BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **DORIS JONES** From denial of reasonable accommodation and constructive medical termination from the position of Office Assistant (General) with the Department of Transportation at Los Angeles	)	SPB Case No. 97-5107 **BOARD DECISION** (Precedential) **No. 99-06** April 6, 1999

APPEARANCES: Michael D. Hersh, Attorney, California State Employees Association, on behalf of appellant, Doris Jones; Eric J. Fleetwood, Attorney, on behalf of respondent, Department of Transportation.

BEFORE: Florence Bos, President; Richard Carpenter, Vice President; Ron Alvarado and Lorrie Ward, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the Proposed Decision of an administrative law judge (ALJ) to consider whether respondent, the California Department of Transportation (Caltrans), constructively medically terminated appellant, Doris Jones, and improperly denied her request for reasonable accommodation.

In this Decision, the Board finds that since appellant only sought to return to work if Caltrans accommodated her work restrictions, she has not shown that Caltrans constructively medically terminated her. In addition, since appellant did not prove that she

had a "disability" as that term is defined in the federal Americans with Disabilities Act of 1990 (ADA),[1] she failed to establish that she was entitled to a reasonable accommodation.

BACKGROUND

Factual Summary

Appellant has been employed by the State of California since September 14, 1987. On May 2, 1989, she began working for Caltrans as an Office Assistant (General) in its Right of Way division, District 7 in Los Angeles. Her job duties were generally that of a receptionist – she answered the telephone, took messages and directed visitors to the appropriate areas of the Right of Way division. She also did some light filing, but no heavy lifting.

(Appellant's Injuries)

In 1994, while standing on her chair attempting to hang a wall clock, appellant fell, injuring her legs and back (1994 fall). As a result of these injuries, appellant was out of work from June 21, 1994 until June 10, 1995.[2]

Appellant returned to work on June 10, 1995. On October 12, 1996, appellant was assaulted by a co-worker in the Caltrans District 7 parking lot (1996 assault). Appellant's arm was injured during this assault; she also experienced internal injuries and stress. Appellant has been off work since she was assaulted in October 1996.

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[1] 42 U.S.C. § 12101 et seq. See also California Fair Employment and Housing Act, Government Code § 12940 et seq. (FEHA).

[2] Appellant testified that she was out of work for only about 7 weeks after the 1994 fall. However, both the testimony from a Caltrans's witness, Sue Emmert, and appellant's PSD History Summary kept by the State Controller's Office, of which the Board takes official notice, indicate that appellant was out of work from June 21, 1994 until June 10, 1995.

(Changes in the Office Assistant (General) Position)

Caltrans installed a voice-mail system for its Right of Way division sometime after appellant returned to work in June 1995. While appellant was off work due to the 1996 assault, Caltrans reorganized its Right of Way division. As a result of the installation of the voice-mail system and the reorganization of the Right of Way division, Caltrans's Office Assistant (General) position was changed from being essentially a receptionist job to a job that required performing basic arithmetic computations, filing documents alphabetically and numerically, faxing documents, and assembling appraisal and/or acquisition packages. Caltrans issued a new duty statement for Office Assistant (General) in July 1997 that reflected these changes in duties.

(Appellant's Requests to Return to Work)

Appellant filed workers' compensation claims with respect to both the 1994 fall and the 1996 assault. SCIF has acknowledged that appellant's injuries incurred in the 1994 fall were work-related and, therefore, covered under the California workers' compensation laws. SCIF has not acknowledged that the injuries appellant incurred as a result of the 1996 assault were work-related and has, therefore, rejected her workers' compensation claim with respect to those injuries.

Dr. Elliot Gross was appellant's treating physician for the injuries she incurred as a result of the 1994 fall. By a "Return to Work Order" dated September 29, 1997, Dr. Gross informed Caltrans that as of October 20, 1997, appellant could return to work "Part time 4 hrs. No bending, no lifting, no filing."

Dr. David L. Friedman was the physician who treated appellant for the injuries she experienced as a result of the 1996 assault. By letter dated October 1, 1997, Dr.

