

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 Disability Retirement of:

TERI L. DUNCAN

and

**CENTRAL CALIFORNIA WOMEN'S FACILITY, DEPARTMENT
OF CORRECTIONS AND REHABILITATION, Respondents**

Agency Case No. 2023-0513

OAH No. 2023120591

PROPOSED DECISION

Patrice De Guzman Huber, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on April 4, 2024, from Sacramento, California.

Bryan R. Delgado, Attorney, represented the California Public Employees' Retirement System (CalPERS).

Teri L. Duncan (respondent) represented herself.

There was no appearance on behalf of respondent Central California Women's Facility (CCWF), Department of Corrections and Rehabilitation (CDCR), and a default was taken pursuant to Government Code section 11520.

Evidence was received, the record closed, and the matter submitted for decision on April 4, 2024.

ISSUE

At the time of her application, was respondent substantially incapacitated from performing her usual and customary duties as a Pharmacy Technician for respondent CDCR on the basis of a pulmonary condition (COVID-19)?

FACTUAL FINDINGS

Respondent's Application and CalPERS's Denial

1. Respondent was a Pharmacy Technician at CCWF. On July 29, 2022, respondent signed and thereafter filed with CalPERS an application for disability retirement (application). By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150.

2. In her application, respondent described her disability as "COVID related." She explained her disability occurred on December 24, 2020, when she was exposed to COVID-19 upon entering a quarantined building at CCWF. As a result, she claims she experienced a 75 percent reduction in her ability to stand or walk. Regarding how her condition affected her ability to perform her job, respondent wrote: "Chronic Fatigue - tire easy. Unable to perform specified duties, GERD

[gastroesophageal reflux disease], Headaches.” Respondent is not currently working in any capacity for the CDCR, having last worked on December 24, 2020.

3. CalPERS retained Eli E. Hendel, M.D., to conduct an Independent Medical Evaluation (IME) of respondent concerning her pulmonary condition and issue an IME report. Upon review of the medical evidence, CalPERS determined respondent was not substantially incapacitated from the performance of her duties as a Pharmacy Technician at CCWF. On April 6, 2023, CalPERS notified respondent her application was denied. CalPERS advised respondent of her appeal rights.

4. By letter dated April 27, 2023, respondent appealed and requested a hearing. On December 13, 2023, Sharon Hobbs, Chief of CalPERS’s Disability and Survivor Benefits Services Division, in her official capacity, signed and thereafter filed a Statement of Issues alleging respondent, at the time she filed her application, was not substantially incapacitated from performing her usual and customary duties as a Pharmacy Technician for the CDCR on the basis of her pulmonary condition (COVID-19). The matter was set for an evidentiary hearing before an ALJ of the OAH, pursuant to Government Code section 11500 et seq.

Pharmacy Technician Duties

5. As set forth in the Duty Statement, a Pharmacy Technician is under the supervision of a Pharmacist II and “performs basic services in a pharmacy.” A Pharmacy Technician “assists in maintaining pharmacy operations and . . . preparing prescriptions and maintains records and inventories of drugs, poisons, and narcotics.” Essential functions include: electronically entering prescription information, printing medication labels, conducting inventory, and distributing medications throughout CCWF. Physical

requirements include lifting, carrying, or moving objects up to 40 pounds and frequent standing and walking.

Dr. Hendel's Independent Medical Evaluation

6. On January 13, 2023, at CalPERS's request, Dr. Hendel conducted an IME of respondent and thereafter prepared a report. He has been performing IMEs for CalPERS for 15 years. Dr. Hendel is board-certified in pulmonary medicine, internal medicine, and sleep medicine. In 1984, he earned his medical degree from State University of New York in Brooklyn, New York, and, in 1984, completed a fellowship on pulmonary diseases at University of Southern California, Barlow Hospital. Since 1986, he has operated a private practice on pulmonary diseases and sleep medicine.

7. As part of the IME, Dr. Hendel interviewed respondent, obtained a medical history, and conducted a physical examination. He reviewed respondent's job description and her medical records. Dr. Hendel then assessed whether respondent suffers from an actual and present pulmonary impairment caused by COVID-19, which rises to the level of substantial incapacity to perform her job duties. Dr. Hendel testified at hearing consistent with his IME report.

HISTORY OF INJURY AND RESPONDENT'S COMPLAINTS

8. Respondent told Dr. Hendel she was injured on December 24, 2020, and has not returned to work since. Although her doctor permitted her to return to work, respondent claimed CCWF was unable to accommodate her. Prior to her injury, respondent worked part time as a Pharmacy Technician. Each week, she worked two eight-hour shifts and one four-hour shift.

9. Respondent described the circumstances underlying her injury. On December 23, 2020, she made three medication deliveries to an area quarantined for COVID-19. On December 24, 2020, respondent felt dizzy at work. She did not complete her shift and went home early. On December 30, 2020, she suffered a syncope spell and was taken to the hospital, where she tested positive for COVID-19. Respondent also tested positive for pneumonia. She was discharged after 24 hours and prescribed medications.

10. Thereafter, respondent quarantined for two weeks, with telephone consultations with Rozanne Hug, M.D., her primary care physician. Dr. Hug permitted her to return to work "at full capacity" by February 2021. In March 2021, respondent underwent a pulmonary function test but did not receive a copy of the results. At some point, respondent also began seeing a physician for workers' compensation, Michael Castillo, M.D. In April 2021, Dr. Castillo placed respondent on modified duty, with restrictions on climbing ladders or using scaffolds. In December 2022, she received a neuropsychological evaluation but did not receive a copy of the results.

11. Respondent told Dr. Hendel, since her injury, she suffers from fatigue, poor recall and focus, and pain and lost her sense of smell. Since having contracted COVID-19, respondent may be able to perceive a scent if it is strong. She can perform activities of daily living such as cooking, cleaning, driving, and shopping, but she does not engage in physical exercise. She also helps care for her elderly parents for a few hours each day. However, she tires easily and struggles remembering recipes, driving directions, or a shopping list without notes. She experiences pain "all over" her back and joints. Respondent also reported to Dr. Hendel, since her injury, she now experiences hiccups, excessive yawning, hoarseness, and ringing in the ear.

12. As a Pharmacy Technician, respondent lifted up to 25 pounds frequently and up to 50 pounds infrequently. She stood constantly, walked infrequently, and never or rarely climbed. Respondent constantly used her hands for simple grasping or fine manipulation. Now with her limitations, she reported to Dr. Hendel she can lift up to 20 pounds and walk for up to two-thirds of the workday. Respondent can perform simple grasping or fine manipulation with her hands for approximately two-thirds of the workday.

PHYSICAL EXAMINATION

13. Dr. Hendel conducted a physical examination. He observed respondent completed sentences without stopping to breathe. He examined respondent's lungs with a stethoscope. They were normal, without wheezing or signs of a mass. Respondent's breath sounds were clear. She did not report any pain upon breathing. Respondent's blood tests were negative for inflammation markers for COVID-19.

DIAGNOSES

14. Based on Dr. Hendel's evaluation of respondent and her medical records, he did not diagnose respondent with a pulmonary condition related to COVID-19. During respondent's interview and physical examination, Dr. Hendel observed she did not present with pulmonary or respiratory issues. Specifically, respondent did not experience shortness of breath at rest or while performing activities of daily living, and her lungs functioned normally. Respondent did have other non-pulmonary medical diagnoses that existed prior to COVID-19. However, these preexisting issues did not appear to have limited her ability to perform her usual and customary job duties.

15. Respondent's reported limitations on walking, simple grasping or fine manipulation with her hands, and lifting did not incapacitate her job performance. She

infrequently walked on the job. Using her hands primarily consisted of filling out prescription orders. Respondent's lifting limitation would affect her performance, though not significantly. Dr. Hendel opined respondent was not substantially incapacitated from the performance of her usual duties as a Pharmacy Technician.

Respondent's Evidence

16. Respondent testified she suffers from swollen feet and back pain, GERD, and "brittle bones," medical issues she claimed were not present before she contracted COVID-19. Although respondent is able to perform activities such as cooking and cleaning, she frequently takes breaks due to fatigue, swelling, and pain. However, she acknowledged approximately two years before she contracted COVID-19, she began suffering from back pain, for which she continues to receive periodic injections. Respondent also occasionally takes pain medication for fibromyalgia.

