

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:**

LERMA G. DE LEON and

DEPARTMENT OF STATE HOSPITALS, NAPA, Respondents.

Case No. 2020-1450

OAH No. 2021040567

PROPOSED DECISION

Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by video conference on January 25, 2022, from Sacramento, California.

Nhung Dao, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Lerma G. de Leon (respondent) appeared and represented herself.

There was no appearance by or on behalf of the Department of State Hospitals, Napa (Department). CalPERS established that it properly served the Department with a

Notice of Hearing. Consequently, this matter proceeded as a default hearing against the Department pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record closed, and the matter submitted for decision on January 25, 2022.

ISSUE

At the time of her application, was respondent substantially incapacitated from performing her duties as a Psychiatric Technician Assistant for the Department based on orthopedic (lower back) and psychological (anxiety, depression) conditions?

FACTUAL FINDINGS

Respondent's Application

1. CalPERS received respondent's Disability Retirement Election Application (Application) on July 14, 2020. In her Application, respondent described her disability as "lower back injury." She stated that her disability occurred in May 2019, when she was assisting an inmate patient, and another inmate patient "poked" her in the back with his hand. Respondent stated that the limitations due to her injury include "no lifting, pushing, over 20 lbs, no bending or twisting." Respondent provided additional information in her Application that she was injured in December 2018, when an inmate patient "punched" her in her upper jaw. Respondent retired for service effective July 25, 2020, and has been receiving her retirement allowance while she pursues industrial disability retirement. By email dated July 7, 2021, to CalPERS, respondent added a "psyche claim" to her Application.

Duties and Physical Requirements of Psychiatric Technician Assistant

2. On September 27, 2018, respondent signed a Duty Statement for a Psychiatric Technician Assistant. A summary of the major tasks, duties, and responsibilities states that the incumbent will "assist licensed direct-care staff by participating in the rehabilitation/habilitation treatment programs for inmate patients with mental disabilities, assist inmate patients in developing and utilizing their potential for self-care and activities of life, and do other related work....." The essential duties include provision of care to mentally disabled and developmentally disabled inmate patients under the direction of a registered nurse or psychiatric technician (35 percent); observing/recording/reporting activities of inmate patients (35 percent); participation in maintaining a clean and safe environment of care (20 percent); and other related duties as required (10 percent).

3. The physical requirements for the position of a Psychiatric Technician Assistant include over five hours per day of light grasping or holding with hands, and interfacing/communicating in person or by telephone with inmate patients and co-workers; up to five hours per day of lifting and carrying up to 10 pounds, standing, and walking; up to 2.5 hours per day of interfacing/communicating by telephone with the public, lifting/carrying up to 50 pounds, sitting, crawling, kneeling, climbing, squatting, bending and twisting at the neck and waist, reaching above and below shoulder, pushing and pulling, fine fingering, computer use, walking on uneven ground, exposure to excessive noise, exposure to extreme temperature, and exposure to dust, gas, fumes, or chemicals; up to 30 minutes of lifting over 50 pounds, running, and power grasping heavy doors; and less than five minutes of interacting/communicating with the public, supervising staff, driving, operating hazardous machinery, and working at heights.

Respondent's Evidence

4. Respondent testified that she has pain in her lower back from the injury she suffered at work. She cannot return to work because of the back pain resulting from her injury. She is also anxious about work because she was injured by inmate patients twice in six months, once when an inmate patient punched her in the jaw, and once when an inmate patient poked her in the back. She worries about the possibility of getting injured again. These injuries have "changed" her "physically, mentally, and psychologically." Her duties involve working with "psychologically unfit people." She cannot work with them if she is not herself "psychologically fit." She is not psychologically or physically fit to work as a Psychiatric Technician Assistant.

5. Pablo de Leon is married to respondent, and testified at hearing. They have been married 17 years. Before her injuries, respondent was happy and could do her job. After her back injury, respondent's range of motion was reduced. She could no longer stand for more than 40 minutes before needing to rest. In addition, respondent is anxious that she might get injured again, and for that reason dreaded going back to work. The injuries to her back and jaw changed respondent physically and emotionally to the point where even their sex life has been negatively affected.

