

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Statement of Issues Concerning the
Application for Industrial Disability Retirement of:**

NANCY C. DUBON, Respondent/Applicant

and

**CHUCKAWALLA VALLEY STATE PRISON, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent.**

Agency Case No. 2021-0140

OAH No. 2021070530

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter utilizing the Microsoft Teams application on July 26, 2022.

Nhung Dao, Staff Attorney, represented complainant, Keith Riddle, Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Nancy C. Dubon, respondent/applicant, represented herself.

There was no appearance on behalf of respondent, Chuckawalla Valley State Prison, California Department of Corrections and Rehabilitation (CDCR).

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on July 26, 2022.

ISSUE

Did competent medical evidence establish that respondent¹ was substantially incapacitated from performing the usual and customary duties of a registered nurse for CDCR on the basis of an orthopedic condition (hips, knees, ankles, and feet), at the time she filed her application for industrial disability retirement on July 22, 2020?

SUMMARY OF DECISION

Respondent had the burden to establish by a preponderance of the evidence that, at the time she filed her application for industrial disability retirement, she was substantially incapacitated from performing the usual and customary job duties of a registered nurse for CDCR based on the claimed orthopedic condition. Although

¹ Hereinafter, the word "respondent" refers solely to Ms. Dubon.

respondent credibly testified that she suffers from ongoing pain and/or discomfort, difficulty in performing one's job, even when doing so is difficult or painful, is not a basis for disability retirement. Only one medical doctor testified, and that doctor concluded respondent was not substantially disabled at the time she filed her application for industrial disability retirement. Accordingly, competent medical evidence did not establish respondent was substantially incapacitated from performing the usual and customary job duties of a registered nurse for CDCR, and respondent's application for an industrial disability retirement is denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent commenced her employment as a registered nurse at the Chuckawalla State Prison in 2015. By virtue of her employment, respondent is a state safety member of CalPERS subject to Government Code section 21151.

2. Respondent underwent bilateral foot surgery in 2017 and returned to work without issue.

3. On July 19, 2018, while moving an inmate onto a gurney, respondent tripped on a curb and fell on her left side. Respondent claimed immediate pain in the left ankle, left knee, and left hip. Respondent had surgery on her left ankle in February 2020 and underwent physical therapy. Respondent never returned to work after the incident.

4. On July 22, 2020, respondent signed a Disability Retirement Election Application seeking an industrial disability retirement. Respondent claimed a disability

based on “the inability to stand, walk for an extended period of time. Bilateral feet surgery and pain swelling.” In her application, respondent further wrote [errors in original]:

I fell at work while responding to an emergency.....I am unable to safely perform and respond to my duties as an R.N. My feet as the pain involved make it unsafe to respond quickly and appropriately during an emergency situation. My job as an R.N. is physically demanding in which I feel that I am not fully able to meet the demands as an R.N. My safety and the safety of others is in jeopardy if I cannot diligently do my work as an R.N. . . .

In a letter respondent attached to the application, respondent wrote, “I am in pain every day and when I stand for even short periods of time, my feet and ankles, knees and hips are so bad that I cannot bare to take another step.”

5. CalPERS obtained applicable medical records and reports related to respondent’s claimed disability, which included reports from Thomas Harris, M.D., Michael Quinn, D.P.M., and Jonathan Blevins, M.D. CalPERS required respondent undergo an independent medical evaluation by Luke F. Bremner, M.D., on October 30, 2020. Dr. Bremner concluded respondent was not substantially incapacitated from performing the usual and customary duties of a registered nurse with CDCR.

6. On December 11, 2020, CalPERS issued a final determination and notified respondent by letter that her application for an industrial disability retirement was denied. CalPERS further informed respondent that she could return to work, seek

alternative employment with CDCR or another CalPERS employer, or discontinue employment. CalPERS also notified respondent of her appeal rights.

7. Respondent timely appealed CalPERS' denial of her application; this hearing followed.

Duties of a Registered Nurse

8. Three official documents were submitted pertaining to physical requirements, essential functions, and duties of a registered nurse with CDCR.

PHYSICAL REQUIREMENTS

9. The form entitled, "Physical Requirements of Position/Occupational Title" is required to be filed with the disability application. The form directs the applicant and the applicant's employer to fill it out to "supplement" the requirements listed on the applicant's job duty statement or job description documents. This document appeared to have been filled out (based on the handwriting) by respondent, but was also signed by a return to work coordinator. Thus, the job duties reported appear to have been respondent's opinion of what her job entails.

10. The following functions were identified as being performed on an occasional (up to 3 hours) basis: sitting, running, kneeling, squatting, reaching above the shoulder, pushing and pulling, power grasping, lifting 51 to 100 pounds, walking on uneven ground, working with heavy equipment (gurney), exposure to excessive noise, exposure to extreme temperatures, operation of foot controls or repetitive movement, and use of a face mask.

11. The following functions were identified as being performed on a frequent (3-6 hours) basis: climbing and lifting 0 to 50 pounds.

12. The following functions were identified as being performed constantly (over 6 hours): standing, walking, bending, twisting, reaching below the shoulder, fine manipulation, simple grasping, repetitive use of hands, computer usage, and working with biohazards.

ESSENTIAL FUNCTIONS

13. The description of essential functions of respondent's job at the time she filed her application for disability retirement are summarized as follows: A registered nurse must provide direct and indirect nursing care to patients in any institution with any level of security. The physical functions include: ability to respond quickly and appropriately during an emergency; ability to walk on uneven ground; ability to access all floors of an institution and maneuver stairs; lift and carry occasionally 20 to 50 pounds; stand, stoop, kneel, reach, squat, climb, crawl, twist, and stretch; properly wear any personal protective equipment; push, pull and grip occasionally to frequently; sit and stand occasionally to frequently; utilize durable medical equipment; and have sufficient strength, agility, and endurance in order to respond during dangerous or emergency situations.

JOB DUTIES

14. The "Duty Statement" is summarized as follows: 40 percent of a registered nurse's duties consist of: providing urgent/emergent care to patients; performing disease infection and prevention activities; reviewing information and developing medical plans; and assisting physicians with medical and minor surgical procedures.

15. Another 40 percent of the duties of a registered nurse consist of: evaluating stability of a patient brought into a CDCR institution; assessing needs for

durable medical equipment; making referrals; monitoring patients and effectiveness of treatment; and attend trainings and meetings.

16. The remaining 20 percent of a registered nurse's duties are: participate in quality improvement activities; assist in development of policy; maintain a safe and secure work environment; follow all safety precautions; and report any unsafe equipment or inappropriate conduct.

Expert Testimony

17. Luke F. Bremner, M.D., testified at the hearing. Dr. Bremner received his Bachelor of Science degree from the University of Notre Dame, his Doctor of Medicine from Georgetown University School of Medicine, and completed his internship and residency program in surgery at the Navy Medical Center in San Diego. Dr. Bremner is a licensed and board-certified orthopedic surgeon. He has served in many medical roles, including as a regimental surgeon when he served in the United States Marine Corps at Camp Pendleton, where he was responsible for medical and preventive care for over 5,000 troops, as well as administrative oversight of 10 other doctors. He was also the Department Head of Musculoskeletal Services in Kandahar, Afghanistan, for the United States Army, where he was an orthopedic traumatologist for the Echelon 3 NATO hospital responsible for the surgical care of United States troops, NATO troops, and local, national, and enemy combatant injuries sustained in southern Afghanistan. Dr. Bremner also served as an orthopedic surgeon at the Naval Hospital in Camp Pendleton where he specialized in complex sports injuries. Dr. Bremner also served as a Battalion Surgeon in combat when he was in the United States Marine Corps, where he rendered surgical aid to injured service men and women before, during, and after the conflict in Fallujah, Iraq, during Operation Phantom Fury in 2004. Finally, Dr. Bremner has served as an adjunct instructor of surgery, has earned many honors and

distinctions including a commendation from the Naval Medical Center, and has published in the field of orthopedics in peer-reviewed journals. Dr. Bremner is an expert in the field of orthopedics and orthopedic surgery.

18. Dr. Bremner conducted an independent medical evaluation of respondent on October 30, 2020. He took a full medical history of respondent, which included respondent's report of bilateral foot surgery in 2017 and the incident at work in 2018 leading to her falling on her left side. He noted respondent began physical therapy in June 2020 and, at the time of his exam, was still participating in physical therapy. At the time of the examination, respondent reported improvement in her condition but claimed "issues" with instability and "pain in a different location." Dr. Bremner's report did not specify exactly where respondent complained of pain, but correctly identified the hips, knees, ankles, and feet as the areas of his examination.

19. Dr. Bremner conducted an extensive review of respondent's records, which included her application, job description, Physical Requirements of Position/Occupational Title, Physician's Report on Disability, and medical records ranging from November 2018 to July 2020, prior to conducting a physical examination.

20. According to his report, respondent had 5/5 strength bilaterally in terms of her lower extremities (iliopsoas, quadriceps, hamstrings, gastrocsoleus, tibialis anterior, and peroneals). Respondent had no evidence of problems with her ankles, and no evidence of any kind of tilt. Respondent exhibited a normal gait. Respondent claimed pain when walking and decreased sensation on the right side of her left foot. Respondent claimed tenderness along the heel of her left foot and mild tenderness in her left hip. Respondent showed "no pain with resisted hip flexion." Regarding her knees, respondent had symmetric range of motion and Dr. Bremner did not note any concerns regarding range of motion.

21. Dr. Bremner diagnosed respondent with a left knee contusion, left hip contusion, and left ankle contusion/sprain "secondary to her work event of July 19, 2018." He determined respondent did not have "actual and present" orthopedic conditions that rise to the level of substantial incapacity to perform her usual job duties. Specifically, Dr. Bremner wrote in his report:

Both the hip and knee injury mechanisms would not be supportive of structural injuries, which appears consistent with the imaging. Treatment for those issues could certainly include therapeutic work, and injections as indicated; however, there is nothing objective concerning the records . . . to support an inability to perform her usual job.

The ankle injury, by description, appears to have been a contusion with the possibility of a sprain. The subsequent imaging noted predominantly degenerative and inflammatory changes; however, it appears, clinically, that lateral sided pain and instability persisted. Recurrent instability following a sprain, with evidence of laxity, would be a reasonable indication for the surgery performed, namely, a lateral based reconstruction. Post-operatively, a period of immobilization and therapy is expected, as is a good functional recovery, as restoration of stability and the pre-injury level of function is expected in most cases.

Reestablishment of stability is common, as appears to have been the case here as there is no evidence of increased laxity on examination. Pain is not the primary indication for

this type of procedure and at this point, is likely more related to underlying degenerative issues and her prior history of ankle/foot issues.....Based on these factors, and a relatively benign examination, there would be no indication objectively of a substantial incapacity as a result of her ankle injury. . . .

22. Dr. Bremner did not believe respondent was exaggerating any complaints of pain or symptoms, but noted that respondent's subjective reporting was inconsistent with the objective information obtained during examination.

23. In a supplemental report, following the review of additional records and imaging (MRIs), Dr. Bremner's conclusion was unchanged. He explained:

Based on these supplemental records, there is no change to my original espoused opinion previously discussed, the mechanisms of injury for both the left knee and hip would be consistent with contusions. Even if one were to entertain the possibility of a strain or twisting type event involving the knee, this did not result in any internal derangement as noted on the MRI. Additionally, the documentation and mechanism support a trochanteric bursitis condition in terms of the hip, which would not have resulted in any internal derangement. Based on these factors, the duration of time that has passed, and treatment, there is no indication of the need for further diagnostic imaging and/or formal care now roughly two and a half years post-injury. In terms of the left ankle, as described in the initial review,

surgery involved a lateral stabilizing procedure with debridement in the setting of previously established issues. Based on what is known concerning recovery from this type of procedure, and an examination demonstrating good objective strength and stability, there is no indication of the need for further imaging and/or treatment simply based on subjective symptomology

24. Dr. Bremner elaborated on his report through testimony, which is summarized as follows: When a person is unbalanced, it can cause their joints to “asymmetrically wear out faster” in the knees. However, respondent’s range of motion in her knees was symmetrical. The only location in respondent’s left knee where palpable tenderness existed was in the anterior medial aspect, but she had normal patellar tracking. Several other tests were completed to assess the integrity of the knee ligaments (Lachman and posterior drawer), which were both negative. Imaging showed no structural damage to the left knee.

The range of motion in her left hip compared to the right hip was off “by a few degrees.” Imaging shows no evidence of structural injuries to the hip.

Regarding respondent’s ankle range of motion, while she had a few degrees less on the affected side (left), the range of motion would be considered normal. He noted that respondent’s surgery on her left ankle was a stabilization surgery, and people typically have “very good recovery.” Often, after this surgery, people return to high level sports and pain is not an issue. Respondent’s surgery was successful because there was no evidence of laxity or any ligament issues, which would be expected if the surgery were not successful.

There was a prior history noted of neuropathy in the saphenous nerve that predated her 2018 injury, but Dr. Bremner noted that this condition is not related to a traumatic event and is usually an underlying medical issue. It also did not change his conclusion regarding respondent's ability to perform her job.

Dr. Bremner did not have an opportunity to review respondent's exhibits in advance of the hearing because they were not timely submitted. However, he did review them briefly just prior to his testimony and correctly noted that most of respondent's exhibits pertained to a possible condition in her right hip, which is not the subject of this hearing (or at least was not the issue raised in her application for disability retirement). At the time of his examination, respondent had no complaints regarding her right hip.

Finally, when asked on cross-examination if he was familiar with the type of work a nurse in a correctional setting might perform, Dr. Bremner said that not only was he familiar with her duties because of having reviewed the records regarding her position provided in evidence, but he also served in a medical capacity in the military which included tending to patients in a custody environment and while providing orthopedic trauma services to patients/inmates in the jail ward at the University of California, San Diego, who had been transferred from other custodial facilities.

Evidence Presented by Respondent

25. Respondent's testimony is summarized as follows: Respondent is 61 years old and has been a nurse since 1983. She started working at Chuckawalla State Prison in 2015 and "really enjoyed it." She was injured in 2017 and had surgery on both feet. She returned to work. In July 2018 respondent fell at work while loading a patient into an ambulance and "that is where all the injuries started." There was a delay

in care from 2018 to 2020 and by January 2020 she started having "pain" in her right hip. Respondent had her surgery on February 25, 2020, on her "left side." Then COVID hit. Physical therapy did not work and respondent still has "residual pain" and "cannot return to work" because of it. Respondent claimed to have a "wobble." She said she cannot go to the market without a cane and cannot lift even 10 pounds. Respondent claimed to have "chronic pain nonstop" since 2018. Respondent said this year she had an MRI that showed "high grade" tears and atrophy and she is now scheduled for surgery in October due to chronic right hip pain, weakness in her right hip, atrophy, and a tendon rupture. Respondent claims her pain is "so excruciating" that she has "no quality of life" and cannot do "anything" except "activities of daily living." If respondent went back to work in her condition she would compromise "fellow employees or an inmate" and considers herself a "danger" due to her "physical limitations."

26. Respondent submitted some medical reports but did not call an expert to testify about them. As such, they all constitute administrative hearsay evidence and cannot be used to make a finding of fact. They can only be used to supplement or explain other evidence under Government Code 11513, subdivision (d).

27. An MRI report dated March 14, 2022, examined respondent's right hip. No expert testified regarding the MRI report.

28. In an undated letter submitted by respondent, an individual named "April" from The Core Institute in Arizona scheduled surgery for respondent to take place on August 16, 2022, for the following condition: right hip open trochanteric bursectomy and abductor tendon repair as needed.

29. Other documents submitted by respondent pertain to her right hip and also were not supported by any expert testimony.

30. A Work Status report from Thomas Harris, M.D., showed respondent's status for worker's compensation purposes as "permanent and stationary" as of July 14, 2022, but did not include any pertinent information concerning the CalPERS disability standard, mainly, whether respondent was substantially incapacitated from performing her job at the time she filed her industrial disability application.

31. A Worker's Compensation Appeal document was submitted, but similarly does not apply to or contain any information pertinent to a CalPERS disability determination.

32. On April 28, 2022, Douglas Roger, M.D., evaluated respondent for worker's compensation purposes. At that time, respondent's complaints (relevant to this matter) were pain and stiffness to her left hip; pain and stiffness to her left knee; pain to both feet and ankles; and right hip pain. Dr. Rogers noted respondent's ability to perform activities of daily living had remained unchanged since his last report in March 2021.

On physical examination, Dr. Rogers noted no major issues with respondent's left knee. Range of motion was normal. Respondent reported "diffuse tenderness" over the trochanteric region.

There were no major issues with respondent's left knee. Respondent reported "diffuse tenderness" over the medial and lateral joint lines. Range of motion was reported as limited, but no medical expert testified and explained what the limitations noted in the report meant.

Dr. Rogers noted previous scars on respondent's left ankle and foot and found they were "well healed." There was no erythema, ecchymosis or gross deformity. Respondent reported "diffuse tenderness" over the lateral and posterior fibular regions

of the ankle joint. Range of motion was reported as limited, but no medical expert testified and explained what the limitations noted in the report meant. Similar findings were reported for the right ankle.

Dr. Rogers, based on his physical examination and review of prior records, made several diagnoses including left hip bursitis, left knee sprain, residual symptoms in respondent's left ankle from her prior surgery, and residual symptoms in her right ankle from her prior surgery as well as a "recurrent" partial thickness tear of the "middle third of the achilles tendon." No medical expert testified or explained what these diagnoses meant.

Dr. Rogers concluded respondent was "permanent and stationary" for worker's compensation purposes and included no evaluation regarding the subject if this hearing, mainly, whether respondent's left hip, left knee, left ankle, and left foot symptoms rendered her substantially disabled to perform the usual and customary duties of a registered nurse with CDCR at the time she filed her application for an industrial disability retirement.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Applicable Statutes

2. Government Code section 20026 defines “disability” and “incapacity for performance of duty” for purposes of a retirement, as:

disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death . . . on the basis of competent medical opinion.

3. Government Code section 21150, subdivision (a), provides that a member who is “incapacitated for the performance of a duty” shall receive a disability retirement. Section 21151, subdivision (a), provides that such incapacitated member shall receive a disability retirement regardless of age or amount of service.

4. Government Code section 21152, provides in part: Application to the board for retirement of a member for disability may be made by:

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

[¶] . . . [¶]

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

(d) The member or any person in his or her behalf.

5. Government Code section 21153 provides:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirements as provided in section 20731.

6. Government Code section 21154 provides in part:

The application [for disability retirement] shall be made only (a) while the member is in state service, . . . On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

7. Government Code section 21156 provides that if the medical evaluation or other evidence demonstrates that an eligible member is incapacitated physically or mentally, then CalPERS shall immediately retire the member for disability. The determination of incapacitation must be based on competent medical opinion.

Appellate Authority

8. Disability is not an inability to perform fully every function of a given position. For nearly 40 years, the courts have consistently and uniformly held that Government Code section 20026, formerly Government Code section 21022, requires “substantial inability” to perform the applicant’s “usual duties,” as opposed to mere discomfort or difficulty performing those duties. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.)² As such, when an employee 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 and does not

² The applicant in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and to apprehend violators; issuing warnings and serving citations; and serving warrants and making arrests. He suffered injury to his right arm while arresting a suspect. There was evidence that Mansperger could shoot a gun, drive a car, swim, row a boat (but with some difficulty), pick up a bucket of clams, pilot a boat, and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry the prisoner away. The court noted that although the need for physical arrests did occur in Mansperger’s job, they were not common occurrences for a fish and game warden. (*Id.* at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding the applicant was not incapacitated for the performance of his duties, the court noted the activities he was unable to perform were not common occurrences and he could otherwise “substantially carry out the normal duties of a fish and game warden.” (*Id.* at p. 876.)

qualify for an industrial disability retirement. (*Id.* at pp. 886-887; *Hosford v. Bd. of Administration* (1977) 77 Cal.App.3d 854, 854.)³

In determining the ultimate question of whether an employee is substantially incapacitated from performing his or her usual duties, the board must consider both a job description and a list of job demands placed on an employee as well as the duties actually performed by the employee. (*Hosford, supra*, 77 Cal.App.3d at pp. 860-861; *Beckley v. Board of Administration* (2013) 222 Cal.App.4th 691, 699.) Moreover, the employee must be presently incapacitated; that disability might occur in the future due to aggravation of the condition or disability that is a prospective probability does

³ In *Hosford*, the court held that in determining whether an individual was substantially incapacitated from his usual duties, the courts must look to the duties actually performed by the individual, and not exclusively at job descriptions. *Hosford*, a California Highway Patrol Officer, suffered a back injury lifting an unconscious victim. In determining eligibility for a disability retirement, the court evaluated *Hosford's* injuries according to the job duties required of his position as a sergeant, as well as the degree to which any physical problem might impair the performance of his duties. Thus, the actual and usual duties of the applicant must be the criteria upon which any impairment is judged. Generalized job descriptions and physical standards are not controlling, nor are actual but infrequently performed duties to be considered. The *Hosford* court found that although *Hosford* suffered some physical impairment, he could still substantially perform his usual duties. The court also rejected *Hosford's* contention that he was substantially incapacitated from performing his usual and customary duties because his medical conditions created an increased risk of future injury.

not satisfy the requirements of the Government Code. (*Hosford, supra*, at p. 863; *Wolfman v. Board of Trustees* (1983) 148 Cal.App.3d, 196.) The above-referenced appellate authority is also discussed thoroughly in several precedential decisions.⁴

Evaluation

9. Respondent did not establish by a preponderance of the evidence that her Disability Retirement Election Application seeking an industrial disability retirement due to specified orthopedic conditions should be granted.

Dr. Bremner was the only medical expert who testified. His credentials were impressive and he is a well-established expert in the fields of orthopedics and orthopedic surgery. His testimony, which included a review of applicable medical records and a physical examination of respondent, showed that respondent had good

⁴ An agency may designate a decision as precedential authority that may be relied upon in future decisions if it contains a significant legal or policy determination of general application that is likely to recur. The following precedential decisions apply to and were received as evidence in this case: *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes and Department of California Highway Patrol*, Case No. 2530, OAH No. L-1999060537, effective January 22, 2000; *In the Matter of the Application for Disability Retirement of Theresa V. Hasan and Department of Corrections [Parole and Community Services Division, Region II]*, Case No. 2704, OAH No. N-1999100099, effective April 21, 2000; *In the Matter of the Application for Disability Retirement of Ruth A. Keck and Los Angeles County Schools [Glendora Unified School District]*, Case No. 3138, OAH No. L-19991200097, effective September 29, 2000.

objective strength and stability in her hips, ankles, knees, and feet, and her subjective complaints of pain and/or difficulties did not correspond to the objective findings during his examination. He found no instability, virtually normal ranges of motion, and nothing structural that would indicate respondent suffers from instability in any of her lower extremities. He therefore concluded that respondent was not permanently disabled or substantially incapacitated from performing the usual and customary functions of a registered nurse for CDCR at the time she filed her application. Although respondent may have new issues regarding her right hip, her right hip was not at issue when he conducted his examination, and at that time, respondent did not have any complaints regarding her right hip. Overall, there was no objective medical evidence to support a claim of substantial incapacitation from performing the usual and customary functions of a registered nurse.

Respondent's testimony regarding how she perceives her condition was credible. It is also understandable that, in a correctional environment as noted on the job duty and physical requirement/essential functions documents provided, respondent would be concerned about responding to an emergency situation. However, respondent's claim that she cannot perform her job safely or would pose a threat to others is purely speculative and is not the standard for a CalPERS disability retirement. Fear of exacerbating a condition or difficulty in performing one's position due to pain is also not the standard. Respondent also did not provide testimony from a medical expert to support her subjective claims or any competent medical evidence to refute her subjective complaints of pain and instability. Finally, most of the reports that respondent submitted were prepared in connection with her worker's compensation case and did not contain any opinions of medical professions utilizing the CalPERS disability standard, which is different.

Accordingly, respondent did not meet her burden to show that she is entitled to an industrial disability retirement and her appeal is denied.

ORDER

The application for industrial disability retirement filed by Nancy C. Dubon with the California Public Employees' Retirement System is denied. California Public Employees' Retirement System's denial of respondent's Disability Retirement Election Application seeking an industrial disability retirement due to orthopedic (hips, knees, ankles, and feet) conditions, is affirmed.

DATE: August 17, 2022



KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings