id.*, at p. A57.) Respondent reported that flexing, bending, carrying, pushing, pulling, reaching, sitting, twisting, turning, driving, lifting, gripping, fine manipulation, and changes in weather, temperature, and humidity aggravated her symptoms. Respondent told Dr. Chuang that she cannot type without immediate pain through her left hand, arm, and shoulder or touch things without feeling burning in her hand.

25. Dr. Chuang's physical examination of Respondent revealed that she is right-hand dominant. He found no evidence of any specific wasting, atrophy, or instability of the left shoulder girdle. Respondent scored 4 out of 5 on a manual strength muscle test of the shoulder girdle for abduction, internal rotation, external rotation, and flexion, and 5 out of 5 for adduction and extension. Dr. Chuang observed that Respondent's shoulder was tender over its anterior and lateral aspects and

Respondent's range of motion was restricted due to pain. However, Dr. Chuang found there was good motion in Respondent's left shoulder with flexion, extension, and abduction and no associated complaints of numbness into the hand. Respondent's gross muscle strength was found to be 5 out of 5.

26. Dr. Chuang's physical examination found no problems with Respondent's elbows. The range of motion of Respondent's elbows fell within normal limits, and Respondent had no complaints of tenderness or discomfort. Respondent scored 5 out of 5 on gross muscle strength testing of her elbows.

27. Dr. Chuang's examination of Respondent's left hand demonstrated full motion of the fingers with no atrophy or deformities. Respondent scored 4 out of 5 on strength testing of her hand and wrist extension and flexion and 5 out of 5 on strength testing of her wrist's ulnar and radial deviation. Respondent scored 5 out of 5 on strength testing of her fingers. Dr. Chuang observed diffuse hypersensitivity to light touch and pinprick on Respondent's left hand. Respondent's grip strength for her left hand was weaker than for her right hand.

28. Based on his examination, Dr. Chuang diagnosed Respondent with chronic pain syndrome, adhesive capsulitis of the left shoulder, ankylosis in the left shoulder, and other specified postprocedural states. He concluded that based on his objective findings, Respondent cannot perform any heavy lifting with her left arm or carry or lift anything weighing more than 15 pounds with her two hands. With these restrictions, Dr. Chuang opined that Respondent was not substantially incapacitated from performing the duties of a CSULB police dispatcher.

29. Dr. Chuang reaffirmed his conclusion regarding Respondent's ability to return to work in a letter to CalPERS dated December 18, 2020, in response to a further

CalPERS inquiry regarding Respondent's condition. (Ex. 12, p. A79.) In that letter, Dr. Chuang states:

[Respondent] is not substantially incapacitated from the performance of her mostly sedentary duties. She works mostly sedentary duties with typing/mouse work, intermittent to occasional lifting of anything over 10 pounds. It does not appear that she has to do frequent or even intermittent overhead work based upon the job descriptions reviewed. . . . She does not appear to be substantially incapacitated from the performance of her job duties as listed.

(Ibid.)

30. Dr. Chuang also had the opportunity to review the qualified medical examination report of Aaron Allen, M.D., Qualified Medical Examiner. According to Dr. Chuang, Dr. Allen examined Respondent on August 13, 2019, and diagnosed her with complex regional pain syndrome and left shoulder pain. In a letter dated February 12, 2021, Dr. Chuang wrote to CalPERS that nothing in Dr. Allen's report changed his opinion that Respondent was not substantially incapacitated from working as a CSULB Police Dispatcher. (Ex. 14.) According to Dr. Chuang's testimony, he disagreed with Dr. Allen's permanent impairment findings relating to Respondent's shoulder because the nerve conduction studies of Respondent's shoulder had been normal.

31. At hearing, Dr. Chuang agreed that frozen shoulder would have prevented Respondent from performing her job duties. However, Dr. Chuang testified frozen shoulder usually resolved in two years, and Respondent's increased range of motion evidenced that the condition had resolved. Dr. Chuang concluded that

Respondent's shoulder-hand syndrome was mild to moderate based on her "good" gripping ability, which Dr. Chuang noted Dr. Allen also observed in his report. Dr. Chuang further concluded that Respondent could perform light sedentary duties, including using a keyboard, particularly since she is right-handed. Dr. Chuang acknowledged that Respondent might feel pain while performing her duties as a police dispatcher. However, he testified Respondent's fingers were not impaired and whatever pain Respondent experienced was manageable and not substantially incapacitating.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. CalPERS has the burden of proving by a preponderance of the evidence that Respondent is no longer incapacitated from performing the duties of a CSULB police dispatcher. (Evid. Code, §§ 500, 115.)

Applicable Statutes

2. Government Code section 20026 defines the terms "disability" and "incapacity for performance of duty," when used as a basis for retirement, to mean a "disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months, as determined by the board" that is based on "competent medical opinion."

3. Government Code section 21060, subdivision (a), provides that a member is eligible for service retirement if he or she has attained the age of 50 and is credited with five years of state service.

4. Government Code section 21156 provides that if the evidence demonstrates that the member is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the Board shall immediately retire him or her for disability.

5. Government Code section 21192 provides:

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. . . . The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties

of the position with regard to which he or she has applied for reinstatement from retirement.

Evaluation

6. A disability retirement is considered a temporary separation from state service. (Gov. Code, § 19143; Cal. Code Regs., tit. 2, § 446.) A state civil service member therefore can be reinstated once the disability ends. (Gov. Code, § 21193.)

7. "Incapacitated" under Government Code section 21156 means the person must be substantially unable to perform his or her usual job duties. Disability is not an inability to perform fully every function of a given position. When a person can perform his or her usual and customary job duties, even though doing so may be difficult or painful, the employee is not substantially incapacitated. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886–887.) Mere difficulty in performing certain tasks is also not enough to support a finding of disability. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 855, 862.)

8. Respondent was under the minimum age for voluntary service retirement applicable to members of her classification when Dr. Chuang examined her to determine whether she was still incapacitated for duty as a police dispatcher for CSULB. After performing a comprehensive examination of Respondent, Dr. Chuang determined that Respondent could perform her duties as a police dispatcher with restrictions on lifting weights of more than 10 pounds. The description of Respondent's physical demands as a CSULB police dispatcher does not require her to lift more than 10 pounds. Dr. Chuang acknowledged that performing her police dispatcher duties may cause Respondent pain but the pain could be managed and would not substantially incapacitating. There was no evidence offered to the contrary.

Accordingly, CalPERS established by a preponderance of the evidence that Respondent is no longer disabled or substantially incapacitated from the performance of her duties as a CSULB police dispatcher.

ORDER

Respondent Leanne M. Tornow is not disabled or substantially incapacitated based on her left shoulder condition from performing the duties of a police dispatcher for California State University, Long Beach. The decision by CalPERS to terminate Respondent's disability retirement and reinstate Respondent to her former position as a police dispatcher for California State University, Long Beach is affirmed.

DATE: 01/14/2022



CINDY F. FORMAN

Administrative Law Judge

Office of Administrative Hearings