17. Respondent testified she contracted a bacterial infection related to GERD in April 2023. She sent a breath sample to Pedram Enayati, M.D., a gastroenterologist, for testing. Respondent testified Dr. Enayati told her the bacterial infection was caused by COVID-19.

18. Respondent testified she learned she had "brittle bones" in March 2024, after a bone density scan. She testified Robin Ruiz, M.D., diagnosed her with "dense" bones. Respondent did not explain why she initially described her condition as "brittle bones" when Dr. Ruiz said "dense." Regardless, Dr. Ruiz did not tell her COVID-19 caused her condition. However, respondent believes this is the case because she did not have this issue before COVID-19.

19. Respondent's concerns about returning to work include walking the half mile between the CCWF entrance and the pharmacy and carrying 35-pound bags of

medication to deliver throughout the facility. Respondent testified she asked CCWF for an accommodation. She stated "Eugene," her supervisor, and Alyssa Eisner, the return to work coordinator, each told her no accommodation was available. As a result, respondent has not returned to work since December 24, 2020.

20. Respondent believes CCWF is responsible for her contracting COVID-19 and she "should be compensated." She conceded, "I can go back [to work], but how long will I make it?" Respondent fears contracting COVID-19 again and the risk of death. She stated, "No one is protecting me."

Analysis

21. Respondent seeks disability retirement based on a COVID-19 related disability. She has the burden to offer evidence at hearing to support her application. However, she failed to meet her burden. Respondent did not provide competent medical evidence, by medical expert or medical documentation, to support her testimony on the long-term effects of COVID-19 and how they affect her job performance. Respondent's fear of contracting COVID-19 again and the risk of death, although understandable, does not establish substantial incapacity.

22. In contrast, Dr. Hendel testified in detail about his evaluation and review of respondent's medical history and records. He found respondent did not suffer from an incapacitating pulmonary or respiratory condition. His IME report was detailed and thorough, and his testimony was clear, comprehensive, and well-supported by the evidence. Dr. Hendel's opinion that respondent was not substantially incapacitated from the performance of her usual and customary duties as a Pharmacy Technician was persuasive.

23. When all the evidence is considered, respondent failed to establish, upon competent medical evidence, at the time she filed her application she was substantially incapacitated from performing her usual and customary duties as a Pharmacy Technician for the CDCR on the basis of a pulmonary condition (COVID-19). Accordingly, her application must be denied.

LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21150, subdivision (a), which provides, any state miscellaneous member "incapacitated for the performance of duty shall be retired for disability . . . if . . . she is credited with five years of state service, regardless of age."

2. To qualify for disability retirement, respondent must prove, at the time she applied, she was "incapacitated physically or mentally for the performance of . . . her duties." (Gov. Code, § 21156, subd. (a)(1).) 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. Incapacity for the performance of duty "means the substantial inability of the applicant to perform [her] usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Substantial inability to perform usual duties must be measured by considering an applicant's abilities. Discomfort, which

makes it difficult to perform, is insufficient to establish permanent incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Bd. of Admin. of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862 (*Hosford*.) A condition or injury that may increase the likelihood of further injury or a fear of future injury does not establish a present "substantial inability." (*Hosford, supra*, 77 Cal.App.3d at pp. 863-864.)

4. Respondent has the burden to demonstrate she is permanently and substantially unable to perform her usual duties such that she is permanently disabled. (*Harmon v. Bd. Of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689 (*Harmon*); *Glover v. Bd. of Retirement* (1980) 214 Cal.App.3d 1327, 1332.) To meet this burden, respondent must provide competent, objective medical evidence to establish, at the time of her application, she was permanently disabled or incapacitated from performing the usual duties of her position. (*Harmon, supra*, 62 Cal.App.3d at p. 697.)

5. Respondent did not present competent, objective medical evidence to establish she was permanently disabled or substantially incapacitated from performance of her duties as a Pharmacy Technician at the CDCR at the time she filed her disability retirement application. Therefore, respondent is not entitled to disability retirement pursuant to Government Code section 21150.

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ORDER

Respondent Teri L. Duncan's application for disability retirement is DENIED.

DATE: May 3, 2024



PATRICE DE GUZMAN HUBER

Administrative Law Judge

Office of Administrative Hearings