

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:

**NEFERTARI J. GUICE, and COUNTY OF SOLANO,
Respondents.**

Case No. 2021-0613

OAH No. 2021110196

PROPOSED DECISION

Timothy J. Aspinwall, Administrative Law Judge (AU), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on October 12, 2022, from Sacramento, California.

Helen L. Louie, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

William Reustle, Attorney at Law, represented Nefertari Guice (respondent) who was present.

There was no appearance by the County of Solano. CalPERS established that it duly served the County of Solano with a Notice of Hearing. Consequently, this matter

proceeded as a default hearing against the County of Solano pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record closed, and the matter submitted for decision on October 12, 2022.

ISSUE

At the time of her application for disability retirement, was respondent substantially incapacitated from performing her usual and customary duties as a Library Associate for the County of Solano based on orthopedic conditions (left hip)?

FACTUAL FINDINGS

1. Respondent was employed by the County of Solano as a Library Associate. By virtue of her employment, respondent is a local miscellaneous member of CalPERS subject to Government Code section 21150. Respondent has the minimum service credit necessary to qualify for retirement.

Application by Respondent

2. On January 25, 2021, respondent signed an application for disability retirement, which CalPERS received on January 28, 2021. In her application, respondent described her disability "hip bursitis" and stated that "it just came on by itself." Respondent stated in her application that her hip bursitis limits or prevents her from walking, standing, sitting, or pushing and pulling heavy items for long periods of time.

Duties and Physical Requirements of a Library Associate

3. The duties of a Library Associate include but are not limited to the following: serve as reference person to the public, train the public to use and understand information and technology resources, place orders for library materials, assist librarians in selecting and replacing materials in the library collection, assist librarians in preparing programming activities, provide cataloging and classification for library materials, contribute to informational handouts, supervise and evaluate clerical staff, and provide training to all levels of staff.

4. The physical requirements for the position of a Library Associate include: greater than five hours per day interfacing with co-workers, supervising staff and computer use; two and a half to five hours per day interfacing with the public, lifting/carrying zero to 10 pounds, sitting, standing, bending and twisting at the neck and waist, reaching above and below the shoulder, and pushing and pulling; 31 minutes to two and a half hours per day communicating with the public by telephone, lifting/carrying 11 to 25 pounds, walking, climbing, and squatting; five to 30 minutes per day lifting/carrying 26 to 50 pounds, kneeling, handling (holding, light grasping), fine fingering (pinching, picking), and working at heights; and less than five minutes per day interfacing with inmates or patients, lifting/carrying more than 50 pounds, running, crawling, power grasping, walking on uneven ground, driving, operating hazardous machinery, exposure to excessive noise, exposure to extreme temperature, and exposure to dust, gas, fumes, or chemicals.

Respondent's Evidence

5. Respondent testified on her own behalf. She began working for Solano County in 1995. She worked for Solano County full-time for approximately 20 years, in

addition to some years of part-time service. Respondent was promoted to the position of a Library Associate in 2006.

6. Respondent developed intermittent hip bursitis in 2019. She saw her primary care physician in 2019 regarding the bursitis. Her physician told her to lose weight and stop wearing high heels. Her physician did not refer her to an orthopedist. She did not receive physical therapy until the fall of 2020.

7. The bursitis became persistent during 2020, when her job responsibilities were expanded to perform some of the work of library shelvers who had been laid off due to the covid-19 pandemic. The work required her to push carts full of books, which resulted in increased strain on her hips.

8. During the fall of 2020, respondent's bursitis caused so much pain that she would sometimes lose balance as she walked. She had to limit the amount of weight she would push and pull in her library work. Other times she could not get out of bed in the morning because of the pain. On those occasions, she felt like her pain was at a level 10 of 10. She knows what real pain feels like from a severely broken ankle when she was 19 years of age. Her hip pain was worse.

9. In respondent's opinion, her hip condition was disabling. She did not present any other evidence to support her assertion that she is substantially incapacitated from performing the responsibilities of a Library Associate.

CalPERS's Evidence – Expert Opinion

10. CalPERS retained Harry A. Khasigian, M.D., to conduct an independent medical evaluation (IME). Dr. Khasigian is an orthopedic surgeon and a fellow in the

American Academy of Orthopedic Surgeons. He conducted an IME on April 30, 2021, and issued an IME report on that date. He testified at hearing regarding his findings.

11. On April 30, 2021, Dr. Khasigian met with respondent and took her history of present injury, medical history, and reviewed her medical records. She did not have x-rays in her medical records, so he ordered x-rays of her lumbar spine and hips. The x-rays show normal bilateral hip joints, without damage to the bones or cartilage. The lumbar spine has L4 ossification, which would not cause pain.

12. Dr. Khasigian also physically examined respondent. She had tenderness over the left hip bursa. She also had hip pain and weakness while lying on her side and lifting her leg (Ely's test).

13. Based on the physical examination and all the evidence available to Dr. Khasigian, he concluded that respondent has tendonitis/bursitis of the left hip. Dr. Khasigian treats hip bursitis on a regular basis. It is a fully treatable condition. The normal treatment includes corticosteroid injections, physical therapy, and a shoe lift to take some of the weight off the affected hip. To Dr. Khasigian's knowledge, respondent was never referred to an orthopedist, nor was she provided with corticosteroid injections. In Dr. Khasigian's view, it is remarkable how little treatment respondent had been provided, especially given that the bursitis condition is fully treatable.

14. Dr. Khasigian reviewed the duties and physical requirements of a Library Associate. Based on the information provided and his examination of respondent, Dr. Khasigian concluded that respondent's conditions are not occupationally limiting. Dr. Khasigian further concluded that respondent was not substantially incapacitated from performing her duties as a Library Associate. In addition, respondent's hip

tendonitis/bursitis is a transient condition that could be resolved with appropriate treatment.

Discussion

15. CalPERS presented competent medical evidence through the testimony and IME report of Dr. Khasigian, who found insufficient evidence to make a finding that respondent is substantially incapacitated from performing the duties of a Library Associate. His opinion was persuasive.

16. Respondent did not submit any medical evidence. Because respondent failed to offer competent medical evidence to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a Library Associate, her application must be denied.

LEGAL CONCLUSIONS

1. To qualify for disability retirement, respondent had to prove that, at the time she applied for disability retirement, she was "incapacitated physically or mentally for the performance of his or her duties . . ." (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 duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board ... on the basis of competent medical opinion.

2. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.) An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of the application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.)

3. *Mansperger* and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date respondent applied for disability retirement, she was substantially unable to perform the usual duties of a Library Associate due to an orthopedic condition. Based on the evidence as a whole, respondent failed to meet this burden. For this reason, respondent's disability retirement application must be denied.

ORDER

The application for disability retirement filed by respondent Nefertari J. Guice is DENIED.

DATE: October 26, 2022

Timothy Aspinwall

TIMOTHY J. ASPINWALL

Administrative Law Judge

Office of Administrative Hearings