

APR 04 2014

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

Robin Lowery,)
)
 Petitioner,)
)
 v.)
)
 South Carolina Public Employee Benefit)
 Authority, South Carolina Retirement)
 Systems,)
)
 Respondent.)

Docket No.: 13-ALJ-30-0545-CC

FINAL ORDER AND DECISION

APPEARANCES: Petitioner: Robin Lowery, Pro Se
Respondent: Melissa Alexander, Esquire and
Justin R. Werner, Esquire

STATEMENT OF THE CASE

The above-captioned case is before the South Carolina Administrative Law Court ("ALC" or "Court") pursuant to S.C. Code Ann. § 9-21-60 (Supp. 2013) for a contested case hearing. In this matter, Robin Lowery ("Petitioner") challenges the October 21, 2013 Final Agency Determination issued by South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems ("Respondent" or "Retirement Systems"), in which the Retirement Systems denied the Petitioner's application for disability retirement benefits under the South Carolina Retirement System. The Respondent contends that Petitioner's application for disability benefits was properly denied because she does not satisfy the statutory requirements for the award of disability retirement benefits.

After timely notice to the parties, a hearing of this matter was held on February 10, 2014, at the South Carolina Administrative Law Court in Columbia, South Carolina. Based upon the evidence presented at that hearing and upon the applicable law, I find that Petitioner has not established that she is entitled to disability retirement benefits and that the Retirement Systems' Final Agency Determination denying those benefits must be sustained.

RECORDED
APR 28 2014

SC COURT REPORTERS

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passing upon their credibility, and taking into consideration the burden of persuasion by the parties, the Court makes the following findings of fact by a preponderance of the evidence:

1. Robin Lowery is a forty year old inactive member of the South Carolina Retirement System ("SCRS" or "System"), who has approximately five years and one month of service credit in the System. Mrs. Lowery was previously employed as a Child Support Enforcement Specialist with York County.

2. On March 15, 2013, Mrs. Lowery filed an application for disability retirement benefits with the South Carolina Retirement Systems in which she alleged that she was incapacitated from performing her prior duties due to "immune system disease, lung disease, high blood pressure, diverticulitis, anxiety, mononucleosis and pneumonia," noting that she would "get sick every time [she] would go back to work."

3. After receiving the Petitioner's application, her file, including any medical records and other documentation received, was forwarded by the Retirement Systems to the South Carolina Department of Vocational Rehabilitation ("SCDVR") for review. The SCDVR Disability Examiner gathered Petitioner's medical records and, after reviewing those records, recommended that Petitioner's disability retirement claim be denied. Specifically, the Disability Examiner found "no evidence of a mental health condition which would impose more than mild limitations on work-related functioning" and "no evidence of [an]...immune system disorder...digestive system condition, lung or liver condition that would be considered disabling." The Disability Examiner concluded that the Petitioner "retains the capacity to perform her past duties."

4. On July 15, 2013, the Retirement Systems denied Petitioner's claim for disability retirement benefits as recommended by the VR Disability Examiner.

5. On July 18, 2013, the Petitioner requested an administrative review of the denial of her application for disability retirement benefits before the Director of the Retirement Systems, David K. Avant. Director Avant appointed Robert E. Brabham, Ph.D., an independent vocational consultant, to review Petitioner's claim for disability retirement benefits and make a recommendation regarding her claim. In order to review the Petitioner's claim, Dr. Brabham

conducted an administrative conference with Petitioner on September 11, 2013, and reviewed Petitioner's disability file, including the additional medical records submitted at the time of the administrative conference.

6. After reviewing Petitioner's file and considering Petitioner's testimony given at the administrative conference, Dr. Brabham issued a recommendation on September 17, 2013 that Petitioner's application for disability retirement benefits be denied. While Dr. Brabham noted that "[s]everal medical records indicate that [Petitioner] is not able to work at the present time.; he concluded that there was "no medical evidence as to the permanency of her conditions and, therefore, she does not meet legal requirements to be approved for disability benefits."

7. On October 21, 2013, Director Avant issued a Final Agency Determination adopting Dr. Brabham's recommendation and denying Petitioner's claim for disability retirement benefits. Thereafter, on November 1, 2013, the Petitioner sought ALC review of that Determination by requesting a contested case hearing.

