

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for  
Disability Retirement of:

THERESA MENA,

Respondent,

and

LOS ANGELES UNIFIED SCHOOL  
DISTRICT,

Respondent.

Agency Case No. 2012-0207

OAH Case No. 2012070712

**PROPOSED DECISION**

Daniel Juárez, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter on January 30, 2013, in Los Angeles, California.

Rory J. Coffey, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Theresa Mena (Respondent) was not present, despite being properly served with a notice of hearing.

The parties submitted the matter for decision on January 30, 2013.

**STATEMENT OF THE CASE**

The issue in this matter is whether CalPERS properly denied Respondent's disability retirement application.

CalPERS contends its denial is proper because Respondent was not permanently disabled or incapacitated from the performance of her duties as an early education center aide at the time of her application, and therefore, she was not eligible for disability retirement.

Respondent contends her lower back and ankle injuries prevented her from substantially performing her usual and customary job duties, and therefore, CalPERS should have approved her disability retirement application.

## FACTUAL FINDINGS

1. CalPERS properly served Respondent with the Statement of Issues and the Notice of Hearing; however, Respondent failed to appear at hearing. Respondent therefore defaulted, pursuant to Government Code section 11520. CalPERS presented its evidence at hearing and sought a Proposed Decision from the ALJ.

2. Respondent was an early education center aide for the Los Angeles Unified School District (LAUSD) from approximately 1979 until August 1, 2010. On August 30, 2010, and January 11, 2011, Respondent filed CalPERS disability retirement applications. On the August 30, 2010 application, Respondent elected "service pending industrial disability retirement." On the January 11, 2011 application, Respondent elected "disability retirement." On December 22, 2011, CalPERS denied Respondent's applications for disability retirement. Respondent requested an administrative hearing on January 19, 2012. The instant hearing dealt with both applications as one application for disability retirement.

3. On December 26, 2012, Mary Lynn Fisher, Chief, Benefit Services Division, filed the Statement of Issues in her official capacity.

4. As an early education center aide, Respondent was required to speak English with fluency, read English aloud with ease, write legibly, enforce safety rules and standards of behavior, learn to operate audio-visual and instructional equipment, work effectively as a member of an instructional team, and select developmentally appropriate materials. Respondent's physical requirements included setting up and lifting equipment weighing 10 to 15 pounds and safely lifting preschool children.

5. In her August 2010 disability retirement application, Respondent described her limitations as precluded from heavy work with preclusion of prolonged walking and standing. She further described her limitations as involving heavy lifting, and bending, stooping squatting twisting, pushing, and pulling. In describing how her claimed disability affected her ability to perform her job, Respondent wrote that she could not perform her normal activities and that she could not be accommodated. She failed to explain why.

6. In her January 2011 disability retirement application, Respondent described her limitations as, standing, walking, climbing, squatting, bending, twisting, lifting, pushing, pulling, standing for 20 minutes, running, and kneeling. In describing how her claimed disability affected her ability to perform her job, Respondent wrote that she was very limited.

7. In her January 2011 application, Respondent identified May 2, 2007, as the date on which her claimed disability occurred. She described her claimed disability as

“Lower back and ankle problem.” In explaining how these problems occurred, she described a time that she was arranging a play yard with toys from a closet, and that while in the closet, she turned, stepped down onto a child’s foot and fell on the left side of her ankle, hurting her lower back in an effort to avoid falling on the child.

8. In Respondent’s request for a hearing, she asserted that her condition is “still the same,” she still sees a doctor and physical therapist, takes prescription medication, and now sees a “[m]ental [h]ealth doctor.” She further asserted that she is very depressed (since 2007) and experiences anxiety attacks.

9. In support of its denial of Respondent’s disability retirement application, CalPERS offered the written reports of two health care professionals, Todd D. Moldawer, M.D. (Moldawer) and Theodore Georgis, Jr., M.D. (Georgis). CalPERS further offered MRIs of Respondent’s left ankle and lumbar spine, dated January 20, 2010.

10. Moldawer, a board-certified orthopedic surgeon, performed surgery on Respondent’s lumbar spine on April 11, 2008, and a microdiscectomy at the left L4-5 level. In his treating physician report, dated March 5, 2009, he wrote, “I feel that [Respondent] can return to back to work without restrictions.” He did not restrict her activities and described her prognosis as “fair.” In an April 9, 2009 report, Moldawer opined similarly.

11. Georgis, a Diplomate of the American Board of Orthopaedic Surgery, examined Respondent and wrote an independent medical evaluation, dated October 26, 2011. Georgis reviewed Respondent’s job description and medical history. Georgis opined that “there is no specific job duty that [Respondent] is unable to perform due to a physical condition relative to her low back or left ankle.” He further opined, “In my professional opinion, [Respondent] is not substantially incapacitated for her performance of the usual duties.”

12. There was no evidence that Respondent was unable to perform her usual and customary job duties throughout her tenure as an early education center aide for LAUSD.

13. There was no evidence to establish or support Respondent’s claim that she was permanently disabled or incapacitated from performing her duties as an early education center aide for LAUSD throughout her employment.

## LEGAL CONCLUSION

1. Cause exists to sustain CalPERS’s denial of Respondent’s disability retirement application, as set forth in Factual Findings 1-13, and Legal Conclusions 2-8.

2. Government Code section 20026 states:

“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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

3. Government Code section 21151, subdivision (a) states:

(a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability, pursuant to this chapter regardless of age or amount of service.

4. Government Code section 31724 states in pertinent part:

If the proof received . . . shows to the satisfaction of the board that the member is permanently incapacitated . . . for the performance of his duties in the service, it shall retire him . . . . His disability retirement allowance shall be effective as of the date such application is filed with the board . . .

5. Government Code section 21154 states in pertinent part:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state services to the time of application or motion. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

6. Government Code section 21156 states in pertinent part:

If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service 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 . . . .

7. Respondent carries the burden of proof in this matter. It is appropriate to 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.) Courts applying the County Employees' Retirement Law have held that the applicant has the burden of proof in those cases. (*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.) Since the County Employees' Retirement Law, as noted in Government Code section 31724, is similar to the California Public Employees' Retirement Law, as set out in Government Code section 21151, the rule concerning the burden of proof is applicable to the instant case.

8. The evidence did not support a finding that Respondent was disabled, as defined in Government Code section 20026. (See *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876 [holding that incapacitated for the performance of duty means the substantial inability of the applicant to perform his usual job duties].) With no such evidence, it is appropriate to deny Respondent's application for disability retirement.

#### ORDER

CalPERS' denial of Respondent Theresa Mena's disability retirement application is sustained.

Date: February 25, 2013



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DANIEL JUAREZ  
Administrative Law Judge  
Office of Administrative Hearings