CalPERS' Evidence

6. CalPERS retained Robert Henrichsen, M.D., and Alberto G. Lopez, M.D., M.P.H.,¹ to conduct separate independent medical evaluations (IME). Their IME reports and testimony are summarized below.

¹ Master of Public Health.

IME REPORT AND TESTIMONY OF ROBERT HENRICHSEN, M.D.

7. Dr. Henrichsen is an orthopedic surgeon, and a fellow in the American Academy of Orthopedic Surgery. He conducted an IME on October 6, 2020, and issued an IME report on that date. He issued supplemental IME reports on November 24, 2020, and August 3, 2021, which reflect his review of records not provided for the original IME. He testified at hearing regarding his findings.

8. On October 6, 2020, Dr. Henrichsen met with respondent and took her personal history, current complaints, occupational history, past medical history, habits, hobbies, family history, social history, and educational history. Dr. Henrichsen also reviewed respondent's medical records and physically examined her. Based on his examination of respondent and review of the information provided, Dr. Henrichsen diagnosed respondent as follows: (1) degenerative disc disease thoracic spine, (2) degenerative arthritis and degenerative disc disease of lumbar spine with bulging at L5-S1 to the left, (3) symptoms greater than findings, and (4) history of diabetes mellitus.

9. Dr. Henrichsen also reviewed the job requirements of a Psychiatric Technician Assistant. Based on the information provided and his examination of respondent, Dr. Henrichsen found that respondent's symptoms are "not well-supported by her examination....." Dr. Henrichsen concluded in his original and supplemental IME reports that respondent's conditions do not rise to the level of substantial incapacity to perform her usual job duties as a Psychiatric Technician Assistant.

IME REPORT AND TESTIMONY OF ALBERTO G. LOPEZ, M.D., M.P.H.

10. Dr. Lopez is board certified in psychiatry by the American Board of Psychiatry and Neurology. He conducted an IME of respondent on September 24, 2021, regarding psychiatric symptoms, and issued an IME report on that date. He testified at hearing regarding his findings.

11. On September 24, 2021, Dr. Lopez met with respondent and took her occupational history, history of present illness, past medical history, current complaints, and social history. Dr. Lopez also reviewed respondent's medical records, and conducted a mental status exam and psychological testing. Dr. Lopez diagnosed respondent with (1) trauma related disorder, and (2) unspecified depression.

12. Dr. Lopez also reviewed the job requirements of a Psychiatric Technician Assistant. Based on the information provided and his examination of respondent, Dr. Lopez concluded that respondent "has a measure of anxiety related to her incident on the job and also some measure of depression" but these do not rise to the level of substantial incapacity. Dr. Lopez concluded that respondent is not substantially incapacitated on a psychiatric basis from performing her usual job duties of a Psychiatric Technician Assistant.

Discussion

13. CalPERS presented competent medical evidence through the testimony and IME reports of Dr. Henrichsen and Dr. Lopez. Their testimony and IME reports are persuasive on the point that respondent is not substantially incapacitated from performing the duties of a Psychiatric Technician Assistant due to an orthopedic or psychological condition.

14. Respondent testified persuasively regarding her symptoms, and her husband testified persuasively regarding his observations of and experience with respondent. Respondent did not, however, provide any competent medical evidence regarding her orthopedic or psychological condition to establish that she is substantially incapacitated from performing the duties of a Psychiatric Technician Assistant.

LEGAL CONCLUSIONS

1. To qualify for disability retirement, respondent had to prove that, at the time she applied for disability retirement, she was "incapacitated physically or mentally for the performance of [her] duties." (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 . . . on the basis of competent medical opinion.

2. 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 [her] 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, she was permanently disabled or incapacitated from performing the usual duties of her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.)

3. *Mansperger* and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date she applied for disability retirement, she was substantially unable to perform the usual duties of a Psychiatric Technician Assistant due to orthopedic and/or psychological conditions. Based on the evidence as a whole, respondent did not meet this burden. For this reason, her Application must be denied.

ORDER

The Application of respondent Lerma G. de Leon for industrial disability retirement is DENIED.

DATE: January 31, 2022

Timothy Aspinwall

TIMOTHY J. ASPINWALL

Administrative Law Judge

Office of Administrative Hearings