

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 Industrial Disability
Retirement of:**

**CHRISTINE V. HEANEY and SUBSTANCE ABUSE TREATMENT
FACILITY, CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, Respondents**

Agency Case No. 2023-0983

OAH No. 2024060492

PROPOSED DECISION

Marcie Larson, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on October 14, 2024, from Sacramento, California.

Mehron Assadi, Staff Attorney, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

Respondent Christine V. Heaney appeared at the hearing and represented herself.

There was no appearance by or on behalf of the Substance Abuse Treatment Facility, California Department of Corrections and Rehabilitation (Department). The Department was duly served with a Notice of Hearing. The matter proceeded as a default against the Department pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record closed, and the matter was submitted for decision on October 14, 2024.

BACKGROUND AND ISSUE

Respondent was employed as a Licensed Vocational Nurse (LVN) for the Department. On March 20, 2019, respondent applied for industrial disability retirement based on her right wrist condition (orthopedic condition). Respondent's application was approved effective April 4, 2019. She was 35 years old.

Because respondent was under the minimum age for voluntary service retirement, pursuant to Government Code section 21192, on October 12, 2022, CalPERS sent respondent to an Independent Medical Evaluation (IME). CalPERS reviewed medical reports concerning respondent's orthopedic condition and determined she was no longer substantially incapacitated from performing the duties of an LVN with the Department. Respondent appealed CalPERS's determination.

The issue for Board determination is whether CalPERS established that respondent is no longer disabled or substantially incapacitated from performing the usual duties of an LVN based on her orthopedic condition.

FACTUAL FINDINGS

1. On March 20, 2019, respondent submitted an application for industrial disability retirement (application) with CalPERS. At the time, respondent was employed as an LVN with the Department. By virtue of her employment, respondent is a state safety member of CalPERS.

2. In filing the application, respondent claimed her specific disability was her right wrist, which included a "tear of the radial aspect of the right triangular fibrocartilage complex." Respondent also wrote that her limitations and preclusions included "no lifting, pushing, carrying, or pulling over five (5) pounds and no performing CPR."

3. On July 3, 2019, CalPERS notified respondent that her application for industrial disability retirement was approved, effective immediately. The letter stated that respondent was found to be substantially incapacitated from the performance of her usual duties as an LVN for the Department based upon her orthopedic condition. CalPERS advised respondent that she may be reexamined periodically to determine her qualification for reinstatement if she was under the minimum age for service retirement. Respondent was 35 years old at the time of her retirement. She was under the minimum age for service retirement.

4. On October 12, 2022, CalPERS notified respondent that it would reexamine her disability retirement. The reexamination included an IME performed by Don Williams, M.D., on August 18, 2023.

5. On September 19, 2023, CalPERS notified respondent that based upon a review of medical evidence and reports, CalPERS determined she was no longer

substantially incapacitated from performing the job duties of an LVN for the Department based on her orthopedic condition. CalPERS informed respondent that she would be reinstated to her former position and advised her of her appeal rights. Respondent timely filed an appeal and requested a hearing.

6. On June 6, 2024, Sharon Hobbs, Chief of the Disability and Survivor Benefits Division for CalPERS, signed and filed the Accusation. Thereafter, the matter was set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Respondent's Employment History and Work Injury

7. On November 2, 2017, while working as an LVN for the Department, respondent's wrist was injured responding to an alarm. Respondent "came upon an inmate who had his throat slashed." Respondent "kneeled down in order to apply pressure with left hand to the wound." While respondent was attempting to rise from the ground to help lift the inmate onto a gurney, she "pushed off the ground with [her] right wrist." She slipped and her right wrist rolled underneath her, causing injury. Respondent immediately sought treatment and filed a workers' compensation claim for her injury.

Duties of an LVN

8. As set forth in the Duty Statement, an LVN for the Department must be able to perform essential functions including the "[a]bility to perform general patient nursing care." The care includes:

application of ace bandages, restraints, postural support devices, and preformed splints, assisting a physician, assisting patients with activities of daily living, bowel care, catheterization of the bladder, application of cold/warm compresses, colostomy care, sterile and non-sterile dressing changes, ear irrigation, electrocardiogram, finger stick blood glucose testing, gastrostomy feeding, harris flush conduit care, insertion of nasogastric tubes, specimen collection, tracheotomy care, wound irrigation, monitoring of blood glucose, [and] maintaining infection control.

