ISSUED
JUN 09 2008
OK MERIT PROTECTION COMM.
BY

OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA

SHAWNDA PENNINGTON, Appellant	)	
vs.	)	CASE NO. MPC 08-110
DEPARTMENT OF PUBLIC SAFETY Appellee.	)	

FINAL ORDER

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on May 20, 2008, at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Shawnda Pennington, appeared in person and was represented by Jack Barragree, Esq. Appellee, Department of Public Safety (hereinafter referred to as "DPS" or "Appellee"), appeared by and through its Counsel, Cory King, Associate Counsel and Director of Human Resources, Weldon Poe, Chief General Counsel, and table representative, Linda Jordan, Administrator, Department of Services.

Appellant, a permanent classified employee working for Appellee, was discharged January 7, 2008 in accordance with 74 OS § 840-6.5 and Merit Rule 455:10-11-14 for inability to perform the duties of her job following an on-the-job injury on May 25, 2005, three surgeries, and a medical release from her attending physician that included permanent restrictions on lifting, pushing, pulling, and gripping.

Whereupon, the sworn testimony of witnesses for both Appellee and Appellant was presented, along with exhibits, which are incorporated herein and made a part

hereof. Accordingly, after careful consideration of all evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Appellant was an administrative technician in Appellee's Records Management Division. On May 25, 2005 Appellant tripped over a seam in the sidewalk while at work. She was treated for injury to her right knee, right shoulder and right elbow, but was released to return to work without restrictions the following day. (Ex. II-2, pgs 1, 2, 5) However, Appellant continued to have problems with her right arm and eventually had surgery performed on October 11, 2005, and again on May 1, 2006.[1] On August 2, 2006 treating physician and second surgeon, Dr. Greg Halko, declared that Appellant had reached Maximum Medical Improvement, released her from his care, and released her to return to work with a permanent 40-pound weight restriction.

Appellant returned to work in August 2006, and worked until April 2007, but continued to have problems and pain in her right elbow that increased with movement and activity. On February 1, 2007 Appellant was seen by Dr. Carlos Garcia-Moral for evaluation. (Ex. II-2, pgs 61-63) Dr. Garcia-Moral performed a third surgery on Appellant in April 2007. During her convalescence and physical therapy Appellant continued to be seen by Dr. Garcia-Moral until November 27, 2007 when he declared that Appellant had reached Maximum Medical Improvement, released her from his care, and released her to return to work with permanent restrictions on lifting, pushing, or

[1] Appellant states that the first surgery was the result of an unrelated automobile accident that resulted in injury to Appellant's right forearm.

pulling no more than 10 pounds, and restrictions on gripping activities with her right hand. In his November 27, 2007 written report Dr. Garcia-Moral states,

> I talked to the patient today regarding the possibility of returning to light working activities with permanent restrictions in regard to lifting, pushing or pulling of no more than 10 pounds and avoiding gripping activities with the right hand. Apparently she [Appellant] does a significant amount of writing. I believe this to be detrimental to the patient.
>
> (Ex. I-4, I-5)

As an administrative technician in the Records Management Division, Appellant's primary job responsibilities required her to open mail and use a pen to code out-of-state abstracts – responsibilities requiring significant daily gripping with her right hand. (Ex. I-8; testimony of Marilyn Greenroid, Director of Records Management; testimony of Linda Jordan, Administrator of Department of Services) Appellant was unable to perform her job duties with the gripping restriction.

On December 4, 2007 Dr. Garcia-Moral wrote a second report lifting the gripping restriction and stating:

> This patient called requesting a change in her restrictions.
>
> She would like to have the restrictions changed regarding no gripping with the right hand. She would like to have just the restrictions regarding lifting activities.
> ...
>
> The restrictions were lifted at the patient's request.
>
> (Ex. I-6, I-7)

Appellee determined that the restrictions contained in Dr. Garcia-Moral's November 27, 2007 letter were based on his professional medical opinion as Appellant's treating physician, while his December 4, 2007 letter was written, not because he believed her condition had changed or that the gripping restriction was not medically indicated, but because Appellant requested he remove that restriction.

Relying on Dr. Garcia-Moral's November 27, 2007 letter, and considering her medical history and Appellant's medical reports since her May 25, 2005 accident, Appellee determined that Appellant was unable to perform the essential functions of an administrative technician, that there were no other positions available for which she qualified, and that vocational rehabilitation was recommended for her. (Ex. I-2; testimony of Commissioner Kevin L. Ward) Following a pre-termination hearing, and after reviewing the record on the case, Commissioner Kevin L. Ward determined that Appellant was unable to perform the essential functions of her position and, in accordance with 74 OS §840-6.5 and Merit Rule 455:10-11-14, terminated her employment effective January 7, 2008. Under the circumstances presented here, this administrative law judge finds that just cause exists for termination of Appellant's employment with Appellee, Department of Public Safety.

DISCUSSION

Appellant argues that her termination was unjust because she was capable of performing the functions of her job, as evidenced by the fact that: (1) she satisfactorily performed all functions of her job from August 2006 to April 2007, prior to the surgery by Dr. Garcia-Moral; (2) the Performance Function Capacity Test taken August 1, 2006 rated her overall level of work as "medium", with some limitation of functional capacity, but does not prohibit gripping (Ex. III-1); (3) Dr. Garcia-Moral did not have Appellant's PMP job description at the time he wrote the first report, but had it and relied on it when he wrote the second report; (4) Appellant did not have sufficient time to obtain a second medical opinion prior to the pre-termination hearing; (5) in the three years since

Appellant's injury, including the seven months she had been treated by Dr. Garcia-Moral, the November 27 , 2007 report is the only report that has mentioned a "gripping restriction".

Contrary to Appellant's claim that she performed satisfactorily while at work, Marilyn Greenroid, Appellant's supervisor, testified that when Appellant was at work, she did perform her job, but was often clearly in pain; she couldn't work effectively or efficiently, and sometimes fell behind in her work.

The August 1, 2006 Performance Function Capacity Test rated Appellant capable of performing medium level work, meaning that she is capable of exerting 20 to 50 pounds of force occasionally, 10 to 25 pounds of force frequently, and up to 10 pounds of force constantly to move objects. (Ex. III-1) But there is no indication that the test measured her ability to grip, or the consequences of constant gripping during the day, or whether constant gripping would exacerbate or cause pain, as Appellant had experienced prior to her last surgery. The last time Appellant was on the job, Appellant was not incapable of performing her duties, but the performance caused her such pain that she sought additional medical attention, was referred to Dr. Garcia-Moral who performed additional surgery, and was forced to take off work to recuperate.

Appellant claims that the December 4, 2007 report from Dr. Garcia-Morales was modified to remove the gripping restriction because he was given a job description for Appellant that he didn't have at the time he wrote the November 27, 2007 report. If the later report was based on Dr. Garcia-Morale's review of Appellant's job description, the report does not so state. In fact, the December report clearly states that the modification is made at the request of Appellant, rather than because of newly obtained

information. While it may be that Appellant did provide the doctor with her job description, neither the Appellant nor this Administrative Law Judge has a basis to determine that it was the job description, rather than Appellant's request, that led to the modification and removal of gripping restrictions.

During the hearing Appellant attempted to introduce a recent medical report of an examination performed by another physician after Appellant's termination. The undersigned denied admission of the report as after-acquired evidence that did not exist at the time of the termination. Appellant argued that she did not have time to obtain this examination prior to the scheduled pre-termination hearing. However, Appellant was represented by counsel at the hearing. There is no indication that Appellant attempted to obtain a continuance of the hearing to allow time to obtain a second medical opinion or to obtain a second Performance Function Capacity Test. And there is no indication that any such request was denied. This Administrative Law Judge did not admit nor consider such after-acquired reports in this action. However, such reports may be relevant in determining Appellant's ability to perform clerical work, should she seek reinstatement under applicable Merit Rules.

Appellant also argues that in the three years since her injury, and in the many reports written by Dr. Garcia-Moral concerning her condition, the November 27, 2007 report is the only report to mention gripping as a concern, and to place gripping restrictions on Appellant. The undersigned does not disagree. The facts show, however, that Appellant has had three years and three surgeries attempting to relieve the pain in her right arm and, at the time of her medical discharge, continued to have aching and pain in her forearm, especially during the performance of activities. (Ex. I-4)

Dr. Garcia-Moral indicates that he can do nothing further for Appellant's pain and discomfort. It is logical to conclude that, if activity and usage exacerbates Appellant's discomfort, limiting activity and usage would be recommended, and conversely, writing and gripping activities are to be avoided, as indicated in Dr. Garcia-Moral's November 27, 2007 report.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled matter.

2. Any findings of fact that are properly conclusions of law are so incorporated herein as conclusions of law.

3. The burden of proof in this case was placed on Appellee pursuant to Merit Rule 455:10-9-2(f)(1) to show by a preponderance of the evidence that just cause exists for discharge of Appellant for inability to perform.

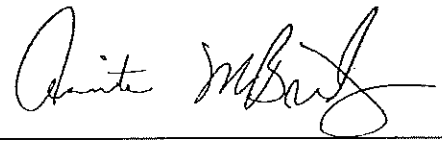
4. OS § 840-6.5C. and Merit Rule 455:10-11-14 state that a permanent classified employee may be discharged for inability to perform the duties of the position in which employed.

5. Appellee Department of Public Safety has met its burden to prove, by a preponderance of the evidence, that Appellant, Shawnda Pennington, was unable to perform the duties of the administrative technician position which she occupied and that just cause exists for Appellant's discharge.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant is hereby **DENIED** and her discharge is sustained.

DATED this 3rd day of June, 2008.



Annita M. Bridges, OBA #1119
Administrative Law Judge
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