

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues Against:

ANGELICA M. TORALBA,

and

DELANO DISTRICT SKILLED NURSING
FACILITY, NORTH KERN-SOUTH TULARE
HOSPITAL,

Respondents.

Case No. 9060

OAH No. 2012050116

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on August 29, 2012, in Glendale.

Rory J. Coffey, Senior Staff Counsel, represented Mary Lynn Fisher (Petitioner), Chief, Benefit Services Division, California Public Employees' Retirement System (PERS).

Michael T. Keating, Esq., represented Angelica M. Toralba (Respondent), who was present. No appearance was made by or on behalf of Respondent Delano District Skilled Nursing Facility, North Kern-South Tulare Hospital (Delano District).

The record was closed and the matter was submitted for decision at the conclusion of the hearing. By an order dated October 12, 2012, the ALJ re-opened the record to allow the parties to submit specified information concerning some of Respondent's medical records. As described in an order dated November 21, 2012, Respondent timely submitted a response on October 23, 2012, but Petitioner did not. The additional information submitted by Respondent, marked as exhibit L, was admitted. The record was again closed and the matter resubmitted for decision on November 9, 2012.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

December 19, 2012
[Signature]

FACTUAL FINDINGS

Parties and Jurisdiction

1. Petitioner filed the Statement of Issues in her official capacity.
2. Respondent was employed by the Delano District as an Office Clerk/Senior Accounts Receivable. By virtue of her employment, Respondent is a local miscellaneous member of PERS subject to Government Code section 21150, and has the minimum service credit necessary to qualify for retirement.
3. On March 12, 2008, Respondent signed an application for disability retirement, in which she stated she was disabled by fibromyalgia, chronic pain and fatigue.
4. PERS obtained medical records concerning Respondent's condition from various medical providers. After review of those records, PERS concluded that Respondent was not permanently disabled or incapacitated for performance of her duties as an Office Clerk/Senior Account Receivable.
5. By a letter dated September 25, 2008, PERS notified Respondent that her application had been denied.
6. On or about October 14, 2008, Respondent timely filed an appeal, in which she requested a hearing.

Background Information

7. Respondent is a 37-year-old married woman with three children. She worked for the Delano District for approximately 13 years. According to her, the Delano District functions similarly to a nursing home, but cares for residents of various ages.
8. She describes her job at the Delano District as that of an office manager, in which she supervised clerks performing accounts receivable and payable. She testified that she also performed some information technology work, mainly fixing and moving computer equipment at various nursing stations. Respondent testified that she used her hands and arms approximately 25-40 percent of the work day, mainly using the telephone and computer.
9. According to the Delano District's job description for her position, Respondent was expected to sit, stand, bend, lift and move intermittently during working hours. She was required to be able to type 45 words per minute and use a calculator. She was also expected to cope with emotional and mental stress, be in good general health and demonstrate emotional stability, and was to lift and move residents, equipment and supplies when required.

10. Respondent testified that she began to feel pain and discomfort at work in approximately 2004. She testified that the pain was such that she could no longer work, so she resigned from her position in September of 2006 and has not returned to work. Respondent did not request any accommodations at work for her pain before resigning. No evidence was submitted from the Delano District.

PERS' Determination of Respondent's Condition

11. In addition to reviewing medical records submitted by Respondent, PERS referred Respondent to Internist and Rheumatologist Dr. Mark Borigini for an independent medical evaluation. Dr. Borigini reviewed the Delano District's job description for Respondent's position, and on September 6, 2008, he took a history from Respondent and performed his examination of her.

12. As documented in his report, Dr. Borigini made a number of findings and observations about Respondent. He found no sign of atrophy of her muscles. Her joints had intact range of motion, and her range of motion of the lumbar spine and cervical spine were intact. Respondent exhibited diffuse pain on palpation of the soft tissue of her back, calf area, arms, and around the second intercostal space. Dr. Borigini diagnosed Respondent with chronic pain syndrome and atypical chest pain. However, Dr. Borigini could "appreciate nothing anatomically amiss here." Although Respondent reported to him that she spent most of her time in bed, Dr. Borigini saw no sign of atrophy that would be caused by doing so. Dr. Borigini concluded that Respondent would be able to stand, walk and sit for six hours out of an eight hour workday, and that she had no functional limitation in lifting or carrying. Dr. Borigini therefore opined that Respondent was able to perform her required job duties and that she was not physically incapacitated from doing so.

13. Since Respondent did not specify any emotional disability in her application, PERS did not refer her to a mental health professional.

Evidence Presented by Respondent

14. Respondent testified that she is no longer able to work because her pain is such that she is unable to walk, it is painful to use her hands and arms and shoulders, it is hard to concentrate, and she is still depressed.