Additionally, an LVN must be able to work in “both minimum and maximum security institutions as well as male and female correctional institutions and youth correctional facilities.” An LVN must also be able to “in an emergency, perform lifesaving nursing procedures that include basic cardio-pulmonary resuscitation and management/intervening of disruptive/assaultive behavior.” An LVN must also “[l]ift and carry occasionally to frequently lift and carry in the light (20 pound maximum) to medium (50 pound maximum) range frequently throughout the workday and in the very heavy lifting range (over 100 pounds) occasionally, such as preventing patient from falling.”

9. On January 11, 2019, respondent and the Department’s Return to Work Coordinator signed a “Physical Requirements of Position/Occupational Title” form (Physical Requirements form). The Physical Requirements form was submitted to CalPERS. According to the Physical Requirements form, when working as an LVN, respondent: (1) constantly (over six hours) sat, stood, walked, bent and twisted her neck and waist, reached above and below the shoulders, pushed and pulled, engaged

in fine manipulation, simple grasped, repetitively used her hands, used a keyboard and mouse, and was exposed to excessive noise; (2) frequently (three to six hours a day) power grasped, lifted/carried up to 50 pounds, walked on uneven ground, was exposed to dust, gas, fumes, or chemicals and worked with biohazards; (3) occasionally (up to three hours), kneeled, climbed, squatted, lifted/carried from 51 to 100 pounds, drove, was exposed to excessive noise and used special visual or auditory protective equipment; and (4) never crawled, worked at heights, or operated foot controls or repetitive movement.

Independent Medical Evaluation by Don Williams, M.D.

10. On August 18, 2023, at CalPERS's request, Don Williams, M.D., conducted an IME of respondent. Dr. Williams prepared a report and testified at the hearing consistent with the report. Dr. Williams is a board-certified orthopedic surgeon. He obtained his medical degree from the Case Western Reserve Medical School, Cleveland, Ohio in 1977. He completed a General Surgery Internship at St. Vincent Hospital, New York City. He completed an Orthopedic Surgery Residency from New York Orthopedic Hospital. Dr. Williams served in the military as an orthopedist from 1982 until 1986.

Since 1986, Dr. Williams has operated a private practice in Orthopedic Surgery in Monterey County, treating patients and performing surgeries related to orthopedic conditions. He has served as a Qualified Medical Evaluator (QME) for workers' compensation matters. He has served as an Independent Medical Examiner for CalPERS for eight years.

11. As part of the IME, Dr. Williams interviewed respondent, obtained a medical history, and conducted a physical examination. He also reviewed the Physical

Requirements form and essential functions for respondent's position. Additionally, Dr. Williams reviewed respondent's medical records and reports related to her orthopedic condition.

RESPONDENT'S COMPLAINTS AND HISTORY OF TREATMENT

12. Dr. Williams obtained a history of respondent's occupational duties, orthopedic condition, treatment, and complaints. Respondent informed Dr. Williams that she worked as an LVN for the Department for six years from 2011 until 2017. Respondent explained that on November 2, 2017, while responding to an alarm she assisted an inmate who had a laceration to the neck. She applied "direct pressure as they moved the inmate from the ground to the gurney (stokes)." In doing so, she "pushed her entire body weight with her right wrist in the closed fashion and the wrist gave out and rolled underneath her." Respondent suffered from right wrist pain as a result. Respondent was 33 years old at the time.

13. Respondent sought treatment with Dr. William Foxley under workers' compensation. Respondent underwent physical therapy and then had surgery. Respondent had surgeries performed by Dr. Randi Galli. "The first was a reconstructive surgery in July 2018 on TFCC [Triangular fibrocartilage complex]." The "second surgery was on November 18, 2021 with some reconstruction of the scapholunate ligament harvesting the right palmaris longus tendon for reconstruction of the scapholunate ligament and she also had denervation of the dorsal aspect of the right wrist."

14. Respondent reported that she "works at Supplemental Health Care for a school as a licensed vocational nurse at an elementary school and she works with a registered nurse." Respondent reported her current symptoms were "pain in the right wrist, some dorsal pain and some dull ache, which she has all the time." Respondent

also reported "numbness in the second, third, and fourth fingertips." Respondent also reported that she has "constant annoying pain, [that is] better with rest and medication and worse with activities." She takes Motrin in the morning to address her pain. Respondent explained that she "feels that she is unable to perform her job duties and unable to play sports. She feels unable to lift over 10 pounds."

PHYSICAL EXAMINATION AND REVIEW OF MEDICAL RECORDS

15. Dr. Williams conducted a physical examination of respondent, including a review of systems. The physical examination was limited to respondent's cervical spine, upper extremities and wrists. Respondent's extension of right wrist was decreased at 40 degrees, volar flexion was 45 degrees, radial deviation was 20 degrees, and ulnar deviation was 30 degrees. Respondent had "tenderness dorsally despite the denervation." She also reported intermittent decreased sensation.

Additionally, her grip strength on the right hand was reduced. She could grip 30 pounds on the right versus 60 pounds on the left. Respondent's uninjured left wrist range of motion was normal. Dorsiflexion was 80 degrees, volar flexion was 80 degrees, radial deviation was 20 degrees, and ulnar deviation was 40 degrees.

16. Dr. Williams listed and summarized in his IME report the documents, medical records and reports he reviewed concerning respondent's orthopedic condition. These records included the physical requirement and essential functions of an LVN for the Department, an IME report prepared by Charles F. Xeller, M.D. on June 12, 2019, which resulted in the approval in respondent's disability retirement, QME reports prepared related to respondent's workers' compensation claims, and operative reports and medical records related to respondent's right wrist surgeries, including

imaging reports. The reports also indicated X-rays and MRI studies performed on respondent's right wrist post-surgery were normal.

DIAGNOSIS AND OPINIONS

17. Dr. Williams diagnosed respondent with "[p]ost reconstruction of the right wrist scapholunate ligament tear and post debridement of triangular fibrocartilage complex small tear. Good result." Dr. Williams explained in part:

[Respondent] had her first right wrist surgery in July of 2018 and a reconstruction of TFCC complex. MRIs showed the ganglion, which was excised. Continued with pain and had second surgery on November 18, 2021, reconstruction of the scapholunate ligament and reconstruction with a harvested palmaris longus tendon, also denervation. She was casted for a while. She ended up with some wrist stiffness, but improved strength. Since the reports of Donald Pompan, M.D., on October 27, 2022, she has regained motion and regained some strength in the right wrist.

18. Dr. Williams opined that there is no objective evidence demonstrating respondent is substantially incapacitated from the performance of her duties as an LVN. He explained in part:

She has improved with the second surgery with less pain, and she has improved her motions with therapy and everyday activities since the previous QME status. She has been released from care by Dr. Galli, her hand surgeon, who

felt she is not in need of any additional surgery in the immediate future. She will probably not need any other wrist surgeries. Dr. Galli indicates there is a slight possible risk that she will re-injure the wrist if she suddenly torques the right wrist. But this is only a slight possibility. She was given prophylactic restrictions by Dr. Galli and Dr. Pompan. However, prophylactic restrictions to avoid the remote possibility of reinjury are distinctly different than substantial incapacity. A CalPERS disability requires substantial incapacity. Her X-rays and MRIs have shown that the right wrist intercarpal spacing has been maintained, normal spacing. The MRI shows the intercarpal ligaments are intact. The intercarpal ligaments had some partial tears, which were surgically corrected. The ganglion has been corrected. She has had therapy and has improved. Although she has a slight loss of extension at 40 degrees, volar flexion 45 degrees. But she does have a functional range of wrist motion and improved grip strength.

19. Dr. Williams further opined that concerning the performance of her job duties, respondent "has expressed concern about being able to perform CPR with extension of her wrist because of fear that she will have pain." Dr. Williams opined the CPR "compressions can be performed with her hand in a fist with the wrist straight." Dr. Williams opined that respondent can perform CPR and that her "right wrist is no longer restricting her lifting abilities." While respondent was given prophylactic lifting restrictions by her workers' compensation physicians, the "prophylactic lifting restrictions do not constitute a substantial incapacity to perform the usual job duties."

Additionally, the “prophylactic restrictions are because of her fears of re-injury, but it has been several years since her injury and the wrist sprain with partial tears has healed.”

20. Additionally, Dr. Williams determined that respondent exaggerated her inability to grip with her right hand. Also, when Dr. Williams initially measured dorsiflexion of her right wrist it was 30 degrees, “but when she demonstrated how she pushes when doing compressions, extension was a little better to 40 degrees, so slight exaggerations.”

Respondent’s Evidence

21. Respondent does not believe she can perform the duties of an LVN for the Department because she cannot put weight on her right wrist. She cannot push down with her right wrist to perform CPR. She also cannot lift more than 10 pounds with her right hand due to the risk of injury. She has work restrictions given to her by her workers’ compensation physicians precluding her from pushing, pulling or lifting over 10 pounds. Due to these restrictions, respondent does not believe it is safe for her to work in a prison.

22. Since December 2020, respondent has worked full time as an LVN for the Fresno Unified School District. She works at a school site caring for students. Respondent is considered a “light duty” LVN because of her work restrictions. She does not have to perform CPR or lift more than 10 pounds with her right hand.

Analysis

23. CalPERS established that respondent is no longer disabled or substantially incapacitated from performing the usual duties of an LVN for the

Department. Dr. Williams persuasively testified that there is no objective medical evidence that respondent is unable to perform the duties of an LVN for the Department. Respondent's range of motion limitations of her right wrist and subjective complaints of pain do not rise to the level of substantial incapacity for performance of her duties as an LVN. Additionally, as Dr. Williams explained, "prophylactic restrictions to avoid the remote possibility of reinjury are distinctly different than substantial incapacity."

24. When all the evidence is considered, CalPERS submitted sufficient evidence to meet its burden. As a result, CalPERS's request that respondent be reinstated from industrial disability retirement is granted.

LEGAL CONCLUSIONS

Burden of Proof

1. CalPERS had the burden of proving by a preponderance of the evidence that respondent is no longer substantially incapacitated for the performance of her usual job duties as an LVN for the Department and should be reinstated to her former position. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (January 22, 2000, Precedential Decision 99-03).) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Bd. 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.)

Applicable Law

2. Government Code section 20026 defines "disability" and "incapacity for performance of duty," and, in relevant part, provides:

"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. Respondent is a state safety member of CalPERS by virtue of her former employment as an LVN for the Department. She was granted industrial disability retirement based on her orthopedic condition pursuant to Government Code section 21151, subdivision (a), which provides the following:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

4. In accordance with Government Code section 21192, CalPERS reevaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, 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. . . . The examination shall be made by a physician or surgeon, appointed by the board. . . . 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 . . . 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.

5. Government Code section 21193 governs the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty and, in relevant part, provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

6. 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." In *Hosford v.*

Board of Administration of the Public Employees' Retirement System (1978) 77 Cal.App.3d 854, 862, the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient.

7. The standards in CalPERS disability retirement cases are different from those in workers' compensation cases. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Kimbrough v. Police & Fire Retirement System* (1984) 161 Cal.App.3d 1143, 1152-1153; *Summerford v. Bd. of Retirement* (1977) 72 Cal.App.3d 128, 132 [a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different].) Thus, any determination of disability that may have been made in respondent's workers' compensation case cannot be given any weight in this proceeding.

8. To involuntarily reinstate respondent from industrial disability retirement, CalPERS must establish that respondent is no longer disabled or substantially incapacitated from performing the usual duties of an LVN for the Department. As set forth in the Factual Findings as a whole, CalPERS established by a preponderance of the evidence that respondent is no longer disabled or substantially incapacitated from performing the usual duties of an LVN with Department. Thus, CalPERS's request that respondent be involuntarily reinstated from disability retirement must be granted.

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ORDER

The appeal of respondent Christine V. Heaney is DENIED. The request of California Public Employees' Retirement System to involuntarily reinstate respondent Christine V. Heaney from industrial disability retirement is GRANTED.

DATE: November 5, 2024

Marcie Larson
Marcie Larson (Nov 5, 2024 14:55 PST)
MARCIE LARSON

Administrative Law Judge

Office of Administrative Hearings