

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 Industrial
Disability Retirement of:

GLORIA RODRIGUEZ-BARNES,

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
VALLEY STATE PRISON,

Respondent.

Case No. 2014-1288

OAH No. 2015050389

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on March 3, 2016, in Fresno, California.

Ashante L. Norton, Deputy Attorney General, represented the California Public Employees' Retirement System (CalPERS).

Thomas J. Tusan, Esq., represented Gloria Rodriguez-Barnes (respondent), who was present throughout the hearing.¹

Evidence was received and the record was held open for respondent to submit a medical record review, and for both parties to submit written closing arguments. The parties' submissions were completed on April 21, 2016, and the record was thereupon closed.

¹ There was no appearance by or on behalf of the California Department of Corrections and Rehabilitation, Valley State Prison.

ISSUE

The issue before the Board of Administration for determination is whether respondent was at the time of her application for disability, permanently disabled or substantially incapacitated from the performance of her duties as a dental assistant for respondent Department of Corrections and Rehabilitation (CDCR), Valley State Prison (VSP), due to an orthopedic condition in her right hand.

FACTUAL FINDINGS

1. Respondent was employed by CDCR at VSP as a dental assistant. By virtue of her employment, respondent is a state safety member of CalPERS subject to Government Code section 21151. On or about March 8, 2014, respondent signed an application for service pending industrial disability retirement, which was received in the CalPERS Fresno Regional Office on March 11, 2014. Respondent retired for service effective June 2, 2014, and has been receiving her retirement allowance from that date.

Respondent's Disability Retirement Application

2. In her Disability Retirement Election Application, respondent described her disability as follows:

Tenosynovitis of hand; Cyst on top of right hand; Trigger finger (right middle finger); Carpel tunnel of right hand and left hand.

3. Respondent stated in her application that her injury occurred as follows:

Accumulative injury; overuse of hand over career.

4. Respondent's application described her limitations/preclusions as: "No forceful or repetitive gripping with right hand." Respondent stated in her application that she is "unable to return to work due to not [being] able to perform [her] job duties (four handed dentistry) assisting doctor[s] with procedures [and] intraoral surgery."

Physical Requirements of Position/Occupational Title

5. On February 20, 2012, respondent signed a document entitled Physical Requirements of Position/Occupational Title, which described the physical requirements of the job as including over six hours per day of fine manipulation and repetitive use of hands; and three to six hours per day of power grasping, simple grasping, keyboard use, and mouse use.

6. Respondent's Duty Statement as a Dental Assistant includes the following: "Assist the Dentist/Dental Hygienist, CF, at chairside, in all phases of Dentistry, utilizing

current concepts of four handed dentistry to increase productivity, reduce stress, and improve quality of dental care. Perform all pre-op and post-op clinical duties. . . . Utilize safe needle/sharps handling and control; prepare and load local anesthetic syringes”

Relevant History

7. Respondent worked at VSP as a registered Dental Assistant beginning in 1997. In early May 2013, she began having mild pain in her right middle finger. She self-treated the pain with over-the-counter Motrin for approximately two weeks. On May 28, 2013, respondent felt a popping and pulling sensation in her right middle finger as she pulled open a heavy door at VSP. Respondent notified her supervisor immediately after the event.

8. Respondent initially went to Jaspal Sidhu, M.D., a primary care physician, for diagnosis and treatment. Respondent presented with complaints of pain in her right hand and middle finger radiating to her thumb and elbow. She also stated that in the mornings she would find her right middle finger locked in flexion (bent position), which she had to manually open into extension. Dr. Sidhu diagnosed respondent with tenosynovitis, an inflammation of the lining of the sheath that surrounds a tendon resulting in a condition commonly known as “trigger finger.” During the period of May 28, 2013, through July 3, 2013, Dr. Sidhu provided various treatments including anti-inflammatories, splinting her right middle finger in partial flexion, and a steroid injection in her right middle finger. Respondent’s symptoms did not improve appreciably, thus Dr. Sidhu referred respondent to Hongshik Han, M.D., a hand surgeon.

9. Respondent was seen by Dr. Han on July 11, 2013. Dr. Han recommended surgery to release the trigger finger by cutting the “A-1 pulley” through which the flexor tendon passes. Dr. Han performed the surgery on August 28, 2013. Dr. Han noted that respondent tolerated the procedure well and that “complete hemostasis” was obtained before the wound was closed with sutures.

10. Respondent was seen postoperatively on September 13, 2013, separately by Dr. Han and Dr. Sidhu. Dr. Han removed the hand dressings and noted that respondent was able to make a tight fist and fully extend her finger. Dr. Han described the right middle finger as no longer triggering at all. The stitches were removed, and respondent complained of some scar pain/sensitivity. Dr. Han recommended physical therapy. Dr. Sidhu saw respondent after her appointment with Dr. Han. Dr. Sidhu noted that flexion was painful and restricted, though no triggering was present.