DISCUSSION

Petitioner's Job Duties

In this matter, the Petitioner contends that she is disabled from performing her prior job duties as a Child Support Enforcement Specialist with York County. The Petitioner's prior job duties consisted of performing clerical work and processing documents to maintain child support enforcement case files and payment orders for child support and alimony. As part of her job duties, the Petitioner was required to attend court proceedings to provide assistance with enforcement and assist the public with information requests. The physical requirements of the Petitioner's job included walking/standing for four hours per day, sitting for five hours per day and frequently lifting case files weighing up to ten pounds.

Petitioner's Medical Conditions

In the Member's Disability Report submitted in conjunction with Petitioner's application for disability retirement benefits, Mrs. Lowery contends that she was disabled from performing her prior job duties as a Child Support Enforcement Specialist as the result of "immune system disease, lung disease, high blood pressure, diverticulitis, anxiety, mononucleosis and pneumonia." The Petitioner further contends that she would get sick every time she returned to work due to her immune system being weak and that she has no energy because she cannot catch her breath. During the administrative conference held on September 11, 2013, the Petitioner also

noted concerns with spots on her liver. The Petitioner's medical concerns are addressed in detail below.

Diverticulitis:

The medical records in this case reveal that the Petitioner has been diagnosed with diverticulitis in the past and has suffered several recurrent episodes of diverticulitis. Specifically, on November 30, 2009, the Petitioner presented at Presbyterian Hospital complaining of abdominal pain and underwent a CT scan of her abdomen which showed mild uncomplicated sigmoid diverticulitis. On January 13, 2010, the Petitioner underwent an elective sigmoidectomy to remove a portion of her sigmoid colon due to recurrent sigmoid diverticulitis. The Petitioner was also seen by Dr. Stephen Bott on January 13, 2012 for left lower quadrant pain. Dr. Bott noted that a CT scan did not show diverticulitis but that Petitioner had experienced at least four episodes of diverticulitis within that year during which she would get significant pain that was largely relieved by medication after two days. The Petitioner was seen by Dr. Bott on April 10, 2012 and June 6, 2012, presenting with left upper quadrant pain, which Dr. Bott assessed during both visits as being mild diverticulitis. However, more recent treatment records make no mention of any further episodes of diverticulitis. In addition, none of the Petitioner's treating physicians have opined that any impairments caused by the Petitioner's diverticulitis are permanent in nature and not amenable to treatment. Rather, the record in this case indicates that, when Petitioner suffers from pain as a result of an episode of diverticulitis, the pain is largely relieved by medication.

Lung Disease:

On a November 29, 2012 visit with Nurse Practitioner Catherine Voci, the Petitioner presented with overall malaise that appeared to be a viral illness. During a subsequent visit on December 11, 2012, the Petitioner was diagnosed as suffering from mononucleosis. In January 2013, Petitioner was given a chest x-ray and subsequently was diagnosed with pneumonia. After a follow-up chest x-ray showed abnormalities, Petitioner underwent a chest CT scan which showed multiple pulmonary nodules. A CT-guided biopsy of one of the nodules was performed on February 22, 2013, and, after analysis of the results, the Petitioner was diagnosed with interstitial chronic inflammation and non-necrotizing granulomas, with no evidence of malignancy found.

Subsequently, the Petitioner was seen by Dr. Momen Wahidi at the Duke University Medical System on March 19, 2013, for a consultation regarding the pulmonary nodules at which time Dr. Wahidi determined that the Petitioner needed to undergo a bronchoscopy. The bronchoscopy was performed on March 22, 2013, and samples were obtained which showed no evidence of malignancy. On March 27, 2013, the Petitioner was evaluated by Dr. Mark Berry, who determined that the Petitioner needed to undergo a wedge resection of her lung lesions to obtain a definitive diagnosis. The wedge resection was performed on March 28, 2013 and yielded a diagnosis of necrosis and organizing infarct with no evidence of malignancy.

On a follow-up visit to Dr. Wahidi on May 7, 2013, the Petitioner reported mild shortness of breath at rest and moderate dyspnea on exertion. Dr. Wahidi noted that the findings of Petitioner's lung biopsy "point toward an embolic process" and that an extensive workup for a hypercoagulable state was negative. Dr. Wahidi also reviewed a chest CT scan done on April 10, 2013, and noted "the previously seen nodules in both lungs have all decreased in size." Dr. Wahidi found that "the infarcts are resolving on chest CT with no new additional nodules" and noted "no additional workup is needed." He also noted that the Petitioner was complaining of dyspnea but continued to actively smoke and, while Dr. Wahidi counseled her about smoking cessation, Petitioner indicated she was "not interested in any smoking cessation either at this point."

The Petitioner visited Dr. Juhayna Davis on May 21, 2013 for a pulmonary consultation regarding the blood clots in her lungs, complaining of chronic fatigue, cough and chest tightness. Dr. Davis performed a pulmonary function test which showed mild restrictive lung abnormality, and she suggested "starting over" to check for a possible asthmatic condition and provided a sample inhaler. Dr. Davis also discussed with Petitioner tobacco associated diseases.

On an Attending Physician's statement for the Petitioner's Long Term Disability claim, Ms. Voci listed chronic lung disease as Petitioner's primary diagnosis and stated Petitioner was too "physically and chronically ill to work *at this time.*" In a letter that accompanied the Attending Physician's statement, Ms. Voci noted that the Petitioner could not work "at this time or for the next 12 months" and asked that the Petitioner be granted "a *year* of disability" so that she could pursue further treatment.¹

¹ Respondent Exhibit 2 (emphasis added.)

In summary, Ms. Lowery has undergone extensive tests to evaluate the condition of her lungs. However, neither the specialists who have evaluated Petitioner nor Petitioner's treating physician have suggested that Petitioner's lung conditions are permanent in nature. Rather, the specialist treating Petitioner indicated the spots on Petitioner's lungs are "resolving" and noted Petitioner needed "no additional workup." Further, while Petitioner's nurse practitioner noted Petitioner was unable to work *at this time*, she did not suggest that Petitioner's lung condition was permanent in nature, but rather indicated she needed a year in order to pursue further treatment.²

High Blood Pressure:

The Petitioner first visited Dr. Shilpesh Patel on April 20, 2012, noting a history of hypertension. At that time, Dr. Patel did not think Petitioner had significant hypertension but still kept her on the hydrochlorothiazide she was taking previously for high blood pressure. On June 19, 2012, Petitioner saw Nurse Practitioner Catherine Voci complaining of high blood pressure and was prescribed lisinopril in addition to the hydrochlorothiazide, and on a follow-up visit on June 27, 2012, Ms. Voci noted Petitioner's hypertension was well controlled on the lisinopril so she could stop taking the hydrochlorothiazide. During a visit on October 4, 2012, Ms. Voci noted Petitioner's blood pressure was slightly elevated and prescribed a combination lisinopril-hydrochlorothiazide tablet, and on October 29, 2012, Ms. Voci noted Petitioner's hypertension was well controlled on the combination tablet. On November 2, 2012, Dr. Patel stopped Petitioner's hypertension medication after she presented with a possible allergic reaction.

Petitioner's blood pressure remained well controlled until her visit with Ms. Voci on December 11, 2012, at which time Ms. Voci noted Petitioner's high blood pressure and advised her to watch it until her follow up visit. On January 29, 2013, Petitioner presented to Ms. Voci with high blood pressure readings and stated her anxiety levels were high and causing her blood pressure to rise. Ms. Voci restarted Petitioner on hydrochlorothiazide, and during a visit on February 15, 2013, Ms. Voci noted Petitioner's blood pressure was doing "fabulous" and that Petitioner's blood pressure was under "complete control."

² At the contested case hearing, Petitioner submitted a letter from Ms. Voci dated January 24, 2014. While Ms. Voci noted in the letter that Petitioner was unable to work, she did not suggest that any of Petitioner's conditions were permanent in nature, but rather indicated Petitioner should be granted disability so that she could pursue further treatment. See Petitioner's Exhibit 1.

To summarize, the record in this case establishes that Petitioner has been diagnosed with high blood pressure and that, at times, Petitioner's blood pressure has been elevated. However, the most recent treatment note dealing with Petitioner's high blood pressure noted that Petitioner's blood pressure was under "complete control" on her current medication. Further, none of Petitioner's treatment providers have indicated that any impairments Petitioner may suffer due to her high blood pressure are permanent in nature and not amenable to further treatment.

Immune System Disease:

On Petitioner's first visit to Dr. Patel on April 20, 2012, Dr. Patel noted Petitioner's blood work indicated a high white blood cell count. During a visit on December 3, 2012, Ms. Voci noted Petitioner's blood count was high, as it had also been on November 2, 2012. On a follow-up visit on February 15, 2013, Ms. Voci noted that one of Petitioner's other doctors had stated she was immunocompromised and had prescribed an antibiotic.

The Petitioner visited Dr. Soheir Adam in the Hematology Clinic at the Duke University Medical Center on April 23, 2013 for evaluation of her high white blood cell count. Dr. Adam ordered blood counts and other blood tests for Petitioner, which came back negative. During Petitioner's pulmonary consult with Dr. Juhayna Davis on May 21, 2013, Dr. Davis ordered an immunology test for Petitioner, which showed low gammaglobulins, a deficiency which was "suggestive of an increased risk of infection." However, on July 25, 2013, Dr. Ekta Shah, an immunologist, notified Petitioner that "at this time it is unlikely that you have an immunodeficiency."

While some of Petitioner's treatment providers have suggested that Petitioner may be suffering from some immunodeficiency, her more recent treatment record indicate that it was "unlikely" that Petitioner was suffering from an immunodeficiency. Ultimately, the record in this case does not firmly establish that Petitioner is suffering from an immunodeficiency. Furthermore, even if Petitioner is suffering from an immunodeficiency, none of Petitioner's treatment providers have indicated that it precludes her from performing her job duties or that it is permanent in nature.

Anxiety:

During a visit to Ms. Voci on June 19, 2012, Petitioner complained of some anxiety and depression and was prescribed the anti-depressant Celexa. On a follow-up visit on July 19, 2012,

Petitioner reported to Ms. Voci that the anti-depressant medication Celexa seemed "to be working really well for her anxiety at work and alleviating some of her stress" and on October 29, 2012, Ms. Voci noted the Celexa seemed to be working well for Petitioner's depression. On November 2, 2012, Petitioner stopped taking Celexa after she was advised to discontinue taking most of her medications due to having developed hives. During Petitioner's visit with Ms. Voci on January 16, 2013, Ms. Voci started Petitioner on a very low dose of Klonopin, an anti-anxiety medication, after Petitioner complained of severe amounts of stress for which she asked to be prescribed medicine as needed for anxiety. When Petitioner followed up with Ms. Voci on January 29, 2013, she stated her anxiety levels were high due to stress on her job but noted the Klonopin worked when she needed it.

During Petitioner's administrative conference on September 11, 2013, Petitioner submitted a current medication sheet that indicated she was taking Celexa for depression and anxiety. During the conference, Petitioner also noted she had just recently started back to counseling and, as of the date of the conference, had attended one session with a social worker and was scheduled to go back. Petitioner noted the first session had seemed to help her anxiety.

Although the record reflects that Petitioner has been diagnosed with anxiety and has been prescribed medications to treat the condition, the record in this case does not indicate that any limitations Petitioner may suffer due to her anxiety are permanent in nature. In fact, Petitioner testified at her administrative conference that she has continued to pursue treatment, including returning to counseling for her anxiety, and noted that her first session had seemed to help her anxiety. Further, the record indicates that, when Petitioner has taken medication for her anxiety, the medication has worked well. .

Liver Disease:

On July 13, 2011, Petitioner visited Dr. Philippe Zamor, who noted Petitioner had a CT scan on June 21, 2011, which showed abnormal lesions on her liver, but that a follow-up MRI on July 1, 2011 had ruled out the possibility that the lesions were cancerous but did reveal the lesions were "slightly increased in size" from January of 2008. During the July 13th visit, Petitioner underwent viral hepatitis screenings that were negative for hepatitis B and C. Dr. Zamor noted Petitioner may have hepatic adenomas that may have enlarged due to the use of birth control pills. He recommended that Petitioner should be on as low a birth control dose as

possible and indicated Petitioner should return for a follow-up in about a year to survey the lesions.

On January 9, 2012, a follow-up MRI showed “benign findings” as to Petitioner’s hepatic lesions. During a visit with Dr. Bott on January 13, 2012, Dr. Bott indicated Petitioner’s liver mass was “stable on MRI” and instructed Petitioner to have a follow-up MRI in two years. On July 26, 2013, during surgery to remove Petitioner’s gallbladder, Dr. Ryan Swan performed a liver ultrasound and biopsy, noting Petitioner’s liver lesions were stable as compared to prior CT scans from 2011.

In short, the record confirms that lesions were discovered on Petitioner’s liver and that those lesions continue to exist. However, nothing in the record suggests that Petitioner’s liver disease precludes her from performing her prior job duties or causes any impairment that is likely to be permanent. Rather, the record indicates that the lesions are not cancerous and have remained stable since 2011, and that Petitioner is not suffering from hepatitis.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude the following as a matter of law:

1. This Court has jurisdiction over this contested case pursuant to S.C. Code Ann. § 9-21-60 (Supp. 2013), S.C. Code Ann. § 1-23-600(A) (Supp. 2013), and S.C. Code Ann. §§ 1-23-310 et seq. (2005 & Supp. 2013).

2. The basic question presented in this matter is whether Petitioner is entitled to receive disability retirement benefits from the South Carolina Retirement System pursuant to S.C. Code Ann. § 9-1-1540 (Supp. 2013). That section provides that qualifying members of the South Carolina Retirement System

may be retired...not less than thirty days and not more than nine months next following the date of filing the application on a disability retirement allowance if the system, after a medical examination of the member, certifies that the member is mentally or physically incapacitated for the further performance of duty, that the incapacity is likely to be permanent, and that the member should be retired.

Id. (emphasis added).

3. As the moving party in this matter, Petitioner bears the burden of establishing, by a preponderance of the evidence, that she satisfies the requirements of Section 9-1-1540 and is entitled to the disability retirement benefits she seeks. See Leventis v. S.C. Dep’t of Health & Env’tl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that the burden of proof in administrative proceedings generally rests upon the party asserting the

affirmative of an issue); see also 73A C.J.S. Public Administrative Law and Procedure § 128, at 35 (1983) (“In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met.”).

4. Therefore, the Petitioner must establish:

(1) that she is mentally or physically incapacitated from the further performance of her job duties as a Child Support Enforcement Specialist with York County;

(2) that any such incapacity is “likely to be permanent;” and

(3) that the circumstances are such that she “should be retired.”

S.C. Code Ann. § 9-1-1540.

Petitioner’s Claim

In the instant matter, Petitioner contends that she should be awarded disability retirement benefits as the result of diverticulitis, lung disease, high blood pressure, immune system disease, anxiety and liver disease. However, the medical records presented in this matter fail to demonstrate that the Petitioner satisfies the eligibility requirements for disability retirement benefits as a result of any of the medical conditions raised at times in connection with her claim.

The crucial inquiry in this case is on the question of the permanence of any incapacity experienced by the Petitioner. With regard to some of Petitioner’s alleged disabling conditions, such as diverticulitis, which Petitioner has not had any recent episodes of; immune system disease, which the record does not firmly establish Petitioner to be suffering from; and Petitioner’s stable liver lesions, the medical records produced in this matter do not meet the initial hurdle of demonstrating that the conditions actually physically incapacitate Petitioner from the performance of her job duties. However, with regard to Petitioner’s other alleged disabling conditions of lung disease, high blood pressure and anxiety, the question is not so much whether or not those conditions have, at some point, incapacitated Petitioner from performing her job duties as a Child Support Enforcement Specialist, but rather, whether the medical evidence establishes that any incapacity caused by those conditions is “likely to be permanent.”

The requirement that an applicant for disability retirement benefits demonstrate that his or her disability is “likely to be permanent” is not a requirement that may simply be presumed to have been satisfied by a showing of current incapacity alone. Rather, it is a distinct element of

the statutory standard for disability retirement benefits that must be fully established by an applicant in addition to proving present incapacity. See S.C. Code Ann. § 9-1-1540. Consequently, the South Carolina Supreme Court has recognized that, in order for an applicant to establish that a disability is permanent for the purpose of receiving state disability retirement benefits, he must show that his “disability is of such nature that it will, regardless of medical and other treatment, continue throughout his lifetime so as to deprive him of the ability [to perform his prior job duties].” Ex parte McFaddin, 254 S.C. 270, 274, 175 S.E.2d 218, 220 (1970) (addressing the standard for disability retirement for members of the judiciary).

Here, the Petitioner’s medical records do not establish that any functional limitations caused by her lung disease, high blood pressure or anxiety are permanent in nature. In fact, the medical records submitted in connection with Petitioner’s disability claim show that Petitioner’s high blood pressure is under control with her current medication. As for the Petitioner’s anxiety, the medical records reveal that medication has worked well for Petitioner’s anxiety; and at the administrative conference held on September 11, 2013, Petitioner testified that she recently returned to counseling for her anxiety and that her first session had seemed to help. With regards to the Petitioner’s lung disease, the specialist treating Ms. Lowery indicated that the spots on her lungs are “resolving.”

While Petitioner’s nurse practitioner, Ms. Voci, stated that Petitioner was unable to work *at this time*, she did not state that Petitioner was permanently unable to work, but rather stated Petitioner needed disability for a year in order to pursue further treatments. In fact, none of Petitioner’s treating physicians, including the nurse practitioner who indicated Petitioner was unable to work *at this time*, have concluded that any limitations caused by Petitioner’s conditions – either alone or in combination – are permanent in nature and cannot be addressed with medical treatment. The record produced in this case does not demonstrate that Petitioner’s medical conditions are of such nature that that those conditions will, regardless of treatment, continue throughout Petitioner’s lifetime so as to permanently deprive her of the ability to perform her prior job duties as a Child Support Enforcement Specialist.

Therefore, based upon the medical records submitted in this matter, the Petitioner has not met her burden of establishing that she is permanently incapacitated from the performance of her duties as a Child Support Enforcement Specialist for York County. Because the Petitioner failed

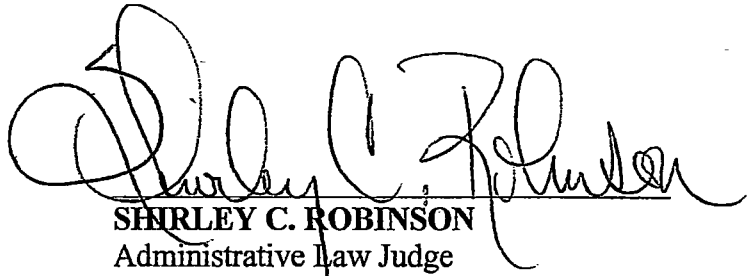
to meet this burden, this Court is compelled to find that Petitioner is not entitled to disability retirement benefits pursuant to Section 9-1-1540.

ORDER

Based upon the Findings of Fact and Conclusions of Law stated above,

IT IS HEREBY ORDERED that South Carolina Retirement Systems' Final Agency Determination denying the Petitioner's application for disability retirement benefits under the South Carolina Retirement System is **SUSTAINED**

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
Administrative Law Judge

April 4, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid or in the emergency Mail Service addressed to the party(ies) or their attorney(s).

This 4 day of April 2014
By: Joseph Henderson
Judicial Law Clerk



Gastroenterology & Internal Medicine
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Cardiology & Internal Medicine
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Endocrinology & Internal Medicine
Chandra Shastry, M.D.

Physician Assistant
Harold Fite, PA

March 13, 2014

To Whom it may concern:

Robin Lowrey has been under my care for a year and a half and has undergone a lung biopsy, has continuous elevated blood pressure, shortness of breath and elevated white blood cells. She is chronically ill and unable to be exposed to any environmental or internal allergens. The patient is permanent disabled and will not ever be able to return to work.

Carroll D. D.P.

Gaston Medical Group.