15. Respondent testified that since 2006, she has been diagnosed with and/or suffered from positional vertigo, carpal tunnel in both hands, temporalmandibular joint disorder (TMJ), irritable bowel syndrome (IBS), and insomnia. Respondent sought treatment with various health care providers and copious medical records were submitted. However, none of those records document a consistent diagnosis of any of those conditions, a prognosis indicating that Respondent would suffer from any of those conditions indefinitely, or that any of those conditions incapacitated Respondent physically or mentally for the performance of her duties.

16. Respondent testified that she began to feel depression and anxiety in 2007 as a result of the pain she was experiencing. She submitted records documenting a visit to the Kern County Mental Health System (KCMHS) in March of 2011, when she was evaluated by staff psychiatrist Komai Desai. Respondent was diagnosed by Dr. Desai as having major depression, recurrent, severe, without psychosis, and she was put on a medication regimen.

17. Respondent also submitted records from KCMHS documenting an annual mental health reassessment in March of 2012 by Judith Chiasson, LMFT, in which it was reported that Respondent's depression had decreased somewhat but she had not made a recovery and was still seeking services.

18. Respondent regularly visited her primary care provider, Dr. Arturo Abalos, in 2011 and 2012. Dr. Abalos has diagnosed Respondent with depression secondary to pain. However, since Dr. Abalos is an internist and not a psychiatrist, it appears that Dr. Abalos has relied on others for that diagnosis. In his reports, Dr. Abalos mentions that Respondent has continued to treat with a psychiatrist and take medications for her depression through 2012. However, no documentation was submitted indicating that Respondent's depression has, directly or indirectly, incapacitated her mentally for the performance of her duties.

19. Respondent's primary health problem is fibromyalgia, for which she was definitively diagnosed in 2006. Before that, various physicians were unsure whether Respondent was suffering from that malady or lupus and/or tachycardia. As a result of her fibromyalgia, Respondent has complained of suffering pain to the touch in most of her extremities, as well as many parts of her back. Since 2008, Respondent has primarily treated with Dr. Abalos for fibromyalgia, and in 2012 she began seeing pain management specialist J.R. Grandhe, M.D., who has put Respondent on a regimen of pain medications.

20. Of all the medical records presented from Respondent's various providers, the only report discussing her inability to work is a one page report written by Nurse Practitioner (NP) Jennifer Zambo after Respondent's visit of May 23, 2008. NP Zambo assessed Respondent as suffering from fibromyalgia, anemia and depression. She further stated that as a result of her condition, Respondent "will not be able to perform any job duty at present secondary to physical and mental limitations. Incapacity is temporary up [*sic*] two years. . . . Disability began on record on 11/05 up to present time." NP Zambo worked for Dr. Abalos at the time. Dr. Abalos subsequently executed a declaration in which he ratified as his own NP Zambo's report of May 23, 2008.

LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.)

2. The statutory scheme for disability retirement requires a “disability of permanent or extended and uncertain duration, as determined . . . on the basis of competent medical opinion.” (Gov. Code, § 20026.) “If the medical examination and other available information show to the satisfaction of the board that the member . . . is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability.” (Gov. Code § 21156.)

3. An applicant does not qualify for a disability retirement when she can perform customary duties, even though doing so may sometimes be difficult or painful. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873.)

4A. Cause was not established to grant Respondent’s application for a disability retirement, in that it was not established that she is permanently disabled or incapacitated for performance of her duties as an Office Clerk/Senior Accounts Receivable. (Factual Findings 1-20.)

4B. As an applicant for disability retirement benefits, Respondent has the burden of rebutting the evidence presented by Petitioner and of proving that she is permanently incapacitated. She failed to do so. Petitioner submitted a report from Dr. Borigini in which he reported finding no objective reason why Respondent could not physically perform her job duties. Though Respondent has complained of many ailments, only two appear to be at the root of her current problems: fibromyalgia and depression. However, Respondent presented no expert medical evidence establishing that she is mentally incapacitated for performing her duties due to depression. The only evidence indicating that her fibromyalgia is preventing her from working is a report authored by a nurse practitioner in 2008 which only states Respondent was unable to work through 2010. Although Respondent’s internist Dr. Abalos ratified that report, it still is insufficient to establish that Respondent now has a condition that will indefinitely incapacitate her. The report in question is vague and does not satisfactorily explain how and why Respondent is unable to perform her duties physically. The subjective nature of fibromyalgia and depression mean that Respondent’s testimony alone is not sufficient, and that it must be corroborated by persuasive, competent medical evidence. Respondent’s evidence in total does not rebut the report submitted from Dr. Borigini written in roughly the same time period as NP Zambo’s report. Though it is clear from the evidence presented that it would be difficult or painful sometimes for Respondent to perform her duties, such does not qualify her for a disability retirement.

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ORDER

Respondent Angelica M. Toralba's appeal is denied.

DATED: December 14, 2012

A handwritten signature in black ink, appearing to read 'Eric Sawyer', written over a horizontal line.

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings