

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:

PEYTON A. SMITH,

Respondent.

and

DEPARTMENT OF MENTAL HEALTH,

Respondent.

Case No. 9324

OAH No. 2012040390

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in Orange, California, on December 20, 2012.

John A. Mikita, Senior Staff Counsel, represented Complainant Mary Lynn Fisher, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS), and not otherwise.

There was no appearance by or on behalf of Respondent Peyton A. Smith.

There was no appearance by or on behalf of Respondent Department of Mental Health.

The matter was submitted on December 20, 2012.

FACTUAL FINDINGS

1. Mary Lynn Fisher (Petitioner) filed Statement of Issues, Case No. 9324, against Peyton A. Smith (Respondent Smith) and Department of Mental Health (Respondent Department of Mental Health), in her official capacity as Chief of the Benefit Services Division, California Public Employees' Retirement System (CalPERS), and not otherwise.

2. Respondent Department of Mental Health employed Respondent Smith from 1980 until 2007. On the date that she filed her application for retirement, she was employed as a Rehabilitation Therapist. By virtue of her employment, Respondent Smith is a state safety member of CalPERS subject to Government Code section 21151.

3. On July 17, 2007, Respondent Smith signed an application for service pending disability retirement. In filing the application, she claimed disability on the basis of psychological, internal (high blood pressure) and orthopedic (back) conditions.

4. Effective August 31, 2007, Respondent Smith retired and has been receiving her retirement allowance since that date.

5. CalPERS obtained or received medical reports concerning Respondent Smith's orthopedic (back), psychological, internal (high blood pressure) and orthopedic conditions from competent medical professionals. After review of the reports, CalPERS determined that Respondent Smith was not permanently disabled or incapacitated from performance of her duties as Rehabilitation Therapist at the time she filed her application for disability retirement.

6. By letter, dated March 16, 2009, CalPERS notified Respondent Smith of its determination and advised her of appeal rights.

7. By letter, dated March 27, 2009, Respondent Smith filed a timely appeal and requested a hearing.

8. By letter, dated November 15, 2012, Petitioner contacted Respondent Smith regarding her verbal request to withdraw her appeal. It stated in pertinent part:

This letter is to inform you that I am currently seeking information as to whether or not you wish to move forward with your disability retirement appeal. Benefits Service Division informed me that you did not attend the IME¹ appointments on November 13, 2012, and November 15, 2012, and that you advised them of your desire to withdraw your appeal.

In the letter, Petitioner informed Respondent Smith that if she were interested in withdrawing her appeal that she should sign the letter and advised her of the consequences of the doing so. There is no evidence that Respondent Smith executed this letter. The hearing in this matter ensued as scheduled.

9. There was no appearance by or on behalf of Respondent Smith. CalPERS established that satisfactory service had been effectuated on Respondent Smith and the matter proceeded as a default.

¹ Independent Medical Examiner

10. The appeal is limited to the issue of whether, on the basis of psychological and/or internal (high blood pressure) and/or orthopedic (back) conditions, Respondent Smith is permanently disabled or incapacitated from performance of her duties as a Rehabilitation Therapist for Respondent Department of Mental Health. If disability is found to exist, any dispute as to whether the disability is industrial or non-industrial will be resolved pursuant to Government Code section 21166.

Job Duties and Physical Requirements

11. The Rehabilitation Therapist employed by Respondent Department of Mental Health provides rehabilitative programs and services through appropriate client/patient assessment, treatment, service planning, therapeutic activities, discharge planning, and community reintegration. The time is spent as follows: 40 percent documentation following interviews, 40 percent implementation of rehabilitation program, 10 percent operational duties and 10 percent staff development (team conferences, etc.)

12. The physical requirements of the position include, occasionally and up to three hours, required to sit, stand, crawl, kneel, climb, squat, bend (neck), bend (waist), twist (neck), twist (waist), reach (above shoulder), reach (below shoulder), push and pull, perform fine manipulation, do simple grasping, repetitively use hands, use the keyboard, use the mouse, drive and lift or carry 0-25 pounds.

The Rehabilitation Specialist was never required to do power grasping, lifting or carrying more than 25 pounds, walk on uneven ground, work with heavy equipment, be exposed to excessive noise, be exposed to extreme temperature, humidity or wetness, be exposed to dust, gas fumes or chemicals, work at heights, operate foot controls or perform repetitive movement, use spatial, visual or auditory protective equipment, or work with bio-hazards.

Medical Evidence

13. The relevant medical evidence included:

- Reports of Stephen Prover, M.D. (Dr. Prover), a psychiatrist
- Reports of Craig Joseph M.D. (Dr. Joseph), an internist
- Reports of Peter Borden M.D. (Dr. Borden), an orthopedist

Each doctor was retained by CalPERS to perform an IME to determine whether Respondent Smith was substantially incapacitated for the performance of the usual duties as Rehabilitation Therapist. Each physician was qualified to render opinions. Though the doctors made mention of other conditions, each focused on the medical condition for which he was retained to evaluate.

14. Dr. Prover performed the psychological/psychiatric assessment. His initial medical evaluation of Respondent Smith occurred on August 8, 2008. He took a history, performed a mental status examination, reviewed medical records and reviewed the job description.

Dr. Prover reported that when asked about her complaints, Respondent Smith “. . . seemed to be overwhelmed by this request and needed to be repeatedly redirected to reply to this question . . . She was told specifically she needed to recite or recount psychiatric complaints for which she has been seeking disability. Instead, she launched into a long and repeated anecdotal diatribe against her employer presenting anecdotal reports dating back almost 20 years . . . Finally, when repeatedly asked to limit her remarks to the psychological symptoms that she had experienced, she paused and stated she is experiencing anergia. She then stated, ‘irritable all the time, no motivation.’” In his report, Dr. Prover documented examples of the foregoing.

Dr. Prover recorded Respondent Smith’s “history as related by patient”, in pertinent part:

. . . in 1998, she went to visit her brother in Singapore for 3 months. When she came back, she had been demoted. She then went to her union to act on her behalf. Eventually her position was returned to her. Since then, she states that she has been suffering from harassment on a systemic basis. She described event after event in which she was obliged to do a job for which she was not trained. She states that efforts were made to cause her to resign. Reports she made were dismissed or criticized simply as a means of harassing her. She alleged there was racial harassment and political harassment . . . These allegations are well described in the reports by other psychiatrist and the specific detail which Ms. Smith provided will not be repeated.

Her psychiatric complaints began about 2000. Ms Smith saw Dr. Chung at Kaiser Hospital and engaged in group therapy . . . She said that Dr. Chung treated her for stomach problems and headaches as well as depression and anxiety . . . She complains of headaches which have occurred since 2000. She said they have been diagnosed as migraine headaches but they stopped in 2007. Her lawyer referred her to Neil Ryan, M.D. Dr. Ryan diagnosed depression and has prescribed a medication for her. She states the medication has helped a little. She sees Dr. Ryan every 60 days. She has not engaged in any psychotherapy nor does she feels [sic] the need for any psychotherapy. Ms. Smith feels that she will never return to work because of the harassment that she has received. She is anergic, apathetic and lacks motivation. . .

Regarding her mental status examination, Dr. Prover reported that, initially, Respondent Smith was “quite rude, oppositional and defiant”; throughout the interview she frequently reverted to advocacy rather than answering questions and performing requested mental status tasks; “Even though, she made wild accusations against virtually all her supervisors and the entire administration of the State Hospital in which she worked, this

could not be considered to be paranoia. This was almost certainly part of her perceived needs to advocate on her behalf and to substantiate her complaints.” With the possible exception of the foregoing, Dr. Prover noted no abnormalities on her mental status examination.

Dr. Prover concluded that Respondent Smith has no psychiatric condition that renders her substantially incapacitated for the performance of the usual duties of her position.

15. Based upon a review of additional medical records, Dr. Prover issued a supplemental medical report, dated January 7, 2009. The records consisted of a psychiatric qualified medical re-evaluation by V. Charuvastra, M.D., performed on May 29, 2008. After reviewing this report, Dr. Prover did not alter opinions expressed in his prior report (Finding 14).

16. Dr. Joseph performed the internal (high blood pressure) assessment. His IME of Respondent Smith occurred on January 5, 2009. He took a history, performed a physical examination and reviewed medical records. Respondent Smith informed Dr. Joseph that Respondent Department of Mental Health employed her between 1980 and 2007.

In or about 1980 when she began working with Respondent Department of Mental Health, Respondent Smith weighed approximately 145 pounds. In or about 2000 Respondent Smith weighed approximately 160 pounds. On January 5, 2009, her weight was 215 pounds. Respondent Smith’s maximum weight was 230 pounds in 1998.

In 1990 Respondent Smith was diagnosed with thyroid disease in the form of an underactive thyroid. She has been on Synthroid, a supplemental thyroid medication since that time.

In 2000 Respondent Smith was diagnosed with high blood pressure/hypertension. On December 20, 2006, her blood pressure was normal at 128/84; on December 26, 2006, her blood pressure was normal at 122/80; on January 3, 2007, her blood pressure was 132/92 (132 was normal, and 92 represents a minimal elevation); on January 10, 2007, her blood pressure was 120/90 (120 is normal, and 90 is borderline elevated); on January 17, 2007, her blood pressure was normal at 130/80; on January 25, 2007, with pain and complaints of harassment at work, her blood pressure was 122/80. On the date of Dr. Joseph’s evaluation, Respondent Smith’s blood pressure was 150/84. Respondent Smith reported that her high blood pressure had been under good control since being on medication. Dr. Joseph reported that the medical records demonstrate excellent control of her high blood pressure even under conditions of pain and complaining of work stress.

Dr. Joseph’s diagnoses were:

1. High blood pressure/hypertension
2. Hypothyroidism

3. Musculoskeletal – with a reasonable degree of medical probability and until proven otherwise, Respondent Smith has a collagen vascular disease with an inflammatory arthritis – consistent with systemic lupus erythematosus

In Dr. Joseph's opinion, Respondent Smith was not incapacitated for the performance of her usual duties.

17. Dr. Borden assessed Respondent Smith's orthopedic (back) condition. He performed a disability evaluation - orthopedic on August 18, 2008. He took a history, performed a physical examination, reviewed medical records and reviewed her job description.

Respondent Smith complained of low back pain, depression and anxiety related to her job.

Among the medical records that Dr. Borden reviewed was a magnetic resonance imaging (MRI) report, dated March 9, 2007. It demonstrated "multiple level disc disease, minimal disc herniation of L3-4, L4-5 and L5-S1, with 3 mm disc bulge maximum."

Respondent Smith reported that on approximately December 20, 2006, she injured her lower back after loading and unloading multiple gift bags not weighing a considerable amount; however, she performed repetitive bending and twisting activities; since then she has had low back pain; she has been treated with (1) two epidural injections which has provided some relief, (2) a course of physical therapy and (3) anti-inflammatory medication. At the time of Dr. Borden's evaluation, Respondent Smith denied any numbness or tingling in the lower extremity but stated that she had had some lower extremity pain throughout treatment of this injury.

On physical examination, Dr. Borden noted that Respondent Smith was approximately 5 feet 7 inches and weighed more than 250 pounds. Examination of her back revealed global tenderness of the lumbar spine (L4-S1) and paraspinal tenderness of the right and left sides of her lower back. The neurological examination revealed that she had a negative straight leg raise bilaterally, normal motor and sensory examination throughout bilateral lower extremities; lower extremity reflexes were 2+ and symmetrical.

Dr. Borden's diagnoses were degenerative disc disease (lumbar spine, multilevel), depression and anxiety.

Dr. Borden recommended that Respondent Smith refrain from repetitive lifting, bending and squatting activities. However, he concluded that Respondent Smith is capable of performing the usual duties of her job description in that her job does not require extensive lifting, bending or squatting. As such, in Dr. Borden's opinion, her back problems do not render Respondent Smith substantially incapacitated for the performance of the usual duties of her position.

18. There was no appearance by or on behalf of Respondent Smith. As such no evidence was offered contrary to Petitioner's evidence of the duties (Finding 11) and physical requirements (Finding 12) or contrary to Petitioner's medical evidence (Findings 12, 13, 14, 15, 16 and 17).

LEGAL CONCLUSIONS

1. Respondent Smith, a State safety member of CalPERS, seeks industrial disability retirement pursuant to Government Code sections 20026 and 21151, subdivision (a).² The sole issue in this proceeding is whether Respondent Smith is "incapacitated for the performance of duty."

2. For more than 40 years, California Courts have consistently and uniformly held "incapacitated for the performance of duty" requires "substantial inability" to perform the applicant's "usual duties" as opposed to mere discomfort or difficulty.

3. In 1970, the Court of Appeal held that to be "incapacitated for the performance of duty" within Government Code section 21022 (now section 21151) means "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) In *Mansperger*, the Court found that while his disability incapacitated him from lifting or carrying heavy objects, Mansperger was not disabled for retirement purposes because he could *substantially* perform most of his *usual* duties. (*Ibid.*) The Court established a crucial distinction between a person who suffers some impairment and one who suffers the substantial impairment required to qualify for disability retirement.

Substantial inability to perform one's usual duties must be measured by considering the applicant's present abilities; disability cannot be prospective or speculative. (*Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 863.) The fact that an activity might bother a person does not mean, in fact, she cannot do that activity. In *Hosford*, the Court of Appeal reasoned that the fact that Hosford testified to having to perform several of the duties described as only "occasional" and did those tasks

² Government Code section 20026 states, in pertinent part: "Disability" and "incapacity for performance of duty" as a basis for retirement mean disability of permanent or extended and uncertain duration, as determined by the board, on the basis of competent medical opinion.

Government Code section 21151, subdivision (a) states, in pertinent part, that a state safety member "incapacitated for the performance of duty" as the result of an industrial disability retirement shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

without reporting any injury represented further evidence of Hosford's ability to perform the more strenuous aspects of his work. (*Ibid.*)

As evidenced by *Mansperger* and *Hosford*, and numerous subsequent cases that followed, mere difficulty in performing certain tasks is not enough to support a finding of disability. (See, e.g., *Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689; *Cransdale v. Board of Administration* (1976) 59 Cal.App.3d 656; *Bowman v. Board of Administration* (1984) 155 Cal.App.3d 937.) A person must be substantially incapacitated from performing her duties.

4. In *Hosford, supra*, the Court held that, in determining whether an individual was substantially incapacitated from performing his/her "usual duties," it is necessary to examine the duties actually and usually performed by the individual, not just the individual's job description. The Court held that neither the job description prepared by the State Personnel Board nor the list of job demands prepared by the employer was the exclusive standard for determining the "usual job duties." (*Hosford, supra*, 77 Cal.App.3d at 860-861.)

Thus, in determining eligibility for disability retirement, the applicant's *actual* and *usual* duties must be the criteria against which any impairment is judged. Generalized job descriptions and physical standards are not controlling nor are infrequently performed duties considered to be the standard.

5. Respondent Smith has the burden of proving entitlement to disability retirement. This rule is derived from two well-accepted legal principles.

First, although no court construing CalPERS law has yet to decide the issue, courts applying the County Employees' Retirement Law have held the applicant has the burden of proof. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.2d 234, 238.) It is well accepted that CalPERS may rely on decisions affecting other pension plans when the laws are similar. (*Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal.App.3d 937, 947.) Since Government Code section 31724 (County Employees' Retirement Law) is similar to Government Code section 21151 (California Public Employees' Retirement Law), the rule concerning the burden of proof should be applied to cases under CalPERS law.

Second, Evidence Code section 664 creates the general presumption that a public agency or office has performed its official duty. CalPERS has fulfilled its duty to determine Respondent Smith's eligibility for disability retirement, and the burden falls on Respondent Smith to rebut this presumption by proving incapacitating disability.

6. Having considered the actual and usual duties of a Rehabilitation Therapist for Respondent Department of Mental Health (Findings 11 and 18), the position held by Respondent Smith, the physical requirements of the position (Findings 12 and 18) and the medical evidence (Findings 13, 14, 15, 16, 17 and 18), insufficient competent medical

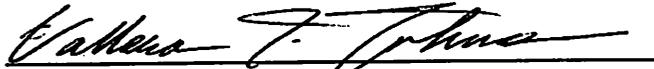
evidence was offered to establish that her psychological and/or internal (high blood pressure) and/or orthopedic (back) conditions prevented Respondent Smith from performing the usual duties of a Rehabilitation Therapist employed by Respondent Department of Mental Health.

7. Respondent Smith is not substantially incapacitated from performing her duties as Rehabilitation Therapist employed by Respondent Department of Mental Health on the basis of psychological and/or internal (high blood pressure) and/or orthopedic (back) conditions, by reason of Findings 11, 12, 13, 14, 15, 16, 17 and 18, and Legal Conclusions 1, 2, 3, 4, 5, 6 and 7.

ORDER

The application for industrial disability retirement of Peyton A. Smith is denied.

DATED: January 8, 2013



VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings