

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Disability Retirement of:

AMBER N. KEUP and

**STANISLAUS COUNTY SCHOOLS – TURLOCK JOINT UNIFIED
SCHOOL DISTRICT, Respondents**

Agency Case No. 2020-1451

OAH No. 2021041004

PROPOSED DECISION

Sean Gavin, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on February 3, 2022, from Sacramento, California.

Helen L. Louie, Staff Attorney, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

Amber N. Keup (respondent) did not appear, and a default was taken pursuant to Government Code section 11520.

Respondent Stanislaus County Schools – Turlock Joint Unified School District (District) appeared through Fernando Ureno, Human Resources Director.

Evidence was received, the record was closed, and the matter was submitted for decision on February 3, 2022.

ISSUE

At the time of her application for disability retirement, was respondent permanently disabled or substantially incapacitated from the performance of her usual and customary job duties as a Secretary I for the District based on her pulmonological (sleep apnea) condition?

FACTUAL FINDINGS

Application and CalPERS's Denial

1. On July 15, 2020, respondent signed and subsequently filed an application for disability retirement with CalPERS (application). At the time she filed her application, respondent was employed by the District as a Secretary I. By virtue of her employment, respondent is a local miscellaneous member of CalPERS subject to Government Code section 21150.

2. In her application, respondent identified her disability as "obstr[uctive] sleep apnea w[ith] uncontrolled daytime sleepiness." She listed her limitation/preclusions as: "fall asleep and/or lose consciousness (uncontrolled)." She reported her injury or illness affected her ability to do her job because, "I am unable to predict when episodes will occur. If mobile at the time of episode, I fall like a domino." Respondent

is not currently working in any capacity for the District, having last worked on April 25, 2016.

3. After receiving respondent's application, CalPERS reviewed respondent's medical reports concerning her sleep apnea and sent her for an Independent Medical Examination (IME) with Omar Tirmizi, M.D. Based on its review of medical records and Dr. Tirmizi's IME report, on November 5, 2020, CalPERS denied respondent's application. On December 11, 2020, respondent appealed the denial. On April 19, 2021, Keith Riddle, Chief of CalPERS's Disability and Survivor Benefits Services Division, in his official capacity, made and filed a Statement of Issues alleging respondent was not permanently disabled or incapacitated from performing her duties as a Secretary I at the time she filed her application. This hearing followed.

Job Duties

4. With her application, respondent submitted a Physical Requirements of Position/Occupational Title form for her position. The form provides the following information about the physical requirements of the Secretary I position:

- a. Infrequent Tasks (between 5 and 30 minutes per day):
lifting/carrying 0-25 pounds; kneeling, squatting;
reaching above and below shoulder; pushing and
pulling; and handling (holding, light grasping).
- b. Occasional Tasks (between 31 minutes and 2.5 hours per
day): walking; bending at the waist; twisting at the neck
and waist; and fine fingering (pinching, picking).

- c. Frequent Tasks (between 2.5 and 5 hours per day):
interacting/communicating with the public by phone
and with co-workers; standing; and bending the neck.
- d. Constant Tasks (more than 5 hours per day):
interacting/communicating with the public face-to-face;
sitting; and computer use (keyboard and mouse).

5. In addition, the Turlock Unified School District job description for the Secretary I position includes: "Under the direction of an administrator performs varied secretarial and clerical duties and other related work as required." It also lists "physical demands of position," including: "walking, standing or sitting for extended periods"; "stooping, squatting, kneeling, overhead reaching and repetitive bending"; and "perceiving the nature of sound, near and far vision, depth perception, providing oral information, the manual dexterity to operate equipment, and handle work with various materials and objects."

IME – Omar Tirmizi, M.D.

6. CalPERS sent respondent for an IME with Dr. Tirmizi regarding her claim of sleep apnea. Dr. Tirmizi received his medical degree from Aga Khan University in Pakistan in September 1988. He completed a one-year internship (1988-1989) and a one-year residency (1989-1990) in internal medicine at the Aga Khan University Hospital. He completed an additional one-year internship (1991-1992) in internal medicine at Michigan State University, McLaren Regional Medical Center and a two-year residency (1992-1994) in internal medicine at the University of Illinois, Michael Reese Hospital before completing a three-year fellowship (1994-1997) in pulmonary and critical care medicine at the University of Southern California. In 1999, Dr. Tirmizi

completed an advanced course in sleep medicine at the Palo Alto School of Sleep Medicine. He is a Diplomate with the American Board of Internal Medicine in Internal Medicine (1995, 2006), Pulmonary Medicine (1996, 2006), Critical Care Medicine (1997, 2006), and Sleep Medicine (2009) and of the American Board of Sleep Medicine (1999). He has performed IMEs for CalPERS for the past five to eight years and is familiar with the CalPERS substantial incapacity standard.

7. On October 17, 2020, Dr. Tirmizi conducted an IME. He interviewed respondent, took a medical history and an accounting of her current complaints, reviewed her medical records and job duties, and physically examined her. Thereafter, Dr. Tirmizi wrote an IME report. He testified at hearing consistent with his report.

8. Dr. Tirmizi concluded: “[i]t is my opinion that the member is not substantially incapacitated.” He opined:

[Respondent] has mild OSA [obstructive sleep apnea]. Such mild OSA typically does not cause the kind of sleepiness that is confirmed and reported by [respondent]. The appropriate diagnosis for her would be (idiopathic) hypersomnia, possibly in relation to medication use or marijuana use. The term hypersomnia best describes her condition. It is my opinion that this does not rise to the level of substantial incapacity, as she has had this all her life, ever since high school and she has been able to function, despite this condition. She is able to perform the secretarial activities, as discussed in the job specification, as well as physical activities, except that she may have a few episodes of brief periods of relative loss of awareness, either due to

sleep attacks or otherwise. Since she is not operating machinery or driving, this does not preclude her from performing the substantial duties associated with Secretary I.

Analysis

9. Respondent bears the burden to establish, through competent medical evidence, that at the time of her application, she was substantially incapacitated from performing her usual job duties based on her pulmonological (sleep apnea) condition. She failed to do so. Rather, the persuasive medical evidence established that respondent's sleep apnea did not, at the time of her application, substantially disable her from performing her usual job duties as a Secretary I.

10. Dr. Tirmizi examined respondent, reviewed her medical records, and evaluated her using the CalPERS substantial incapacity standard. Based thereon, he found that her sleep apnea condition did not preclude her from performing her usual job duties. Dr. Tirmizi's testimony was undisputed. As a result, when all the evidence is considered, respondent did not prove through competent medical evidence that, at the time she applied, her sleep apnea incapacitated her from performing her job duties for the District. Therefore, her application must be denied.

LEGAL CONCLUSIONS

1. By virtue of her employment, respondent is a local miscellaneous member of CalPERS, pursuant to Government Code section 21150. To qualify for disability retirement, respondent must prove that, at the time she applied, she was

“incapacitated physically or mentally for the performance of [her] duties in the state service.” (Gov. Code, § 21156.) As defined in Government Code section 20026,

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

2. The party asserting the affirmative at an administrative hearing has the burden of proof, including the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) This burden requires proof by a preponderance of the evidence. (Evid. Code, §§ 115, 500.) Respondent did not meet her burden.

3. As discussed in Factual Findings 9 and 10, respondent failed to provide competent medical evidence sufficient to demonstrate that she was substantially incapacitated from performing her normal and usual employment duties as a Secretary I at the time she filed her disability retirement application. Accordingly, as set forth in the Factual Findings and Legal Conclusions as a whole, respondent is not entitled to retire for disability pursuant to Government Code section 21150.

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ORDER

The application for disability retirement filed by respondent Amber N. Keup is DENIED.

DATE: March 4, 2022


Sean Gavin (Mar 4, 2022 16:20 PST)

SEAN GAVIN

Administrative Law Judge

Office of Administrative Hearings