11. During the following months, respondent kept numerous appointments with physical therapists and treating physicians. She was tentatively diagnosed with carpal tunnel syndrome and Dupuytren’s contracture, a gradual thickening and tightening of tissue under the skin of the hand, causing knots of tissue that can pull one or more fingers into a bent position. Respondent’s symptoms included restricted flexion of the middle and ring fingers of the right hand, and complaint of palmar pain.

12. On April 3, 2014, Michael Oberto, M.D., an orthopedic surgeon, cleared respondent to return to work as a dental assistant, noting that if the pain is tolerable it may help speed her recovery. Based on Dr. Oberto's approval, respondent returned to work at VSP on or about April 5, 2014. Respondent stayed at work only a few hours, complaining that she was unable to put on a rubber glove of the correct size or safely handle dental instruments because of pain and lack of dexterity with her right hand.

13. Respondent did not present sufficient objective medical evidence of her medical condition to support any determination whether the pain she experienced in her attempt to return to work on April 5, 2014, was commensurate with her physical condition at the time. Respondent's April 5, 2014 attempt to return to work was proximate in time to the filing of her application for disability retirement on March 11, 2014.

14. Respondent has continued to receive medical attention. Respondent introduced selected medical records of subsequent treatments and evaluations, discussed below at Factual Finding 22.

Testimony of Respondent

15. During her work as a dental assistant at VSP, respondent would sit directly next to the patient. Respondent and the treating dentist practiced four handed dentistry, meaning that both the treating dentist and respondent constantly used both hands during care of the patients.

16. Respondent wished to continue her work as a dental assistant, and had every hope that the surgery performed by Dr. Han would have allowed her to do so. Because of the pain she experiences and a lack of full hand dexterity respondent feels she is not able to handle dental instruments for durations of up to 120 minutes, as required of a dental assistant at VSP.

Testimony of Jean Chang, DDS

17. Dr. Chang is employed as a supervising dentist at VSP. Approximately 45 percent of her time is spent performing clinical work, with the remainder committed to administrative responsibilities. One of Dr. Chang's responsibilities was to determine whether respondent would be able to return to work with medical restrictions.

18. Based on her experience as a supervising dentist at VSP, Dr. Chang credibly testified that respondent would not be able to return to work with medical restrictions. If a dental assistant cannot fulfill all of their duties they will not be permitted to return to work. The duties include working with a dentist on the same patient continuously for up to 90 minutes.

Testimony of Dr. Morgan

19. Hiram Morgan, Jr., M.D., is a board-certified orthopedic surgeon, and member of the American Society for Surgery of the Hand, and the American Association for Hand Surgery. Respondent retained Dr. Morgan to examine her, prepare a written report, and testify on her behalf.

20. Dr. Morgan examined respondent on August 6, 2015, and February 9, 2016. Dr. Morgan's findings included significant restrictions in respondent's ability to flex and extend her right middle finger. Based on his review of the medical records and examination of respondent, Dr. Morgan concluded that respondent had suffered a post-surgical, palmar hematoma which led to scar tissue underneath the skin on her palm. In his opinion, the postsurgical hematoma occurred after Dr. Han closed the wound and removed the tourniquet. This is a rare condition in such surgeries, though Dr. Morgan has seen three or four of them in his more than four decades of medical practice. Dr. Morgan does not believe that respondent has Dupuytren's disorder, as respondent is Hispanic and the condition tends to afflict Scandinavians and Northern Europeans.

21. Based on respondent's physical condition, Dr. Morgan does not believe that she is able to perform the tasks required of a dental assistant. Dr. Morgan testified that he cannot specify dates respondent became disabled as a result of the post-surgical palmar hematoma.

Additional Medical Evidence Offered by Respondent

22. Respondent offered statements from the medical records of three physicians who did not testify at hearing. These statements were admitted as administrative hearsay to supplement and explain² Dr. Morgan's testimony.

Treating surgeon Dr. Han stated in his February 3, 2015 Workers' Compensation follow-up note: "I do feel that she is unable to return to work as a dental assistant, for the painful right long finger with a extensor lag would make it significantly harder to work within the mouth."

Workers' Compensation primary treating physician Michael Runge, M.D., stated in his January 7, 2015 progress report "Work Status: Permanent work restrictions (No gripping right hand, No fine manipulation right long and ring fingers)."

² Government Code section 11513, subdivision (d) provides that "[h]earsay 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."

Orthopedic surgeon, Fred Orcutt, M.D., served as the Agreed to Medical Examiner with respect to respondent's workers' compensation claim, and in that capacity prepared a report dated December 4, 2014, addressed to the State Compensation Insurance Fund. Dr. Orcutt stated in his report: "Ms. Rodriguez-Barnes does have a disability limiting or precluding the following activities related to the right hand and fingers: Disability precluding gripping with the right hand and precluding fine manipulation with the right long and ring fingers. . . . Due to the work preclusions specified above, Ms. Rodriguez-Barnes is not able to return to work in her preinjury occupation as a dental assistant."

CalPERS's Evidence

23. CalPERS retained Joseph Serra, M.D., a board certified orthopedic surgeon, to conduct an Independent Medical Examination (IME). Dr. Serra conducted an IME of respondent on July 1, 2014, and issued an IME report on that date concluding that respondent is not substantially incapacitated from performing the usual and customary duties of a dental assistant. At the request of CalPERS, Dr. Serra issued a supplemental IME report dated August 19, 2014, in which he considered the findings by other treating physicians that respondent is unable to return to work due to her hand condition. Dr. Serra's conclusions in his supplemental report are not different than his initial conclusions.

24. Dr. Serra found that respondent had a flexion contracture of her right middle finger and to a lesser degree her right ring finger. Dr. Serra's diagnostic impression is possible onset of Dupuytren's palmar fibrosis of the right middle and ring fingers. He did testify, however, that Dupuytren's is an unusual diagnosis for Hispanics.

25. In Dr. Serra's medical opinion, respondent is not substantially incapacitated for the performance of her duties, and returning to work would be therapeutic for her right hand. Dr. Serra believes that respondent exaggerated her complaints to a significant degree.

26. Dr. Serra disagrees with Dr. Morgan's diagnosis of palmar hematoma, opining that the surgical release of a trigger finger of the middle finger does not involve large blood vessels, and there is very little bleeding. Dr. Serra opined that a palmar hematoma does not happen with such a surgery.

27. Dr. Serra also firmly disagrees with the conclusion that respondent is not able to return to work, as articulated by Dr. Morgan, whose opinion is corroborated by the quoted portions of the reports by Drs. Han, Runge, and Orcutt. In Dr. Serra's view, these physicians said what the patient (respondent) wanted to hear because "medicine is a business."

28. Dr. Serra also testified that a person can't become disabled as a dental assistant because of Dupuytren's palmar fibrosis. Dr. Serra has known people with severe Dupuytren's who were not disabled, including a physician whose two smallest fingers on both hands were flexed into his palm but could still perform surgeries. Dr. Serra believes respondent should have worked through her pain, taking breaks as necessary during the early stages of her return to work.

Discussion

29. This case turns on the sufficiency of respondent's medical evidence more than questions of credibility as between Drs. Serra, Morgan, the corroborating reports of Drs. Han, Runge, and Orcutt, and respondent. For purposes of this decision it is assumed that each of the witnesses testified credibly to the best of their knowledge, and that the reporting physicians prepared reports that reflect their respective unbiased opinions.

30. Respondent's medical evidence is insufficient for two reasons. First, Dr. Morgan's examination is remote in time from respondent's application for disability. It was not established by a preponderance of evidence that Dr. Morgan's observations and conclusions reflect respondent's condition at the time of her application for disability retirement. The same is true with respect to the reports of Drs. Han, Runge, and Orcutt, as quoted by respondent. Second, the reports prepared by Drs. Han, Runge, and Orcutt were prepared in the context of a workers' compensation matter. In such matters the standard of determining disability is not the same as in CalPERS disability cases. *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, 215. Because of the insufficiency of competent medical evidence, respondent failed to establish that was permanently disabled or substantially incapacitated at the time of her application for disability retirement.

LEGAL CONCLUSIONS

1. By reason of her employment, respondent is a miscellaneous member of CalPERS, and eligible to apply for disability retirement under Government Code section 21151.

2. To qualify for disability retirement, respondent must prove that, at the time she applied for disability, she was "incapacitated physically or mentally for the performance of ... her duties" in the state service. (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 and uncertain duration, 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.

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.) An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of the application, he or she was permanently disabled or incapacitated from performing the

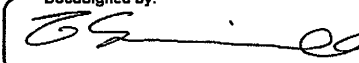
usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.)

4. In sum, the evidence did not establish that respondent was substantially incapacitated from performing her usual and customary duties when she applied for industrial disability retirement. Respondent's application for industrial disability retirement must therefore be denied.

ORDER

The application of Gloria Rodriguez-Barnes for industrial disability retirement is denied.

DATED: May 23, 2016

DocuSigned by:

26BAECCBE5EF478...
TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings