

NEW YORK STATE AND LOCAL RETIREMENT SYSTEM

In the Matter of the Application

of

JEFFREY A. HARROD
EMPL ID: R10263992
H.C. No.: 20150347

Pursuant to Section 74 of the Retirement and Social Security Law
for a Hearing and Redetermination

This document constitutes the final determination of the Executive Deputy Comptroller pursuant to designation by the State Comptroller.

Hearings having been held in Albany, New York, on August 30, 2016, and on November 7, 2016, with the HONORABLE MICHAEL C. EIDENS, and with the HONORABLE WILLIAM H. KENIRY presiding as Hearing Officers, with the applicant, JEFFREY A. HARROD, having appeared in person, and by THOMAS J. JORDAN, ESQ., his Counsel, and the NEW YORK STATE & LOCAL RETIREMENT SYSTEM, having appeared by ROBERT COUGHLIN, ESQ., Counsel, DANA S. RIELL, ESQ., of Counsel, and the HONORABLE MICHAEL C. EIDENS having rendered the decision, and all the evidence taken and introduced having been read and considered;

NOW, after due deliberation, the Executive Deputy Comptroller of the New York State and Local Retirement System accepts the Findings and Conclusions of the Hearing Officer as attached.

IT IS DETERMINED AND DIRECTED that the application of JEFFREY A. HARROD for ARTICLE 15 DISABILITY RETIREMENT is APPROVED.

IT IS DETERMINED AND DIRECTED that the application of JEFFREY A. HARROD for ARTICLE 14 ORDINARY DISABILITY RETIREMENT benefits is DENIED.

Dated at Albany, New York, this 26th day of July 2017

By


Colleen Gardner
Executive Deputy Comptroller

New York State and Local Retirement System

In the Matter of the Application of

Jeffrey A. Harrod
Reg. # 30942817
HC # 20150347

Pursuant to Section 74 or 374 of the Retirement and
Social Security Law for a Hearing and Re-determination

Hearings were held in the above entitled matter on August 30, 2016 in Albany, New York before the Hon. Michael C. Eidens, presiding as Hearing Officer, the Applicant appearing personally and by his attorney, Thomas J. Jordan, Esq., and the New York State and Local Retirement System having appeared by Robert Coughlin, Esq., its counsel, Dana S. Riell, Esq., of Counsel; and on November 7, 2016 in Albany, New York, before the Hon. William H. Keniry, presiding as Hearing Officer, the Applicant appearing personally and by his attorney, Thomas J. Jordan, Esq., and the New York State Retirement System having appeared by Robert Coughlin, Esq., its counsel, Dana S. Riell, Esq., of Counsel.

The issues to be determined are (1) whether the applicant was approved for primary social security disability at the time his Article 14 Application for Ordinary Disability Retirement was filed, and (2) whether the applicant is permanently disabled from performing his duties with respect to his Article 15 Application for Disability Retirement Benefits.

References to T1 followed by a number are to the transcript page of the hearing held on August 30, 2016 and T2 to the hearing held on November 7, 2016.

Now, all of the proofs having been read and all of the evidence having been taken and introduced and having been read and considered, and the Retirement System having submitted a Memorandum of Law dated May 19, 2017, and the counsel for applicant having submitted a Memorandum of Law on May 19, 2017, the undersigned Hearing Officer Michael C. Eidens finds as follows:

FINDINGS OF FACT

1. Applicant was a Direct Support Assistant for the New York State Department of Disability for over 35 years (System Exhibits #1, #3). His duties included lifting disabled individuals (referred to as 'consumers') into wheelchairs and into bed, and if a disabled person became violent, he was required to physically restrain the person by taking him to the ground (T1, p 14; System Exhibit #5, p 16-19).
2. While on duty on October 11, 2013, [a consumer] "got agitated...he was picking up chairs and going at me and other staff. We had to take him down and calm him down. We went to do a take down and that's when the consumer pushed me

- against a wall cabinet and my right shoulder and neck hit the cabinet wall..." (T1, p 16,17). The applicant injured his neck and right shoulder during the incident.
3. Applicant was treated on a monthly basis for his neck and shoulder injuries for two years by Board certified orthopedic surgeon Dr. Evan Rashkoff (T1, p 18) and is now being treated on a monthly basis by Dr. Kumar, who specializes in pain management (T1, p 18).
 4. Applicant returned to light duty work in December of 2013 and worked for approximately 90 days in that capacity and was then terminated because he was unable to return to full duty work (T1, p 14,18).
 5. On August 20, 2014, applicant submitted an Application for Article 14 Ordinary Disability Retirement pursuant to Retirement and Social Security Law (RSSL) section 506 in which he alleged permanent disability by reason of injuries to his right shoulder and cervical spine (System Exhibit #1).
 6. The Article 14 application was denied on September 22, 2015 upon the ground that RSSL section 506 requires that the member be eligible for Primary Social Security Disability benefits in order to be eligible for Ordinary Disability Retirement, and applicant was not determined to be eligible for Primary Social Security Disability benefits (System Exhibits #2, #7).
 7. The applicant also filed an Application for Article 15 Disability Benefits pursuant to RSSL section 605 in which he alleged permanent disability due to injury to his neck and shoulder (System Exhibit #3).
 8. The Article 15 application was disapproved by determination dated September 22, 2015 on the basis that the applicant was not permanently incapacitated for the performance of his duties (System Exhibit #4).
 9. Applicant filed a timely request for a hearing and redetermination of the denial of both of his applications (Retirement System Memorandum of Law, p 2).
 10. A member shall be entitled to Article 14 Ordinary Disability Benefits pursuant to RSSL section 506 as follows: "A member in active service who is not eligible for a normal retirement benefit shall, upon completing 5 years or more of service, be eligible for the ordinary disability benefit described in subdivision b of this section if such member has been determined to be eligible for primary social security disability benefits".
 11. In a Notice of Disapproved Claim dated October 23, 2014, applicant's claim for Social Security disability benefits was denied (System Exhibit #7).
 12. A member shall be entitled to a Article 15 Disability Retirement if, at the time the application is filed, he has at least ten years service credit and is physically or mentally incapacitated for performance of duty (RSSL section 605).

13. The applicant had more than ten years service credit when the Article 15 Disability Retirement application was filed (System Exhibit #3).

Issue

14. The issues are (1) whether the applicant was approved for primary social security disability at the time his Article 14 application was filed, and (2) whether the applicant is permanently disabled from performing his duties as a Direct Support Assistant.

Medical Proof

15. Following a course of conservative treatment with Dr. Rashkoff beginning several days after the injury on October 11, 2013, which consisted of home exercises, physical therapy, cortisone injection, and medication, applicant continued to experience right shoulder pain and weakness (System Exhibit #5, p 71, 73-76). An MRI of the shoulder was performed on March 7, 2014 which revealed a focal full thickness tear of the suprapinatus and impingement from the ACJ with fluid in the subacromial space (System Exhibit #5, p 74; T2, p 12).
16. Dr. Rashkoff performed surgery on applicant's right shoulder on March 7, 2014 which consisted of arthroscopic acromial decompression and open distal clavicle resection with mini open rotator cuff repair and anchor (System Exhibit #5, p 68).
17. Applicant underwent physical therapy after the surgery, but continued to have severe shoulder pain and right arm weakness consistent with cervical radiculitis (System Exhibit #5, p 66). A cervical MRI performed on May 12, 2014 (System Exhibit #5, p 5 - check page; or is it 41) revealed that applicant had a C4-5 herniated disc which abutted the spinal cord with foraminal narrowing on the left (System Exhibit #6, p 59, 60, 61).
18. On August 12, 2014, Dr. Rashkoff noted that applicant had "severe shoulder pain and arm weakness due to his cervical disc and never achieved full motion and developed symptomatic adhesive capsulitis" (System Exhibit #5, p 65).
19. On September 30, 2014, Dr. Rashkoff noted that applicant still had considerable pain and "Delayed incomplete rehab following shoulder surgery because of mitigating issues including traumatic cervical radiculitis, which is discogenic..." (System Exhibit #5, p 63). Several months later on November 17, 2014, he noted that applicant "finished out a course of physical therapy which did not help as much as we had hoped. He now has severe right parascapular with shoulder pain...Physical therapy stated there is nothing further they could do to help him." (System Exhibit #5, p 61; System Exhibit #6, p 64). On December 23, 2014, Dr. Rashkoff noted "incomplete rehab following the right rotator cuff surgery due to adhesive capsulitis, right parascapular pain contributing from a herniated cervical disc" (System Exhibit #5, p 60).

20. Dr. Rashkoff examined applicant on May 14, 2015 and found diminished shoulder motion with some weakness, trigger points along the right paracervical region, limited cervical motion with a normal neurologic exam. He noted that applicant "has been plagued with parascapular pain secondary to cervical radiculitis. He has multilevel disc disease." (System Exhibit #6, p 63).
21. Dr. Rashkoff was familiar with applicant's job duties (T2, p 18,19) and concluded that applicant was totally disabled from his regular job (System Exhibit #6, p 63) by reason of the injuries he suffered on October 11, 2013 (T2, p 19).
22. Dr. Rashkoff's conclusion that applicant had multilevel disc disease was later confirmed by a MRI performed on March 9, 2016 which revealed a small posterocentral disc protrusion at C2-C3; degenerative endplate changes with bulging of the annulus fibrosis at C3-C4; degenerative endplate changes and a posterocentral disc protrusion which results in mild thecal sac compression at C4-C5; mild left foramina stenosis at C5-C6; and mild degenerative disc disease at C6-C7 (System Exhibit #6, p 18).
23. Electrophysiologic testing of applicant's right arm was done by Dr. Park and reviewed by Dr. Rashkoff on January 7, 2016. Dr. Rashkoff concluded that the findings were "consistent with chronic lower cervical radiculopathy bilaterally, underlying peripheral sensory, motor polyneuropathy, left carpal tunnel syndrome." (System Exhibit #6, p 56).
24. Dr. Rashkoff testified that the electrophysiologic test results were objective and also were consistent with the May 2014 cervical MRI results and applicant's physical examinations (T2, p 15, 16).
25. A Functional Capacity Evaluation (FCE) of applicant was performed on March 30, 2016 and the conclusion was that applicant could only perform light work and was not able to perform his job as a Physical Therapy Aid (System Exhibit #6, p 10).
26. Dr. Rashkoff testified that "...everything correlates so clearly that...there's a clear irritated nerve root on the right caused by this injury, confirmed by two years of examining the patient and also confirmed with electrophysiologic testing and an MRI scan." (T2, p 26).
27. Dr. Rashkoff believed that applicant was capable of working full time at a job that was less physically demanding than that of a Direct Support Assistant (T2, p 21). He testified that the shoulder surgery was technically successful because there no longer was an impingement (T2, p 20), but the pain and weakness and slightly diminished motion of his right shoulder, combined with the neck condition, together resulted in applicant being disabled from performing all of his job duties (T2, p 20, 21). He testified that the primary cause of applicant's disability was the cervical radiculitis (T2, p 21).
28. On cross examination, Dr. Rashkoff agreed that he recommended rehabilitation after the shoulder surgery and was asked if applicant had complied with that

rehabilitation. Dr. Rashkoff stated "I don't know. I don't have notes on that" (T2, p 21). He was then asked "If I were to tell you that the notes that you have created indicate that he did not comply with the regimen for rehabilitation, do you have any evidence to dispute that?" Dr. Rashkoff stated "No, that's probably why his motion isn't full." (T2, p 21). Dr. Rashkoff was later asked what the result would have been if the applicant had complied with the rehab for the shoulder that he had suggested, and he said applicant would have more internal rotation of his shoulder (T2, p 26).

29. Board certified orthopedic surgeon Dr. Louis D. Nunez examined applicant at the request of the Retirement System on August 24, 2015 and issued a written report (System Exhibit #5, p 1-4). Dr. Nunez reviewed the available medical records, took applicant's history, and examined him. The medical records he reviewed did not include the FCE performed on March 30, 2016 nor the electrophysiologic testing performed in January of 2016 nor the results of the cervical MRI performed on March 9, 2016.
30. Dr. Nunez found that applicant had some limited range of motion of his right shoulder and cervical spine (System Exhibit #5, p 2). Dr. Nunez noted that the range of motion of applicant's right shoulder was "for the most part self-limited" and that there were "elements of symptom magnification" (System Exhibit #5, p 4) and that there was no permanency. He concluded that applicant was not compliant with the postoperative shoulder rehabilitation which applicant elected to discontinue on his own (System Exhibit #5, p 4). He also noted that with respect to the shoulder, although there may be an impairment, applicant had "further treatment options available such as subacromial injection and range of motion exercises to regain full extension." (System Exhibit #5, p 4).
31. Dr. Nunez found "absolutely no disability or impairment associated with [applicant's] neck." (System Exhibit #5, p 4).

CONCLUSIONS OF LAW

1. The applicant has the burden of proving that he is permanently incapacitated from the performance of his job duties (Matter of Weaver, v DiNapoli, 108 A.D. 3d 974; NYS Administrative Procedure Act, section 306 (1); Valerioti v New York State Comptroller, 186 A.D. 2d 858 [Third Dept., 1992]).
2. The Comptroller has exclusive authority to determine applications for retirement allowances and benefits (RSSL section 74(b); Matter of Mancuso v Regan, 190 A.D. 2d 948, [Third Dept., 1993]).
3. There is no obligation to give greater weight to the opinions of the treating physicians than those of the independent medical examiners (English v McCall, 6 A.D. 3d 923; Irish v McCall, 297 A.D. 2d 895) and the Hearing Officer has the authority to resolve conflicts in medical opinions and to credit the testimony of one expert over another (Matter of Schine v Hevesi, 40 A.D. 3d 1362) provided that the credited expert "articulates a rational and fact-based opinion founded upon a

physical examination and review of pertinent medical records” (Matter of Rawson v DiNapoli, 2017 NY Slip Op 04189).

4. The Retirement System contends that the applicant has not proven that his disability is permanent because under the law, his disability is temporary if there is a reasonably safe treatment to correct applicant’s condition. The Retirement System argues that Dr. Nunez’s examination and report establishes that the applicant is not permanently disabled because the potential treatment for the shoulder impairment suggested is reasonable and safe (Retirement System Memorandum of Law, p 3).
5. However, there is no medical evidence in the record that there is further medical treatment for applicant’s cervical condition that would enable him to perform all of his job duties as a Direct Support Assistant.
6. The testimony and reports of Dr. Rashkoff are based upon his review of the objective results of the electrophysiologic testing, the FCE, his findings and medical records, the surgery he performed in 2013, and applicant’s history and his physical examinations of applicant. His testimony was articulate, rational, reasonable standing alone, fact based, and reasonable when considered in light of the record as a whole, and is credited (Matter of Kosilla v Hevesi, 25 A.D. 3d 870).
7. Although Dr. Nunez stated that applicant was not compliant with the postoperative shoulder rehabilitation and he elected to discontinue that on his own (System Exhibit #5, p 4), there is no evidence in the record to support those assertions. In addition, Dr. Nunez found “elements of symptom magnification” (System Exhibit #5, p 4) but offered no explanation or basis for that assertion.
8. On September 30, 2014, Dr. Rashkoff noted that applicant still had considerable pain and “Delayed incomplete rehab [emphasis added] following shoulder surgery because of mitigating issues including traumatic cervical radiculitis, which is discogenic...” (System Exhibit #5, p 63). On November 17, 2014, Dr. Rashkoff noted that applicant “finished out a course of physical therapy which did not help as much as we had hoped...Physical therapy stated there is nothing further they could do to help him.” (System Exhibit #5, p 61; System Exhibit #6, p 64). The December 23, 2014 notes of Dr. Rashkoff that Dr. Nunez reviewed and recited in his report stated “incomplete rehab [emphasis added] following the right rotator cuff surgery due to adhesive capsulitis, right parascapular pain contributing from a herniated cervical disc” (System Exhibit #5, p 60). In each note, Dr. Rashkoff provided a reason for the rehab delay, and also stated that applicant “finished out a course of physical therapy”. To infer rehab non-compliance by applicant from those office notes by Dr. Rashkoff is not rational or reasonable.
9. On cross examination, Dr. Rashkoff did not have his office notes available and was then led to believe that those notes indicated that applicant did not comply with the shoulder rehabilitation the doctor had recommended. Dr. Rashkoff then speculated that probably was why the shoulder range of motion wasn’t full (T2, p 21). However, the office notes in the record do not so indicate (System Exhibit #5,

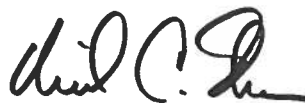
p 60, 61, 63, 64). Dr. Rashkoff's speculation is not credited because it was based upon an incorrect assertion and is inconsistent with the content of his office notes.

10. Dr. Nunez stated in his report that applicant's shoulder disability was temporary, and that there was absolutely no cervical disability or impairment (System Exhibit #5, p 4). By contrast, Dr. Rashkoff testified that the shoulder condition alone was not disabling, but the primary cause of applicant's disability was the cervical radiculitis.
11. Dr. Nunez examined the applicant on August 24, 2015. He was not provided with the FCE test results, the electrophysiologic test results, nor the results of the cervical MRI performed on March 19, 2016.
12. The medical records Dr. Nunez did not review, when considered with the medical records in System Exhibit #5, confirm and corroborate the findings and opinion of Dr. Rashoff that applicant is permanently disabled from performing all of his job duties by reason of the condition of the shoulder and neck.
13. Dr. Nunez' opinion that the applicant was not permanently disabled for the performance of his job duties as a Direct Support Assistant by reason of his neck and shoulder condition was not based upon a review of all of the pertinent medical records (Matter of Rawson v DiNapoli, supra), and is not reasonable or rational when considered in light of the record as a whole (Matter of Danieu v DiNapoli, 77 A.D. 3d 1152) and is not credited.
14. The applicant has met his burden to establish that he is permanently incapacitated from the performance of his duties as a Direct Support Assistant as a result of the injuries he suffered to his neck and shoulder while at work on October 11, 2013.

Conclusion

15. The application for Application for Article 14 Ordinary Disability Retirement pursuant to Retirement and Social Security Law section 506 is denied.
16. The application for Article 15 Disability Retirement pursuant to Retirement and Social Security Law section 605 is granted.

Dated: May 30, 2017
Albany, New York



Michael C. Eidens
Hearing Officer

Exhibits received in evidence and reviewed:

System Exhibit #1	Application for Article 14 Ordinary Disability Retirement; 2 pages
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System Exhibit #2	Retirement System denial of Application for Article 14 Ordinary Disability Retirement; 1 page
System Exhibit #3	Application for Article 15 Disability Retirement; 2 pages
System Exhibit #4	Retirement System denial of Application for Article 15 Disability Retirement; 1page
System Exhibit #5	Applicant's Medical Records; 274 pages
System Exhibit #6	Additional Medical Records; 67 pages
System Exhibit #7	Social Security Disability Claim denial letter dated October 23, 2014
Applicant Exhibit A	Curriculum Vitae of Dr. Evan Rashkoff