Friedman informed Caltrans that appellant could return to work on October 20, 1997 with the following restrictions:

> 1) No more than 4 hours work daily until February 20, 1998; 2) No work under Jerry King or Theo Walker; 3) She must be moved from Right of Way and she should be provided a safe working environment.[3]

After Caltrans received Dr. Gross's Return to Work Order and Dr. Friedman's October 1, 1997 letter, Sue Emmert (Emmert), a Caltrans Workers' Comp Case Manager, spoke to Jerry King (King) and Larry Staley (Staley), appellant's supervisors, about whether Caltrans could accommodate the restrictions imposed by the doctors. Staley informed Emmert that Caltrans would be able to accommodate appellant's request for part-time work and the restriction that she not work under King or Theo Walker (Walker), but it could not accommodate the bending, filing and lifting restrictions imposed by Dr. Gross given the requirements of the Office Assistant (General) position described in the July 1997 duty statement. According to Emmert, since the Office Assistant (General) position required bending, repetitive filing, stooping and reaching, appellant's supervisors felt that her work restrictions made her incapable of performing the essential functions of that recently changed position.

Although the record was not completely clear, it appeared that Emmert did not discuss with appellant whether appellant could perform the essential functions of the recently modified Office Assistant (General) position with or without an accommodation. According to appellant's testimony, she had always required some sort of

[3] Dr. Friedman sent a letter dated February 11, 1998 that modified the first restriction to provide that appellant could return to work on October 20, 1997 for no more that 5 hours daily. The other two restrictions remained the same.

accommodation to perform her job as it had previously been structured, and the only additional accommodations she was requesting to her old job were that: (1) she be allowed to work part-time; (2) her supervisors not include Walker and King; (3) all the filing cabinets be placed at torso level; and (4) she be provided a completely safe environment.[4]

Staley completed a "Physical Demands of Employee's Job Duties," Form RU-91 (RU-91) that described the frequency of each activity required to be performed by an employee in the changed Office Assistant (General) position. Emmert sent the completed RU-91 to SCIF, for forwarding to Dr. Gross, to assist him in determining whether appellant would be able to return to work as an Office Assistant (General).

Dr. Gross issued a "Narrative Change of Status Report" dated October 27, 1997 (October 1997 Status Report) that concluded that appellant

> is able to attempt working with work restrictions as presently prescribed avoiding bending, lifting and stooping and should be considered as temporarily partially disabled and will be reevaluated in this office in approximately 3 weeks. She will be initially limited to working only four hours a day and this will be on a trial basis.

On November 22, 1997, Dr. Gross completed a "Treating Physician's Report of Disability Status" that concluded that appellant was able to "perform light duties if modified or alternative work is available" with the following limitations:

> Part time 4 hr/day – no use L + R arm at or above shoulder height, no repetitive filing, bending, stooping, kneeling or heavy lifting

[4] It is not clear from appellant's testimony what she wanted Caltrans to do in order to provide her with a completely safe environment. Appellant suggested in her testimony that she wanted a security guard to sit by her desk while she worked and to walk her out of work at the end of the day when she left for home.

In light of this report, Emmert wrote a letter dated November 25, 1997 to appellant informing her that the restrictions Dr. Gross was imposing:

> preclude you from returning to work as an Office Assistant at this time. You will be placed on temporary disability. When you are determined to be permanent and stationery and released to work without restrictions or are determined to be a qualified injured worker, you will be advised.

Dr. Gross issued another "Return to Work Order" on December 4, 1997, which certified that appellant was able to return to work on October 20, 1997 with the following restrictions:

> Part time 5 hours – no use of L and R arm at or above shoulder height, no repetitive filing, bending, stooping, kneeling or heavy lifting.

On January 21, 1998 Dr. Gross issued another "Narrative Change of Status Report" (January 1998 Status Report) that reflected these same restrictions.

On February 25, 1998, Dr. Gross issued a further "Narrative Change of Status Report" (February 1998 Status Report) that found that appellant needed surgery on her knee and should be considered "temporarily totally disabled for an additional 12 weeks."

(Caltrans's Efforts to Find Appellant Alternative Work)

Emmert conducted two job searches in Caltrans's southern districts, including the San Bernardino, Los Angeles, San Diego and Santa Ana work areas, to see if there were any vacant positions that could accommodate appellant's work restrictions. These searches included District Office positions, as well as positions in maintenance, construction and traffic. She conducted her first job search in December 1997. She conducted her second search in March 1998. For the March 1998 search, Emmert expanded her inquiry to see if there were any jobs that were temporarily vacant due to catastrophic, maternity or other short-term leaves that could accommodate appellant's

restrictions. During her two job searches, Emmert was informed that there were no positions available that could accommodate appellant's work restrictions.

In December 1997, appellant brought to Emmert's attention an "Office Assistant (General) P.I." position that was available in the District 7 Los Angeles office. Emmert discussed this available position with appellant . According to Emmert, when she told appellant that this position was a permanent intermittent position, and not a full-time position, appellant indicated that she was not interested in it. Appellant testified that she would have accepted a permanent intermittent position if she could have kept her seniority as full-time.

In February 1998 appellant declined an offer to participate in vocational rehabilitation.

According to Emmert, when Caltrans concludes it cannot accommodate an employee's work restrictions and return the employee to work, it first sends to that employee a letter setting forth various non-work options from which the employee can choose, including disability retirement. If an employee who receives such a letter does not pick one of the available options within the time allotted, Caltrans may thereafter seek to medically terminate that employee; Caltrans will not seek to medically terminate an employee until after an employee has been sent an options letter and has not chosen an offered option by the stated deadline. According to Emmert, as of March 9, 1998, the date of the hearing before the ALJ, Caltrans had not sent appellant an options letter because it was still making every effort to determine whether it could find an available position for her.

Procedural Summary

By letter dated November 26, 1997, appellant filed an appeal with the Board from denial of a request for reasonable accommodation.[5] By letter dated December 9, 1997, appellant filed an appeal with the Board from constructive medical termination. In her December 9 letter, appellant asked that these two appeals be consolidated and assigned for an evidentiary hearing. On March 9, 1998, an evidentiary hearing in these consolidated appeals was held before a Board ALJ. After hearing, the ALJ issued a Proposed Decision that dismissed appellant's consolidated appeals, finding that appellant's only remedy for her claims was under the workers' compensation law until such time as she recovered from her injuries or her condition was deemed to be "permanent and stationary."

The Board rejected the Proposed Decision to consider: (1) whether Caltrans refused to allow appellant to work under circumstances where appellant asserted that she was ready, willing and able to work and had a legal right to work; and (2) whether Caltrans was obligated to accommodate appellant's medical restrictions under Government Code § 19253.5. The Board has reviewed the record, including the

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[5] Board Rule 53.2 permits an employee to file an appeal with the Board from a denial of a request for reasonable accommodation as follows:

> Requests for reasonable accommodation are requests from qualified disabled individuals for accommodation to known physical or mental limitations. These requests may be made concerning securing, retaining or advancing in employment in State service. Appointing authorities shall respond to such request within 20 days of receipt. Appointing authorities shall respond in writing and inform complainants of their right of appeal to the board, within 30 days of receipt of the department's response. Failure to respond to a request within 20 days shall be deemed a denial of the request by the appointing authority and shall release the complainant to file an appeal directly with the board. Such filing shall be done within 30 days of the exhaustion of the 20-day period.

transcripts, exhibits, and written arguments of the parties, and heard the oral arguments of the parties, and now issues the following decision.

ISSUES

1. Was appellant constructively medically terminated?

2. Was appellant improperly denied a reasonable accommodation?

DISCUSSION

Constructive Medical Termination

Government Code § 19253.5

Government Code § 19253.5 sets forth procedures a state agency must follow when it seeks to demote, transfer or terminate an employee for medical reasons. Government Code § 19253.5(d) allows a state agency to terminate an employee for medical reasons only if: (1) it concludes, based upon a medical examination or other medical evidence, that the employee is not fit to perform the work of his or her position or any other position in the agency; and (2) the employee either is not eligible for, or waives the right to apply for, disability retirement.[6]

[6] Government Code § 19253.5(d) provides:

> When the appointing power after considering the conclusions of the medical examination provided for by this section or medical reports from the employee's physician, and other pertinent information, concludes that the employee is unable to perform the work of his or her present position, or any other position in the agency, and the employee is not eligible or waives the right to retire for disability and elects to withdraw his or her retirement contributions or to permit his or her contributions to remain in the retirement fund with rights to service retirement, the appointing power may terminate the appointment of the employee.

In this case, it is clear that Caltrans did not invoke the provisions of Government Code § 19253.5(d) to terminate appellant's Office Assistant (General) appointment for medical reasons. As of March 9, 1998, the date of the hearing before the ALJ, Caltrans had still not made any final determination as to how it would respond to appellant's request for a reasonable accommodation in light of her work restrictions.

Elements of a Constructive Medical Termination

Even though Caltrans took no official action under Government Code § 19253.5(d) to terminate her appointment, appellant asserts that Caltrans's letter of November 25, 1997, which stated that the work restrictions imposed by Dr. Gross precluded her from returning to her position as an Office Assistant, and that appellant would be on temporary disability leave until she was determined to be "permanent and stationary," amounted to a constructive medical termination under the reasoning set forth in C[redacted]. M[redacted] (M[redacted]).[7]

In M[redacted], the Board determined that a state agency was required to reinstate an employee to her position in the agency after PERS had denied her application for disability retirement. The agency in M[redacted] refused to reinstate the employee until the employee obtained medical releases from her doctors. The Board found that the agency's conditioning the employee's reinstatement upon her obtaining medical releases from her doctors after her disability retirement application had been denied amounted to a constructive medical termination. The facts set forth in M[redacted] indicate

[7] (1993) SPB Dec. No. 93-08.

that, after PERS had denied her request for disability retirement, the employee sought reinstatement to her prior position without any work restrictions.

In M[redacted], the Board recognized that the employee, who had been denied the right to return to work, had stated a claim for constructive medical termination, which the Board described as follows:

> A "constructive medical termination" arises when an appointing power, for asserted medical reasons, refuses to allow an employee to work, but has not served the employee with a formal notice of medical termination, and the employee challenges the appointing power's refusal to allow the employee to work under circumstances where the employee asserts that he or she is ready, willing, and able to work and has a legal right to work.[8]

Applying the analysis recently adopted by the Board in Jesse Brown,[9] the Board finds that in order for appellant to establish that she was constructively medically terminated, she must show that: (1) Caltrans refused to allow her to work in her position as an Office Assistant (General) for asserted medical reasons; and (2) she asserted to Caltrans that she was ready, willing and able to work and had a legal right to work under circumstances that indicated that she was, in all good faith, ready to return to work as an Office Assistant (General) and perform the duties of that position as it was then structured. As set forth below, appellant has failed to prove either of these two elements.

Appellant presented no evidence that showed that Caltrans ever refused to allow her to work as an Office Assistant (General) and perform all the duties and responsibilities of that job. Appellant left work on her own accord to recover from the

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[8] Id. at p. 6. (Footnote omitted.)

[9] (1999) SPB Dec. No 99-02. This decision is not yet final. See Board Rule 51.6.

1996 assault. When she sought to return to work in October 1997, she asked that Caltrans restructure the duties of the Office Assistant (General) position in order to accommodate her work restrictions. Caltrans did not accede to this request. Unlike the employee in Connie J. Armstead[10] who was placed on an involuntary, unpaid medical leave of absence although she claimed that she could perform all the functions of her job, appellant in this case claimed she was only able to return to work if her request for significant job modifications was approved. There is nothing in the record to indicate that if appellant had sought to return to her job without the modifications she requested, Caltrans would have refused her request. Thus, appellant has failed to establish that Caltrans refused to allow her to work in her position as Office Assistant (General) for asserted medical reasons.

Appellant also presented no evidence to indicate that she was, in all good faith, ready, willing and able to return to work as an Office Assistant (General) and perform the duties and responsibilities of that position. There was no dispute that appellant only wished to return to work if her job duties as an Office Assistant (General) were significantly modified to accommodate her work restrictions. An employee who seeks to work only if significant modifications are made to her job functions is not "ready, willing and able to work" in her position as that term is used in M[redacted]. Because appellant sought to return to work only if Caltrans granted her request for significant job modifications, she failed to establish that she was "ready, willing and able" to work as an Office Assistant (General) as that job was then structured.

[10] (1997) SPB Dec. No. 97-01.

The Board, therefore, finds that appellant has failed to show that Caltrans constructively medically terminated her when it sent to her its letter dated November 25, 1997.

Denial of Reasonable Accommodation

Impact of Appellant's Worker's Compensation Claim

Caltrans contends that it was not required to address appellant's request for a reasonable accommodation until such time as appellant was deemed to be "permanent and stationary" in her workers' compensation case. As set forth below, Caltrans's contention is not correct.

On September 3, 1996, the Equal Employment Opportunity Commission (EEOC or Commission) issued a document entitled "EEOC Enforcement Guidance: Workers' Compensation and the ADA" (Enforcement Guidance).[11] EEOC's purpose for issuing this Enforcement Guidance was to set forth the Commission's position on the interaction between the ADA and state workers' compensation laws. In its Enforcement Guidance, EEOC made clear that, since an "employee's rights under the ADA are separate from his/her entitlements under a workers' compensation law,"[12] under the ADA, a workers' compensation physician is not responsible for deciding whether an employee with an occupational injury is ready to return to work:

> The employer bears the ultimate responsibility for deciding whether an employee with a disability-related occupational injury is ready to return to work. Therefore, the employer, rather than a rehabilitation counselor, physician, or other specialist, must determine whether the employee can

[11] Although the Board recognizes that EEOC's Enforcement Guidance does not carry the force of law, the Board finds that such Guidance is useful to it in developing the Board's own policies and positions.

[12] Enforcement Guidance, Answer to Question 25.

perform the essential functions of the job, with or without reasonable accommodation, or can work without posing a direct threat.[13]

Since appellant's rights to a reasonable accommodation under the laws discussed below are different from her rights under workers' compensation laws, the Board finds that it was improper for Caltrans to indicate that the determination of her "permanent and stationary" status in her workers' compensation case would be dispositive of whether and when Caltrans had to reasonably accommodate her. Caltrans had an obligation, independent of the workers' compensation laws, to determine whether appellant was entitled to a reasonable accommodation.

Elements of a Reasonable Accommodation Case

Appellant asserts that Caltrans's failure to reasonably accommodate all her work restrictions violated Government Code §§ 19230 and 19702.[14]

Government Code § 19230(c) provides, in relevant part, that a state agency:

> shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee who is an individual with a disability, unless the hiring authority can demonstrate that the accommodation would impose an undue hardship on the operation of its program.[15]

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[13] Enforcement Guidance, Answer to Question 16.

[14] In her appeal, appellant claimed that Caltrans had also violated other state and federal laws prohibiting discrimination based upon disability, but did not specifically identify the other state and federal laws she alleged Caltrans violated.

[15] The definitions of the terms used in Government Code § 19230 are set forth in Government Code § 19231, which provides:

> (a) As used in this article, the following definitions apply:
> (1) "Individual with a disability" means any individual who (A) has a physical or mental impairment which substantially limits one or more of that individual's major life activities, (B) has a record of the impairment, or (C) is regarded as having such an impairment.
> An individual with a disability is "substantially limited" if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a disability.

Government Code § 19702(a) prohibits discrimination on the basis of, among other things, physical or mental disability.

When applying the requirements and prohibitions of Government Code §§ 19230 and 19702, since their language and intent is substantially similar to the language and intent behind ADA, the Board looks for guidance to the ADA,[16] and the EEOC regulations and interpretative guidance and the court decisions thereunder.[17]

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(2) "Reasonable accommodation" means both of the following:
(A) Making facilities used by employees readily accessible to and usable by disabled persons.
(B) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification or examinations, training materials or policies, provision of qualified readers or interpreters, and other similar accommodations.
(b) Undue hardship on the operation of a department's program shall be judged on all of the following:
(1) The overall size of the department's program with respect to the number of employees, the number and type of facilities, and the size of the department's budget.
(2) The type of departmental operation, including composition and structure of the department work force.
(3) The nature and cost of the accommodation needed.

[16] The Board also looks for guidance to FEHA.

[17] See C[redacted], supra, SPB Dec. No. 98-01 at p. 8. Government Code § 19702 specifically requires the Board to look to the ADA's definition of disability when determining whether an employee has a disability and is, therefore, entitled to the protections set forth in Government Code § 19702:

(b) As used in this section, "physical disability" includes, but is not limited to, impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment that requires special education or related services.
(c) As used in this section, "mental disability" includes, but is not limited to, any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
(d) Notwithstanding subdivisions (b) and (c), if the definition of disability used in the Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (b) or (c), then that broader

Section 12112 of the ADA prohibits discrimination against a qualified individual with a disability because of that disability in regard to, among other things, the terms, conditions, and privileges of employment. Section 12112(b)(5)(A) of the ADA specifically defines prohibited discrimination to include:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity

Section 12111(8) of the ADA defines a "qualified individual with a disability" to mean:

> an individual with a disability who, with or without an accommodation, can perform the essential functions of the employment position that such person holds....

Thus, to establish a prima facie case under the ADA, an employee who sues his or her employer alleging discrimination based upon a failure to provide a reasonable accommodation must show that: (1) he or she has a disability as defined by the ADA; (2) he or she is able to perform the essential functions of his or her position with or without a reasonable accommodation; and (3) he or she suffered an adverse

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> protection shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (b) and (c). The definitions of subdivisions (b) and (c) shall not be deemed to refer to or include conditions excluded from the federal definition of "disability" pursuant to Section 511 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12211).

The language set forth in Government Code §§ 19230 and 19231 was substantially borrowed from the federal Rehabilitation Act of 1973, William Aceves, Jr. (1992) SPB Dec. No. 92-04, p. 12, and substantially mirrors the language of the ADA.

employment decision because of his or her disability.[18] The Board finds that, in order to meet her burden of proof under Government Code §§ 19230 and 19702, appellant must also establish all three of these elements.

Disability Analysis

Under the ADA and Government Code § 19230 and 19702, the first question that must be answered in determining whether Caltrans was obligated to accommodate appellant's work restrictions is whether appellant has a "disability" as defined in these laws.

Dr. Gross's October 1997, January 1998, and February 1998 Status Reports were the only documents admitted into evidence as to appellant's disability status.[19] In the October 1997 and January 1998 Status Reports, Dr. Gross found appellant to be "temporarily partially disabled." In the February 1998 Status Report, Dr. Gross concluded that appellant would be "temporarily totally disabled" for 12 weeks due to knee surgery. As set forth in these Reports, Dr. Gross's opinions as to appellant's disability status were given pursuant to the requirements of the workers' compensation laws.

In its Enforcement Guidance, EEOC has stated that:

> Even if an employee with an occupational injury has a "disability" as defined by a workers' compensation statute, s/he may not have a "disability" for ADA purposes.... Impairments resulting from occupational injury may not be severe enough to substantially limit a major life activity, or they may be only temporary, non-chronic and have little or no long term impact.

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[18] Barnett v. U.S. Air (9th Cir. 1998) 157 F.3d 744, 748.

[19] Appellant presented no evidence that described the extent or nature of her psychological conditions that were being treated by Dr. Friedman.

Thus, it is EEOC's position that a doctor's determination that an employee is disabled under workers' compensation laws is not dispositive of whether an employee should be deemed to have a "disability" as defined by the ADA.[20] In light of this guidance, the Board finds that Dr. Gross's determination of appellant's disability status is also not dispositive of whether appellant was disabled from the standpoint of Government Code §§ 19230 and 19702.

Under the ADA, in order for appellant to show that she has a "disability," she must prove that she has:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities …;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.[21]

EEOC regulations define "major life activities" to include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[22] In addition, EEOC, in "Interpretive Guidance" promulgated as an appendix to its regulations, has stated that sitting, standing, lifting and reaching also are major life activities.[23]

To establish a "disability" under the first subsection of the ADA definition, an employee must show that he or she has an "impairment" that "substantially limits" the

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[20] See Sanders v. Arneson Products, Inc. (9th Cir. 1996) 91 F.3d 1351, 1354, n. 2, cert. denied (1997) 520 U.S. 1116, which states:

> The ADA defines "disability" with specificity as a term of art. Hence, a person may be "disabled" in the ordinary usage sense, or even for the purpose of receiving disability benefits from the government, yet still not "disabled" under the ADA.

[21] 42 U.S.C. § 12102(2).

[22] 29 C.F.R. § 1630.2(i).

[23] 29 C.F.R. § 1630.2(i), Appendix III.

performance of one of these major life activities. "Substantially limits" means that the individual is either:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[24]

Factors considered in determining whether an individual is substantially limited in a major life activity include the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long term impact of, or resulting from, the impairment.[25] When an ADA claim relates to the major life function of "working," an employee will not be deemed to be substantially limited if he or she is only restricted from performing a single, particular job. Rather, in order to show a disability, the employee must prove that he or she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."[26]

Even though Dr. Gross's determination of disability is not dispositive in this case, his medical diagnoses are relevant to a disability determination under the ADA. Dr. Gross's Status Reports and his testimony before the ALJ indicate that, due to "slight tenderness" and "limited range of motion" in her back and "persistent local tenderness" in her right knee, appellant had difficulty with repetitive kneeling, stooping, squatting,

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[24] 29 C.F.R. § 1630.2(j)(1).

[25] 29 C.F.R. § 1630.2(j)(2).

[26] 29 C.F.R. § 1630.2(j)(3). See C[redacted], SPB Dec. No. 98-01 at pp. 10 –11 and the cases cited therein.

and bending. She also could not do any heavy lifting. Due to the injury to her right shoulder, which caused "persistent minimal decrease range of motion," appellant's use of her right arm at or above shoulder height was limited. Due to the injury to her left wrist and hand, which left her with stiffness in her fingers and "persistent local tenderness", appellant could not do repetitive filing. Dr. Gross testified that appellant could do some light filing during the day so long as the files were not on either a low or very high shelf. Dr. Gross also testified that appellant could do a job that involved using a computer keyboard, "entering some data, being on the telephone, using an adding machine, writing a couple things down, interviewing people, taking people to a room, [and] that type of thing" so long as it did not involve doing "one constant thing all day."

From this evidence, it appears that appellant's work restrictions placed limitations on her ability to perform the types of work her position had been changed to require: repetitive filing and significant stooping, bending and reaching. Dr. Gross's testimony, however, indicated that she could do other types of work that did not require such repetitive filing, stooping, bending or reaching. Given this evidence, appellant has not demonstrated that she is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes necessary to establish that she was substantially limited in the major life function of working.[27]

Appellant has not specifically claimed in the evidence she produced at the hearing before the ALJ or in any briefs that she has filed with the Board that she is substantially limited in any major life activities other than working. As set forth above,

[27] See Gomez v. American Building Maintenance ("Gomez") (N.D.Cal. 1996) 940 F.Supp. 255, 258.

EEOC's regulations consider performing manual tasks to be a major life activity, and its Interpretive Guidance suggests that lifting and reaching may also be major life activities. In order for appellant to show that she was disabled within the meaning of the ADA, she must show that her physical impairments substantially limited her ability to perform these major life functions. While appellant has shown that she had some physical impairments that limited her ability to repetitively bend, stoop, reach and file, she has not produced adequate evidence to show that these impairments are sufficiently permanent, severe or restrictive enough to "substantially limit" any major life activities.[28] Appellant has, therefore, failed to establish that she is "disabled" under the first subsection of the definition of "disability" set forth in the ADA.[29]

The ADA also defines an individual as having a "disability" when that individual has "a record of … an impairment" or when that individual is "regarded as having … an impairment."[30] In its Enforcement Guidance, EEOC stated that not every person who files a workers' compensation claim will be deemed to have a disability under the "record of" portion of the ADA definition:

> A person has a disability under the "record of" portion of the ADA definition only if s/he has a history of, or has been misclassified as having a mental

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[28] See Gomez, 940 F. Supp. at p. 258 (A janitor with only one hand and permanent back injuries, who could not perform the essential functions of his job, failed to show that his impairment was "severe enough to substantially limit his ability to work" and was, therefore, found not to be disabled.) See also Rondon v. Wal-Mart, Inc. (N.D.Cal. 1998) 1998 WL 730843 (A pharmacist with lower back strain who was restricted in performing "repetitive twisting, bending and lifting more than five pounds" was not deemed to have an impairment that substantially limited a major life activity); Cleveland v. Waste Management of Alameda County, Inc. (N.D. Cal. 1999) 1999 WL 66518 (An employee whose knee injury prevented him from heavy lifting, walking on irregular ground and twisting his knee, and thus doing the essential elements of his job of operating a front end loader truck, failed to establish that his impairment was sufficiently severe or restrictive to constitute a disability under the ADA.)

[29] See C[redacted], SPB Dec. No. 98-01, pp. 8 – 11; Stanley McNicol (1994) SPB Dec. No. 94-14, pp. 16-19; Gomez, 940 F. Supp. at p. 258.

[30] 42 U.S.C. § 12102(2).

> or physical impairment that substantially limits one or more major life activities.

In addition, in the Enforcement Guidance, EEOC stated that a person with an occupational injury will only have a disability under the "regarded as" portion of the ADA if he or she:

> (1) has an impairment that does not substantially limit a major life activity but is treated by an employer as if it were substantially limiting, (2) has an impairment that substantially limits a major activity because of the attitude of others towards the impairment, or (3) has no impairment but is treated as having a substantially limiting impairment.

Thus, in order for appellant to establish that she has a "record of" or is "regarded as" having a disability, she must show that Caltrans believed her to have a disability that substantially limited one or more major life activities. While the evidence showed that Caltrans believed that appellant was unable to perform the essential functions of the Office Assistant (General) position as they had been modified in July 1997, she did not prove that Caltrans believed her to be substantially limited in the major life activity of working in general or in any other major life activity. Appellant has, therefore, failed to establish that she had a disability under the "record of" or "regarded as" subsections of the ADA definition of "disability."[31]

In sum, appellant has failed to prove that she has a disability under either the ADA or Government Code §§ 19230 and 19702. She has, therefore, failed to establish an essential element necessary to prevail on her claim that Caltrans had a legal obligation under these statutes to restructure the Office Assistant (General) position to accommodate the work restrictions imposed by her doctors.

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[31] See McNicol, SPB Dec. No. 94-14, at pp. 17 – 19.

Appellant's Request for Accommodations under Government Code § 19253.5

In a footnote in C[redacted], the Board left open the question of whether a permanent state civil service employee who does not have a disability as defined under the ADA may still have a right to a reasonable accommodation under Government Code § 19253.5.[32] We now hold that Government Code § 19253.5 does not grant a state employee a separate legal right to a reasonable accommodation when that employee, for medical reasons, is unable to perform the work of his or her position, but does not have a disability as defined in the ADA.

As explained above, Government Code § 19253.5 sets forth procedures a state agency must follow when it seeks to demote, transfer or terminate an employee for medical reasons. Subdivision (c), in relevant part, provides:

> When the appointing power, after considering the conclusions of the medical examination and other pertinent information, concludes that the employee is unable to perform the work of his or her present position, but is able to perform the work of another position including one of less than full time, the appointing power may demote or transfer the employee to such a position. (Emphasis added.)

By its terms, Government Code § 19253.5(c) provides a state employer the option of demoting or transferring an employee who, due to medical reasons, cannot perform all the functions of his or her job; it does not mandate that an employer implement this option if the employer chooses not to do so.[33]

As set forth above, Government Code § 19253.5(d) provides, among other things, that if an employee is not eligible for or waives disability retirement, a state

[32] C[redacted], SPB Dec. No. 98-01, at p. 16, n. 33.

[33] See Kuhn v. Department of General Services (1994) 22 Cal. App. 4th 1627.

employer can seek to medically terminate that employee. Government Code § 19253.5(d) contains no language, however, that requires an employer to terminate an employee who, due to medical reasons, cannot perform the duties of his or her job. Moreover, there is no language in Government Code § 19253.5(d) that grants a state employee an independent right to a reasonable accommodation when that employee, for medical reasons, is unable to perform the work of his or her position. The statute requires only that if an employer seeks to medically terminate an employee, the employer must first review whether that employee is medically unable to perform not only his or her job, but also any other position within the agency. If the employee can perform in another position, the employer may not medically terminate that employee. Thus, while an employer must invoke the requirements set forth in Government Code § 19253.5(c) and (d) to effectuate a medical demotion, transfer or termination of an employee,[34] it has no independent obligation under these subdivisions to accommodate an employee's work restrictions when it does not seek to demote, transfer or terminate that employee.

The Board encourages a state employer to work with an employee who, for medical reasons, cannot perform all the duties of his or her job to determine whether there may be available alternative jobs or light duty tasks that the employee can perform.[35] However, since Caltrans never invoked the provisions of Government Code § 19253.5(c) or (d) in an effort to transfer, demote or terminate appellant due to her

[34] See William A. Poggione (1995) SPB Dec. No. 95-12, pp. 16-17.

[35] For example, under Board Rule 443, a state agency has the option of placing in a temporary light duty assignment an employee, who, due to disability, injury or illness, cannot perform the essential functions of his or her job.

medical condition, in the absence of clear statutory language, the Board declines to read Government Code § 19253.5 as imposing an independent accommodation requirement upon Caltrans to restructure the position of Office Assistant (General) to satisfy appellant's work restrictions.

CONCLUSION

Appellant has failed to carry her burden of showing that she was constructively medically terminated or that Caltrans's failure to accommodate her work restrictions was the result of illegal discrimination. The Board, therefore, dismisses her appeals.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The Appeals of Doris Jones from denial of reasonable accommodation and constructive medical termination from the position of Office Assistant (General) with the California Department of Transportation at Los Angeles are hereby dismissed.

2. This decision is certified for publication as a Precedential Decision. (Government Code § 19582.5).

STATE PERSONNEL BOARD[36]

Florence Bos, President
Richard Carpenter, Vice President
Ron Alvarado, Member
Lorrie Ward, Member

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[36] Board member William Elkins did not participate in this decision.

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 6, 1999.

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Walter Vaughn
Executive Officer
State Personnel Board

[Jones-D.doc]