

**BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

In the Matter of the Application for
Disability Retirement of

RUTH A. KECK,

Respondent,

And

LOS ANGELES COUNTY SCHOOLS
(GLENORA UNIFIED SCHOOL
DISTRICT),

Respondent.

Case No. [3138](#)

OAH No. [L-1999120097](#)

**PRECEDENTIAL DECISION
00-05**

EFFECTIVE: September 29, 2000

PRECEDENTIAL DECISION

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System hereby adopts as its own decision the Proposed Decision dated May 16, 2000, concerning the [application of](#) Ruth A. Keck; hereby designates its decision as precedential; RESOLVED FURTHER that this Board decision shall be effective 30 days following mailing of the decision.

* * * * *

I hereby certify that on August 23, 2000, the Board of Administration, California Public Employees' Retirement System, made and adopted the foregoing Resolution, and I certify further that the attached copy of the administrative law judge's Proposed Decision is a true copy of the decision adopted by said Board of Administration in said matter.

BOARD OF ADMINISTRATION, CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
JAMES E. BURTON, CHIEF EXECUTIVE OFFICER

Dated: August 30, 2000 BY _____
BARBARA HEGDAL
ASSISTANT EXECUTIVE OFFICER

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

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RUTH A. KECK,

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LOS ANGELES COUNTY SCHOOLS
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OAH No. L-1999120097

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Bernardino, California on March 7, 2000.

Nathan D. Schmidt, Staff Counsel, represented Petitioner James E. Burton, Chief Executive Officer of the California Public Employees' Retirement System.

Judith S. Leland, Esq., represented respondent Ruth A. Keck, who was present during the hearing.

There was no appearance by or on behalf of respondent Los Angeles County Schools (Glendora Unified School District).

On March 13, 2000, Petitioner filed his Closing Brief, marked Exhibit 12. Claimant's Reply to Petitioner CalPERS' Closing Brief was filed on March 16, 2000 and marked Exhibit K.

The matter was submitted on March 16, 2000.

FACTUAL FINDINGS

1. Petitioner James E. Burton made and filed Statement of Issues Case number 3138, dated December 22, 1999, in his official capacity as Chief Executive Officer of the California Public Employees' Retirement System (CalPERS).

2. Between 1969 and 1997, Los Angeles County Schools (Glendora Unified School District) [respondent Glendora Unified School District] employed Ruth A. Keck (respondent Keck) as a clerk typist and as a Secretary II from 1992 until June 30, 1998, the date she filed an application for disability retirement.

By virtue of her employment, respondent Keck is a miscellaneous member of CalPERS subject to Government Code section 21150. Respondent Keck has the minimum service credit necessary to qualify for retirement.

3. On June 30, 1998, respondent Keck signed an application for disability retirement. CalPERS received the application on July 9, 1998. In filing the application, respondent Keck claimed disability on the basis of an orthopedic (neck and back) condition.

On August 2, 1999, respondent Keck signed an application for service retirement. Effective September 22, 1999, respondent Keck retired for service and has been receiving her retirement allowance from that date.

4. CalPERS has obtained or received medical reports concerning respondent Keck's condition from competent medical professionals. After review of the reports, the Chief Executive Officer determined that respondent Keck was not permanently disabled or incapacitated from performance of her duties as a School Secretary II at the time her application for disability retirement was filed.

5. By letter, dated January 5, 1999, the Chief Executive Officer notified respondent Keck of his determination and advised of her appeal rights.

6. On January 25, 1999, respondent Keck filed an appeal, requesting a hearing. The appeal has been accepted as timely.

7. This appeal is limited to the issue of whether respondent Keck is permanently disabled or incapacitated from performance of her duties as a School Secretary II.

8. In the capacity of Secretary II employed by respondent Glendora Unified School District, respondent Keck worked essentially as an office manager and supervised a part-time clerical worker. The principal of the school served as her supervisor.

As Secretary II, respondent Keck greeted and provided necessary assistance to the members of the public who entered the office, including staff, parents and students. She

answered the telephone, responded to inquiries, typed, used the computer and other office machines, responded to the intercom (located on the wall), maintained various records for students and staff, requisitioned, received, stored and distributed office supplies, sorted, stamped and distributed mail. She administered first aid for sick or injured students. She collected and accounted for money collected in conjunction with fund-raising activities and other school activities. At least once a month, respondent Keck drove to the district office to pick up payroll checks or to use office machines.

Respondent Keck's duties required that she sits, stand, walk, bend, push, pull, and twist. She was required to reach at, above and below shoulder level. The amount of time she spent engaging in these activities varied on a daily basis. She lifted and carried five to twenty pounds in the form of mailbags and small supplies. Occasionally, she was required to climb one or two stairs on a stool, to squat or to walk on uneven ground. She was required to perform with her right and left hand simple grasping and fine manipulation. Because there were often multiple activities occurring at one time, respondent Keck had limited control over the amount of time that she spent engaging in any specific activity.

9. Respondent Keck was injured on June 30, 1997, while working after school closed. She pulled a file box forward on a shelf in order to remove documents. After re-filing, respondent Keck pushed the box to the back of the shelf and felt a sharp shooting pain radiating up and down her back from her neck to her lower back.

10. The medical evidence in this case consists of the following:

A. the testimony of Jayaraja Yogaratnam, M.D. (Dr. Yogaratnam);

B. reports issued by Paul J. Stern, M.D. (Dr. Stern), dated July 5, 1995, Dr. Steiger, dated August 12, 1997, Douglas Tait, M.D. (Dr. Tait), dated September 18, 1997, David H. Payne, M.D. (Dr. Payne), dated October 20, 1997, Dr. Steiger, dated January 27, 1998, David L. Wood, M.D., (Dr. Wood), dated April 30, 1998, Archie Mays, M.D. (Dr. Mays), dated September 26, 1998, Dr. Yogaratnam, dated September 18, 1998 and May 26, 1999

Dr. Steiger provided medical care to respondent Keck immediately following her injury, between June 30, 1997 and January 1998. Doctors Payne, Wood and Mays were each retained to perform an orthopedic evaluation of respondent Keck. Complainant retained Dr. Yogaratnam to provide a consultation and render an opinion regarding respondent Keck's orthopedic (neck and back) condition and whether she qualifies for disability retirement.

Each physician who evaluated respondent Keck is an orthopedic surgeon who took her medical and occupational history, performed a physical examination of her cervical and lumbar spine, reviewed any medical records and the position description provided to him and issued an opinion about respondent Keck's orthopedic (neck and back) condition. The radiological evidence includes magnetic resonance imaging (MRI) reports, dated July 5, 1995 and September 18, 1997.

11. Since her June 30 injury, respondent Keck's subjective complaints are neck pain with radiation to the upper back and shoulders, numbness of the left arm and fingers, low back pain radiating to the right hip with intermittent numbness of the right foot. She described her pain as constant and sometimes worse than other times.

She testified that she has difficulty bending and is unable to put on her own shoes. Looking up to reach is difficult. According to respondent Keck, walking after 10 minutes, sitting for over 15 minutes and standing for over five minutes in one position is difficult, and she has difficulty with stairs.

Respondent Keck takes medication for her pain, to wit: Naprosyn (375 mg.), an anti-inflammatory agent, Ultram (50 mg.), as often as four times a day for pain, Flexeril (10 mg.), a muscle relaxant, one hour before bedtime.

12. According to the MRI reports, dated July 5, 1995 and September 18, 1997, there are disc bulges at the C5-C6 and C6-C7 measuring about two millimeters, and, in the lumbar spine, there are disc bulges at L4-L5 and L5-S1 measuring about one to two millimeters.

13. Dr. Steiger's initial orthopedic evaluation occurred on August 12, 1997.

His physical examination of the cervical spine revealed tenderness to palpation at the base of the occiput, trapezius, levator scapula and rhomboids. Cervical range of motion was limited. Deep tendon reflexes in the upper extremities at biceps were 1/1+, triceps 0/1 and brachioradialis were absent bilaterally. There was no sensory deficit, no loss of motor function and no atrophy in the upper extremities.

Examination of the shoulders revealed tenderness of the supraspinatus bilaterally, and range of motion was decreased. Grip readings were 0/0 on the right and 0/0 on the left on three different trials.

Examination of the lumbar spine revealed tenderness of the right posterior superior iliac spines, and range of motion was significantly restricted. Reflexes were measured at 1+ throughout. Sensation and motor were normal. Straight leg raising was 45 degrees bilaterally in the supine position with pain in the back on the left side. In the sitting position, straight leg raising was 75 degrees on the right and 80 degrees on the left with back pain bilaterally. Lasegue's test for sciatic nerve root irritability was positive on the left.

The x-rays of the cervical spine, ordered by Dr. Steiger on the day of his orthopedic consultation, revealed some straightening and slight curve reversal consistent with muscle spasm. The x-rays of the lumbar spine showed degenerative changes at L3/4, L4/5, L5/S1 with anterior lipping and spurring at the contiguous margins of the vertebra.

Dr. Steiger's diagnoses were musculoligamentous sprain, cervical spine, with radiculitis and musculoligamentous sprain, lumbar spine, with bilateral lower extremity radiculitis.

He opined that respondent Keck was temporarily partially disabled with restrictions of no heavy lifting, repeated bending or stooping, no continuous neck movement or downward gaze.

14. On October 20, 1997, Dr. Payne performed his orthopedic consultation.

Regarding the cervical spine, Dr. Payne reported that there was no evidence of atrophy or wasting and a “severe lack of range of motion in all planes.” There was tenderness to light and deep palpation over the spinous processes at C6 and C7. “There was gross motor weakness of the upper extremities bilaterally 3+ to 4/5. The patient’s cervical spine motion, and motor exam is intact with 5/5 strength in all planes – flexion, extension, right/left lateral bending and right/left lateral rotation, without pain.” Sensation and reflexes were normal. The deep tendon reflexes were intact to the upper extremities bilaterally at the biceps, triceps and brachioradialis. They are all 2+ and symmetrical bilaterally.

His examination of the lumbar spine revealed full and painless range of motion. Sensory, motor and reflex findings were normal except the posterior tibial tendon reflex could not be elicited.

In his report, Dr. Payne stated:

Concerning her lumbar spine, the patient has an equivocal straight leg raise. I do not have her previous x-rays or MRI's for my review and it is difficult to make a substantiated diagnosis at this time. The patient does have intact motor and sensory examination, as well as normal strength, but decreased range of flexion. Given the above facts, it is difficult, at this point, to make a determination as to what treatment this patient should undergo, if any...

He concluded that respondent Keck did not require further treatment and that her condition was permanent and stationary, that her cervical spine injury had totally resolved and that her lumbar spine injury required a temporary total disability of two weeks and partial disability of four weeks maximum. In Dr. Payne’s opinion, respondent Keck is capable of performing her usual and customary duties.

15. On January 27, 1998, respondent Keck was again seen by Dr. Steiger for a comprehensive orthopedic evaluation. He reported that she had not returned to work, had not undergone additional testing, was no longer receiving physical therapy and continuing with medications. She complained of ongoing pain.

His physical examination revealed moderate tenderness upon palpation of the base of the occiput, upper trapezius, levator scapulae and rhomboids bilaterally. Cervical range of motion remained decreased. There was tenderness over the supraspinatus bilaterally. Shoulder range of motion was also decreased bilaterally. There were no sensory or motor deficits, but reflexes in the upper extremities were decreased, being absent in the brachioradialis bilaterally and right triceps, and 1+ in both biceps and left triceps. Grip was reduced bilaterally with the right being 15/10/10 and the left 15/10/10 with 40/60 being normal. In the lumbar spine, there was moderate tenderness over the bilateral posterior superior iliac spine. Range of motion was decreased. The neurological examination of the lower extremities revealed no loss of sensitivity in the lower extremities, no evidence of muscle weakness and the deep tendon reflexes were physiological and equal bilaterally.

Straight leg raising sitting was 75 degrees on the right and 80 degrees on the left with pain in the back on both sides. In the supine position, it was 45 degrees bilaterally with pain in the back on the left side. Lasegue's maneuvers were positive bilaterally.

Dr. Steiger concluded that respondent Keck had disability of the neck precluding continuous or prolonged neck movement and prolonged downward gaze and repetitive pushing, pulling and reaching with upper extremities. Further, he opined that she had a disability of the back, precluding very heavy work, repetitive twisting and repeated bending and stooping.

16. On March 30, 1998, Dr. Wood performed his medical evaluation of respondent Keck.

Dr. Wood found tenderness over the paraspinal and trapezius regions, bilaterally. Range of motion of the cervical spine and right wrist was decreased. The Jamar grip dynamometer readings were 15/20/15 on the right and 20/20/15 on the left. In the lumbar spine, there was tenderness bilaterally and decreased range of motion. While she was unable to walk on her heels and toes satisfactorily, squatting was limited to 50 per cent of normal with low back pain. Straight leg raising was negative at 80 degrees bilaterally sitting but positive at 70 degrees bilaterally supine with low back pain on the left. No x-rays were taken at the request of respondent Keck.

Dr. Wood's diagnoses were strain/sprain, cervical spine, superimposed over disc bulges and strain/sprain, lumbar spine, superimposed over disc bulges at L4-5 and L5-S1.

Dr. Wood determined that respondent Keck was permanent and stationary. He opined that she is able to perform her usual and customary duties, albeit with some pain. His work restriction was no heavy work. Though he imposed the work restriction, he characterized it as prophylactic.

17. On September 8, 1998, Dr. Yogaratnam performed his orthopedic evaluation of respondent Keck to determine whether respondent Keck qualified for disability retirement.

His examination of her neck was essentially normal with regard to normal movement. Dr. Yogaratnam reported that respondent Keck complained of slight pain at extremes of rotation and opined that this was understandable due to the fact that she has some degenerative disease in the cervical spine. He found no evidence of neurological deficit in her upper extremities. Motor (muscle), sensory (sensation) and reflex functions were normal and present in the upper extremities. The Jamar grip dynamometer readings were 15/15/15 on the right and 15/15/10 on the left.

Respondent Keck complained of tenderness to palpation over the mid-thoracic spine and the whole of the lumbar spine extending down to the coccyx. She had some restriction of motion in forward flexion. Straight leg raising in the supine position was 70 degrees on the right and 80 degrees on the left, with complaints of pain in the back on each occasion. In the sitting position, she had 90 degrees and "complains of no pain in the back on specific questioning".

Motor (muscle), sensory (sensation) and reflex functions were normal in the lower extremities. Dr. Yogaratnam found no evidence of visible atrophy of the musculature or weakness of the lower extremities on testing selected muscles.

His diagnoses were degenerative disc disease of the cervical spine and degenerative disc disease of the lumbar spine.

Evaluating the nature of respondent Keck's duties, the physical requirements of the position and the results of his orthopedic evaluation, Dr. Yogaratnam reported that the only duty that respondent Keck may not be able to perform is rendering cardiopulmonary resuscitation (CPR) because of the physical constraints over a prolonged period of time. She testified that she is not required to perform CPR. Otherwise, in his opinion, respondent Keck is capable of performing the usual and customary duties of a Secretary II, albeit with some pain. Further, any difficulty that she would have with performing any strenuous physical activity for any prolonged period of time is not significant, as her duties do not seem to reflect that this is necessary.

18. Dr. Mays was retained by the Social Security Administration to provide an orthopedic consultation. He issued a medical report, dated September 26, 1998, following his evaluation on the same date.

On the physical examination, Dr. Mays reported that there was mild muscle spasm of the paracervical and shoulder girdle muscles with most ranges of motion of the cervical and lumbar spines. She had "strong" straight leg raising signs to 90 degrees bilaterally without Lasegue's sign. Jamar grip readings were 15/15/10 on the right and 15/10/10 on the left. Sensation and reflexes were tested and found to be normal, as was muscle strength except for right hip motor strength which was 4/5 in extension.

His diagnoses were chronic/severe cervical and lumbar pain with previous diagnosis of discongenic disease in the cervical spine; and musculoligamentous sprain/strain syndrome chronic in the lumbosacral spine with mildly decreased motor strength in the right hip and thigh.

In his report, Dr. Wood stated:

Physical examination today reveals that this patient in fact does have severe lumbosacral spine pain and cervical spine pain. She has objective findings of some motor weakness in her upper extremities particularly with grip strength and some decreased ranges of motion with pain in her cervical spine. She also has some low back pain and tenderness to de-palpation without radicular findings.

Dr. Wood opined that respondent Keck "may qualify for a sedentary type of activity" with restrictions of lifting no more than five to 10 pounds particularly over her head and repetitively and in a capacity of bending, stooping, climbing, crawling or crouching.

19. By letter, dated May 26, 1999, complainant requested that Dr. Yogaratnam review the Social Security Notice of Decision – Fully Favorable, dated March 18, 1999 (Exhibit C) and the letters from Glendora Unified School District, dated April 9, 1999 and January 29, 1998 (Exhibit D), and issue a supplement report indicating whether or not the additional information

changed his original medical opinion. Dr. Yogaratnam issued his supplemental report (Exhibit 9), stating, essentially, that none of the foregoing documents provided information that caused him to change his opinion, therefore it remained the same.

20. Respondent Keck asserts that she is unable to perform her usual duties as a Secretary II because of the constant pain she suffers and that she has submitted competent medical evidence in support of her argument, to wit: the medical reports of Doctors Steiger, Wood and Mays. (Exhibits E-1, E-2, J and F) and the MRI report issued by Dr. Stern, dated July 5, 1995 (Exhibit H). These physicians agree that she has limited range of motion of the cervical and lumbar spine and her grip strength is reduced. According to respondent Keck, she would not have known how to fake the readings on the grip strength test, and Dr. Yogaratnam read too much into it. As his report is inconsistent with the reports of the other physicians and he did not understand the pace, duties and physical requirements of the position, respondent Keck argues that Dr. Yogaratnam's report should be disregarded or not given much weight.

21. Expert testimony established that respondent Keck is exaggerating her symptomatology. His opinion is based on inconsistencies that he found on his physical examination, findings of other physicians in medical records that he reviewed and the MRI reports.

Dr. Yogaratnam's examination of her neck was essentially normal with regards to movement normally executed. She had slight discomfort at extremes of rotation, which he found reasonable, given that she has some degenerative disease in the cervical spine. However, Dr. Yogaratnam found no evidence of neurological deficit in the upper extremities. He had no explanation for numbness and tingling she experienced in the fingers of her left hand, normally due to nerve root compromising the neural foramina spine of which there was no evidence in the MRI report. He could determine no reason that she did not have normal range of motion in her neck.

According to Dr. Yogaratnam, his findings on the range of motion test were contradictory and therefore suspect. This test involves movements in the seated position, which is the same as the forward flexion in the erect position and straight leg raising in the supine position. The results should be the same or similar. During his physical examination of respondent Keck, the results were contradictory (Finding 17).

There was no evidence of any neurological deficit in her lower extremity.

Competent medical evidence established that there was no atrophy, no detectable motor or sensory weakness in her upper extremities, i.e., arms, hands or wrists, and no absent reflexes. In Dr. Steiger's report, dated August 12, 1997, he reported a grip strength reading of 0/0. According to Dr. Yogaratnam, this is very unlikely because he could not find any reason that respondent Keck would be unable to register a reading on the dynamometer tests and having 0/0 readings is suspect of the patient making no attempt and wanting to convey that there is a disability. He found no justification for the work restrictions imposed by Dr. Steiger.

Dr. Yogaratnam agreed that the 1995 and 1997 MRI reports were inconsistent. Normally a patient's condition deteriorates as time goes on. However, in this case, according to the 1997

MRI, her condition improved, substantiating Dr. Yogaratnam's conclusion about reflexes, weakness, numbness and no evidence of neurological encroachment.

Dr. Yogaratnam had a copy of the duties and physical requirements of the position of Secretary II. He discussed the aforementioned with respondent Keck prior to rendering his opinion. Despite the distinctions made by respondent Keck regarding his lack of understanding of the duties and physical requirements of her position, insufficient competent evidence was offered to establish that he did not understand the duties and physical requirements of the position.

Dr. Yogaratnam concluded that, given the medical records that he reviewed, his physical examination, the duties and physical requirements of her position, respondent Keck is capable of performing her usual and customary duties of a Secretary II.

22. As set forth in Finding 10, Dr. Yogaratnam is the only physician who testified as a witness in this case. He criticized Dr. Steiger, respondent Keck's former attorney, and the decision rendered by the trier of fact in respondent Keck's case before the Social Security Administration. As a result, it is appropriate to consider whether he was biased and whether his medical opinion is tainted. After careful evaluation of all evidence in the case, it is not clear whether Dr. Yogaratnam was biased. However, he is a well-qualified orthopedist, and his medical opinion is reasonable, supported by the evidence and is not refuted.

No competent evidence was offered in response to Dr. Yogaratnam's opinion. Respondent Keck did not call a physician who testified regarding whether range of motion and/or Jamar grip findings constitute valid/objective medical evidence, whether a patient can control the results of either of these tests, whether the range of motion findings are inconsistent and whether the physician believed that respondent Keck exaggerated her symptoms.

As there are references to x-rays and other treatment dates by Dr. Steiger in respondent Keck's memorandum (Exhibit A) that are not discussed in his or any other physician report, it appears that there are medical records, including x-rays, that were not provided to the medical examiners for review. At least two physicians (Doctors Payne and Wood) reported that no x-rays were performed because respondent Keck refused. Dr. Payne explained that she refused the x-rays because of her prior history of breast cancer. However, the foregoing limited the available evidence for review by the evaluating physicians.

With the exception of Dr. Yogaratnam, none of the other physicians evaluated respondent Keck specifically applying the CalPERS disability standard, set forth in Legal Conclusions 1, 2, 3 and 4.

For the reasons set forth in Findings 21 and 22, Dr. Yogaratnam's medical opinion is more credible, reliable and persuasive in this case.

23. Dr. Yogaratnam acknowledged that respondent Keck suffers from pain but the degree of pain should not prevent her from performing her duties.

There is insufficient competent medical evidence of any underlying physical condition that would prevent respondent Keck from performing the usual duties of a Secretary II.

24. Respondent Keck is not substantially incapacitated from performance of her usual duties as a Secretary II on the basis of her orthopedic (neck and back) condition.

25. By letters, dated December 19, 1997, January 29, 1998 and April 9, 1999, respondent Glendora Unified School District notified respondent Keck that, considering the restrictions imposed by Dr. Steiger, that the District had not identified any reasonable accommodation that would allow her to return to her usual and customary duties; and, further, continuing in the position with the restrictions imposed by Dr. Steiger would be unsafe.

26. Respondent Keck filed a claim for disability insurance benefits with the Social Security Administration. By decision, dated March 18, 1999, the trier of fact in that case determined that claimant had been under a 'disability' as defined in the Social Security Act, since June 30, 1997. No evidence was offered to establish that the standard applied in the Social Security case is the same as the standard applied by CalPERS, the specific medical reports of Dr. Steiger and the x-rays and/or MRI reports that were considered or that Dr. Yogaratnam's medical report was considered as part of the case before the Social Security Administration. For the foregoing reasons, the decision in the case before the Social Security Administration is not relevant in this case.

LEGAL CONCLUSIONS

1. The issue in this proceeding is whether respondent Keck is incapacitated on the basis of her orthopedic condition from performing the usual and customary duties of a Secretary II with respondent Glendora Unified School District. The courts have had numerous opportunities to rule on the meaning of the term "incapacitated for the performance of duty" and have been in full agreement to its scope. For nearly 30 years, the courts have consistently and uniformly held that Government Code section 20026, formerly Government Code section 21022, requires "substantial inability" to perform the applicant's "usual duties," as opposed to mere discomfort or difficulty. *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.

The *Mansperger* court found that Mr. Mansperger was not disabled because, although he suffered some physical impairment, he could still substantially perform most of his usual job duties. Thus, it is clear from the *Mansperger* case that a crucial distinction exists between a person who suffers some impairment and one who suffers substantial impairment sufficient to become eligible for disability retirement. To be eligible for a disability retirement, respondent Keck must be "substantially unable" to perform her usual duties.

The *Mansperger* test was applied in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 143 Cal.Rptr. 760. Horace Hosford, a state traffic officer with the California Highway Patrol, suffered a back injury lifting an unconscious victim. This injury aggravated previous injuries suffered in two prior accidents. The court examined Mr. Hosford's case in terms of his rank as a sergeant, and the duties required of this position, as well as the degree to which any physical problem might impair the performance of his duties.

As in *Mansperger, supra*, the court found that, although Hosford suffered some physical impairment, he could still substantially perform his usual duties.

Thus, it is clear from the case law that the difficulty in performing certain tasks is not enough to support a finding of disability. A person must be substantially incapacitated from performing his or her usual duties.

2. In *Hosford, supra*, the court held that in determining whether an individual was substantially incapacitated from his “usual duties”, the court must look to the duties actually performed by the individual, and not exclusively at the job descriptions. In determining eligibility for disability retirement, the actual and usual duties of the applicant must be the criteria upon which any impairment is judged. Generalized job descriptions and physical standards are not controlling nor are actual but infrequently performed duties to be considered.

3. In the *Hosford* case, the court rejected a contention frequently raised by disability applicants, i.e., many injuries or medical conditions create an increased risk that the person will suffer a further injury or aggravation at a later time. The medical opinion is that the person is presently capable of performing a certain task, but the task should be avoided as a prophylactic restriction. In the *Hosford* case, Mr. Hosford presented the argument that his back injuries created an increased risk for further injury. In rejecting his contention that this increased risk rendered him presently disabled, the court stated:

As the Board correctly points out, however, this assertion does little more than demonstrate his claimed disability is only prospective (and speculative), not presently in existence. (Id. at p. 863)

Thus, the disability must be presently existing and not prospective in nature. The person must be presently incapable of performing the duties of a position. Prophylactic restrictions that are imposed only because of risk of future injury are insufficient.

4. *Wolfman v. Board of Trustees* (1983) 148 Cal.App.3d, 196 Cal.Rptr. 395 involved facts similar to the *Hosford* case but clearly distinguishable. In the *Wolfman* case, the court found that reinstatement of Ms. Wolfman would initiate a vicious circle of infection, leading to severe pulmonary attack and the need for dangerous steroid therapy. Disability was not merely a prospective probability, but a medical certainty (emphasis added).

5. In the instant case, in order to determine whether respondent Keck is substantially incapacitated from performing her “usual duties” as a Secretary II, it is necessary to evaluate the “usual duties” of the position (Finding 8), the physical requirements of the job (Finding 8), and the medical evidence related to her orthopedic (neck and back) conditions (Findings 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21).

Expert testimony established that respondent Keck suffers from degenerative disease of the cervical spine and degenerative disease of the lumbar spine and obesity. According to the radiographic evidence, over time, her medical condition has improved. Insufficient competent medical evidence was offered to establish that respondent Keck’s orthopedic (neck and back) conditions would prevent her from performing the usual duties of a Secretary II, albeit with some pain. The evidence did not establish that if respondent Keck were returned to duty as a Secretary II engaging in the usual duties of a Secretary II would cause her disability to a medical certainty.

6. According to the evidence in this case, respondent Keck is not substantially incapacitated from performance of her usual duties of a Secretary II, by reasons of Findings 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24.

7. All factual and/or arguments not addressed herein are unsupported by the evidence, without merit and therefore rejected.

8. Respondent Keck argues that an employee who is terminated for disability but later found ineligible for disability retirement is placed in a “catch-22” situation. Further, she asserts that because the purpose of disability retirement is to eliminate financial hardship, an employee, such as respondent Keck, should be given the benefit of the doubt and granted disability retirement. She cites *Raygoza v. County of Los Angeles* (1983) 148 Cal.App.3d 1985 and *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985 in support of the foregoing.

In *Raygoza v. County of Los Angeles*, a deputy marshal had been medically terminated following a Workers’ Compensation Appeals Board decision containing a restriction precluding him from “situations where he may have to use a weapon.” (17 Cal.App.4th at 1242.) The deputy’s employer filed for disability retirement on his behalf, but the county retirement board denied the application after a full hearing, finding that he was capable of performing his job duties. (*Id.* at 1243.) In reviewing the trial court’s denial of the deputy’s petition for a writ of mandate seeking reinstatement to his job, the Court of Appeal ruled that the deputy was entitled to reinstatement under Government Code section 31725, part of the County Employee’s Retirement Law of 1937.

Under that section, a county employee who has been terminated based on a disability and is later denied a disability retirement because the evidence presented to the county retirement board does not establish “that the member is incapacitated physically or mentally for the performance of the duties,” must be reinstated to his or her position. (*Id.* at 1244) If the employer disagrees with the retirement board’s determination, the employer may file a petition for writ of mandate, or join in a writ filed by the employee, seeking to compel a disability retirement. If the employer fails to do so, or if the court upholds the retirement board’s decision, the employee must be reinstated. (*Id.*) The *Raygoza* court explained:

The purpose of enacting this section was to eliminate severe financial consequences to an employee resulting from inconsistent decisions between an employer and the retirement board concerning an employee’s ability to perform his duties. Prior to the enactment of the statute, a local government employer could release an employee on the grounds of physical incapacity, and the retirement board could then deny the employee a pension on the ground that he was not disabled. (Id., quoting Leili v. County of Los Angeles, supra, at 988).

The court concluded that, in such a circumstance, the Legislature had left the final decision to the retirement board. *Raygoza, supra*, at 1247)

Although Government Code section 31725 is part of a different statutory framework than the Public Employees' Retirement Law, Government Code section 20000, et. seq., which governs the operation of CalPERS, the *Leili* court noted that the California Attorney General had reached the conclusion that the same right to reinstatement exists for CalPERS members. (*Leili*, 148 Cal.App.3d at 988, *citing* 57 Ops.Cal.Atty.Gen. 86 [1974].) Consequently, an employer cannot terminate a member of CalPERS, such as respondent Keck, for medical reasons after CalPERS has denied disability retirement to the employee on a finding that he/she is able to perform the duties of his/her position.

Raygoza and *Leili* established that, following the final decision denying her application for disability retirement, respondent Glendora Unified School District is required to reinstate her to her former position. If respondent Glendora Unified School District refuses, respondent Keck's remedy is to file a petition for writ of mandate compelling respondent Glendora Unified School District to do so.

Based on the forgoing analogy, since CalPERS has determined that respondent Keck is able to substantially perform her usual duties, she must be reinstated.

Respondent Glendora Unified School District, a respondent in this case, had a right to participate in this hearing and elected not to do so. Respondent Glendora Unified School District has an obligation to reinstate her, even if the employer believes that she is not ready to return to work.

1. The decision of James E. Burton, Chief Executive Officer of the California Employees' Retirement system is affirmed.
2. The application for disability retirement of respondent Ruth A. Keck is denied.

DATED: May 16, 2000

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings