

ATTACHMENT A
PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application For
Disability Retirement of:

NANCY W. FAIRFIELD,

Respondent,

and

PLACER COUNTY OFFICE OF
EDUCATION,

Respondent.

Case No. 9640

OAH No. 2012050925

PROPOSED DECISION

On January 16, 2013, in Sacramento, California, Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter.

Carol A. McConnell, Senior Staff Counsel, represented the California Public Employees' Retirement System.

Respondent Nancy M. Fairfield appeared and represented herself.

Respondent Placer County Office of Education did not appear.¹

Evidence was received. The matter was submitted and the record was closed on January 16, 2013.

¹ Placer County Office of Education was duly served with a Notice of Hearing. The matter proceeded as a default against this respondent, pursuant to California Government Code section 11520, subdivision (a).

PROCEDURAL FINDINGS

1. On February 3, 2009, respondent signed a Disability Retirement Election Application for Disability Retirement (application or disability retirement application). In filing the application, respondent claimed disability on the basis of orthopedic, neurological and dental conditions.
2. Respondent was employed by the Placer County Office of Education (PCOE) as a Staff Secretary II. By virtue of her employment, respondent is a miscellaneous member of the California Public Employees' Retirement System (CalPERS), subject to Government Code section 21150.
3. CalPERS obtained medical reports concerning respondent's medical condition from competent medical professionals. On the basis of the medical evidence, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of her duties as a Staff Secretary II.
4. On September 9, 2009, CalPERS notified respondent that her application was denied. Respondent filed a timely appeal of the denial.
5. Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, made the Statement of Issues on September 18, 2012, and filed it thereafter.
6. At hearing, CalPERS submitted medical records and reports from Joseph McCoy, M.D., Jeffrey G. Light, D.D.S, and Eric Van Ostrand, M.D., all of whom testified. Respondent submitted a report by Gregory I. Fields, Ph.D. and a chart note from David S. Seminer M.D. Respondent and her husband testified at hearing.

FACTUAL FINDINGS

Respondent's Employment and Injuries

1. Respondent was born in 1955. She has a high school education and about three years of college credit. In March of 1998 she was hired by PCOE as a Staff Secretary. She was eventually promoted to Staff Secretary II, in the Technology Services Department. The position is primarily administrative and clerical, requiring respondent to compile information, keyboard, and interact with people in person and on the telephone. Generally the job required respondent to sit 80 percent of her day, walk 10 percent of her day and stand 10 percent of her day.
2. Respondent is an alcoholic. Her consumption of alcohol increased significantly in about 2003 and she began missing a lot of work. She was disciplined for excessive absenteeism. She was also jailed at one point because she behaved aggressively

while under the influence of alcohol. In April 2005, respondent was driving her vehicle while under the influence of alcohol, blacked out and caused a head on-collision. Her car rolled over and her head was squeezed between the head rest and the roof of the car, causing a concussion and breaking her jaw and hand. She was hospitalized for a week, her jaw was wired shut for six weeks, and she was placed in an inpatient alcohol rehabilitation center. While respondent was in rehabilitation, PCOE began preparing termination documents based on excessive absenteeism and on-the-job drinking. Respondent returned to work in January 2006 on a part-time basis, but she increased her use of alcohol and missed many days of work. PCOE told her that she would be terminated if she did not resign. On October 25, 2006, respondent submitted a letter of resignation, effective October 27, 2006. She did not apply for disability retirement at this time.

3. Respondent continued to drink heavily and in November 2007 she caused another motor vehicle accident by blacking out while driving with a blood alcohol level of .263. She was hospitalized for a week with a concussion, collapsed lung, broken sternum, broken ribs and fractures of the right wrist and right calcaneus (the quadrangular bone at the back of the tarsus, also called the "heel bone"). She did not require surgery on her wrist or calcaneus. She was convicted of driving under the influence of alcohol and spent two months in jail and six and a half months in prison.

4. Respondent has a private disability carrier, American Fidelity Assurance Company, which provides a disability benefit to her based on a diagnosis of organic brain injury\post concussion syndrome with speech deficits, cognitive deficits and memory deficits. American Fidelity Assurance Company encouraged respondent to apply for disability retirement through CalPERS and she did so on February 3, 2009.

5. The application is based on respondent's injuries from both automobile accidents. In the application, respondent listed her continuing disabilities from the 2005 accident as summarized below:

Continued numbness in the lower lip and chin causing her to mumble words and dribble on her chin; chronic TMJ pain from the shattered and broken jaw; inability to type with any speed or accuracy due to the left index finger not being straight and bending to the left; inability to grasp because unable to close left hand all the way; short-term memory loss with inability to understand or follow verbal instructions; inability to remember how to spell words or their definitions and inability to find words and phrases to describe things; losing her way and getting tired easily and having to nap.

6. In the application, respondent described the continuing disabilities from the 2007 accident as summarized below:

Chronic pain; inability to walk or stand for any length of time or to rest her right foot on the floor; severe short-term memory loss and chronic pain with loss of range of motion.

7. At hearing, respondent testified that her most disabling condition is “not my foot or jaw, but my brain.” Her two automobile accidents “damaged my brain” and she is unable to perform her job duties due to short-term memory loss, inability to find words and cognitive confusion. She is not able to write letters with proper spelling and punctuation, or to multitask. She tires easily and takes naps. She has difficulty comprehending while reading. She was unable to perform her job following the 2005 accident. The 2007 accident compounded her problems. She acknowledged that she stayed in her position less than six months after the 2005 accident, before she resigned in lieu of termination.

Issues

8. The Statement of Issues, Section IX, defines the issue on appeal as follows:

The appeal is limited to the issue of whether, on the basis of orthopedic (left hand, index finger, fractured jaw), neurological (organic brain injury syndrome, short-term memory loss, peripheral neuropathy) and dental (temporomandibular joint pain, lower lip/chin numbness) conditions, respondent is permanently disabled or incapacitated from performance of her duties as a Staff Secretary II for respondent Placer County Office of Education, and, if she is permanently disabled, on what date she became disabled.

9. CalPERS did not argue that respondent’s application was untimely pursuant to Government Code sections 21252 or 21154 and *Piscioneri v. City of Ontario* (2002) 95 Cal. App. 4th 1037, 1044. Although, reference was made to these statutes in the Statement of Issues, Section IX does not include timeliness of the application as an issue on appeal. For these reasons, this issue is deemed waived.

10. CalPERS did not argue that respondent is ineligible for a disability retirement benefit because she was terminated for cause, as articulated in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 and *Smith vs. City of Napa* (2004) 120 Cal App.4th 194. This issue is deemed waived.

11. CalPERS did not argue that respondent was only eligible for a disability retirement benefit if her disabling condition resulted from the 2005 accident, since she was forced to resign from employment in 2006, well before the 2007 accident. Therefore, this issue is deemed waived.

Medical Opinions

12. *Jeffrey G. Light D.D.S.* has been a licensed dentist since 1981 and has a private practice in prosthodontics and maxillofacial prosthetics. CalPERS retained him to render an

opinion whether respondent was disabled due to residual effects of the fractured jaw she sustained in 2005 accident. Dr. Light reviewed respondent's dental records and job description, took a history and examined her. Respondent told him she had mild pain from her jaw muscles and temporomandibular joints and the pain was present 50 percent of the time. She reported numbness of the lower lip, from the middle to the left corner all the way down to the chin. She stated that because of the numbness she had difficulty with speech and she was concerned that people might not be able to understand her. She was also concerned that she was unable to tell if she was drooling or if there was food on her lip and chin.

13. Respondent told Dr. Light that the jaw pain did not affect her ability to perform her job. However, she believed that because of the numbness in her lower lip she would be unable to perform her job because she had difficulty with speech and was self-conscious about her appearance.

14. Dr. Light observed that respondent had some difficulty pronouncing some words, but during their 20-minute interview he was able to understand her quite easily without asking her to repeat anything.

15. Dr. Light did not find any dental condition that would prevent respondent from performing her job duties as a staff secretary. He concluded that she was not substantially incapacitated from the performance of her job duties based on a dental condition.

16. *Joseph W. McCoy M.D.* is an orthopedic surgeon who was board certified in orthopedic surgery in 1991. CalPERS retained him to render an opinion whether respondent was incapacitated from performance of her job duties due to any of the orthopedic conditions respondent identified in her application for disability retirement. Dr. McCoy reviewed respondent's medical records and job description, took a history and conducted an examination on June 1, 2009.

17. Respondent told Dr. McCoy that she had difficulty with her right foot following the calcaneus fracture, and had chronic pain and a sense of instability or unreliability of the ankle. She also described a long-standing neuropathy in her lower extremities, which she attributed to alcoholism. She complained that her left index finger was deviated, which resulted in difficulty typing or performing other manual skills. She described her right wrist as painful when performing repetitive manipulation of a computer mouse. She described a severe short-term memory loss she attributed to the combination of alcoholism and her two motor vehicle accidents. She described difficulty finding words and spelling. Dr. McCoy observed that respondent had a very slight limp, which he observed again at the hearing.

18. Dr. McCoy noted that respondent "converses readily with me without noticeable verbal or cognitive impairment." Her right leg demonstrated persistent atrophy of the calf. There was a mild weakening of the calcaneus/hind foot, with surprisingly good preservation of subtalar and ankle movement. There was only a slight limitation of subtalar motion and normal ankle motion. Respondent had normal range of motion in hands and

fingers, and normal wrists. She was able to fully grasp and extend all digits with slight loss of extension of the index proximal interphalangeal joint and mild ulnar deviation. Grip strength was mildly impaired on the left.

19. Dr. McCoy concluded that respondent did not have an orthopedic condition which would substantially incapacitate her from performance of any of her job duties. She might have some exacerbation of pain if she was required to walk for long periods of time or walk on uneven ground. But the job did not require this. She might have some diminished accuracy or speed in typing because of her left hand injury, but there would be no substantial incapacity.

20. *Eric Van Ostrand M.D.* was board certified in neurology in 1997. CalPERS retained him to render an opinion whether respondent was substantially incapacitated from performance of her job duties due to organic brain injury syndrome or peripheral neuropathy. On June 1, 2009, Dr. Van Ostrand took a history from respondent and examined her and reviewed her medical records and her job description.

21. Respondent told Dr. Van Ostrand that she began experiencing burning and tingling sensations about three years ago (2006). She reported that she had been drinking a significant amount of alcohol for the preceding six years and she believed her neuropathy was related to alcohol consumption. She also felt some weakness in her right ankle due to the 2007 motor vehicle accident. She advised that she was taking Neurontin and that her symptoms improve 90 percent when taking Neurontin. At the time of her examination she had stopped drinking alcohol and her neuropathy had improved.

22. Respondent's chief complaint was that since the first motor vehicle accident her short term memory was impaired. The situation worsened following the second motor vehicle accident. She also advised that she had short-term memory difficulties predating the 2005 accident by at least a few years. The difficulties include word finding and following directions, for example, following the steps of a recipe. She reported that she was easily angered out of frustration and that she got lost when she was driving a car, although she does not drive any longer because her license was suspended by the Department of Motor Vehicles. She reported that she had difficulty recalling names of her friends, although not the names of her family members or her own name. She felt that her memory difficulties had not changed significantly since the second motor vehicle accident. Respondent told Dr. Van Ostrand that she had not performed "up to par" at work, because of alcohol use, not because of other medical issues.

23. On examination, Dr. Van Ostrand observed that respondent's body postures, sitting, standing and walking were normal. Her speech and language functions were normal. Her cranial nerves were normal and there was no focal atrophy. She had no dermatomal sensory loss and there was no distal loss of light touch perception. There was no evidence of difficulties with coordination.

24. Respondent was alert and pleasant and demonstrated a normal fund of knowledge. She had no word finding difficulties and followed commands well. She had no semantic or phonemic errors or confusion. Her speech and language functions were normal, concentration was normal and her short-term recall was intact. There was no right-left confusion. She was able to draw the face of a clock without difficulty, including a hand on the clock showing the time of 3:20. She was fully oriented and her thought processes appeared normal, without tangential or other features.

25. Dr. Van Ostrand noted that following respondent's accidents there were no skull fractures and no inter-cranial bleedings. Her CT scan was negative and there was no evidence of cerebellar dysfunction.

26. Dr. Van Ostrand concluded that respondent was able to perform her job duties and that there was no neurological condition which precluded her from performing her job duties. She had "no neurological abnormalities whatsoever" and "no objectively definable signs on examination to support the existence of a peripheral neuropathy." He noted that "she stated in no uncertain terms that her work stoppage was due to her drinking on the job as opposed to her having neurological impairment which precluded her ability to perform the requested job duties."

27. *David S. Seminar M.D.* - Respondent submitted a chart note by David S. Seminar, M.D. written on December 12, 2009. Respondent was complaining of difficulty with memory and following instructions, cooking, filling out forms, studying new things, finding words, and punctuation and grammar. She also complained that she gets frustrated and angry easily. On mental status examination she was fully alert and oriented. Her speech was normal and she scored 30 out of 30 on the Mini Mental Status Examination. Dr. Seminar referred respondent to a cognitive specialist, Dr. Kile. Dr. Seminar offered no opinion as to whether respondent was permanently and substantially incapacitated from the performance of her job duties.

28. *Gregory I. Fields, Ph.D.* - Respondent submitted a report by Gregory I. Fields, Ph.D. dated June 29, 2010. Respondent's primary care provider had referred her to Dr. Fields for a neuropsychological evaluation. Respondent reported to Dr. Fields that she had been unconscious after both automobile accidents and her cognition was "different now." She reported that when she was not drinking alcohol she thought more clearly. Dr. Fields noted that "because of her concurrent use of alcohol it was difficult for her to provide information regarding recovery between accidents or the differential influences of the accidents themselves."

29. On examination, respondent was alert and oriented and missed no points on the brief mental status examination. Retention and concentration were grossly intact for conversation and interview. She correctly completed serial sevens items, demonstrated no observable delays and had good information processing speed for decision making. She was a good historian, recalling recent and remote aspects of her personal history equally well. She provided background history in a reasonably organized fashion with good detail and

without repetition. She recalled three out of three objects immediately and following a brief delay. He did not observe expressive language or perception problems. She was not notably tangential or circumlocutory. Rate of speech was in normal limits, although mild dysarthria (slowed or slurred) speech was periodically observed. Dysnomia (recalling words or names) and paraphasic (use of wrong words) errors were not observed. Dr. Fields did not observe any symptoms of formal thought disorder or overt emotional distress. Respondent exhibited frustration and anxiety when she perceived that she was not doing well on testing.

30. Dr. Fields administered several psychological tests which rendered results as follows: No difficulty on a cognitive screening measure; low average to high average range performances on the visual scanning, vasomotor speed, visual recognition and cancellation; working memory within the average range; low average to high average range performances in memory and learning; low average to high average range performances on expressive language; low average to average range performances on visuconstructional, visuperceptual and visuospatial reasoning abilities; impaired to average range performances on executive/frontal systems functioning. Her impairment was based upon her becoming quickly frustrated and unable to solve a "second card count" and her commission of several other errors demonstrating confusion. The second card testing was discontinued after the 23rd trial, "as her frustration was mounting."

31. Dr. Fields diagnosed respondent with post-concussion syndrome. He noted that she "is presenting with subtle mild cognitive dysfunction and ongoing mild emotional dyscontrol... but she is doing very well ... maintaining her abstinence from alcohol." He also noted that it was difficult to know if her lowered levels of frustration tolerance were associated with current emotional symptoms, related to personality characteristics, associated with the auto accidents, or related to some combination of those facts.

32. Dr. Fields offered no opinion as to whether respondent was permanently and substantially incapacitated from the performance of her job duties. His testing showed that respondent was generally functioning in the average range but that she had some difficulties with confusion and frustration on tests involving executive functioning. There was no finding that the degree of impairment she showed was non-situational, permanent or rendered her substantially unable to perform her job duties.

33. *Other Medical Notes* - Fred Von Stieff, M.D. signed at "request for continuing disability" form on August 7, 2012. He lists respondent's diagnoses as "organic brain injury/post concussion syndrome." Dr. Light summarized a note in his record review from Annette Bennett, a physician's assistant, who wrote a "physical report on disability" on January 20, 2009. Ms. Bennett wrote that respondent was incapacitated as far as grasping things, typing and using a keyboard. Dr. Light also summarized a questionnaire completed by Dr. Dublin on November 11, 2008, for American Fidelity Assurance Corp. Dr. Dublin wrote that respondent had peripheral neuropathy of the hands and feet with traumatic degenerative joint disease and organic brain injuries. Dr. Dublin felt that because of pain and weakness in the hands respondent would have extreme anguish in attempting to perform secretarial duties.

34. The medical records of Dr. Dublin, Dr. Von Stieff and Ms. Bennett were not persuasive evidence that respondent is permanently and substantially incapacitated from performance of her job duties. These documents were admitted as administrative hearsay. None of these medical providers submitted reports or testified at hearing. Their qualifications, bases for their opinions, and extent of their examination and testing are unknown. Moreover, respondent has acknowledged that she does not consider peripheral neuropathy or pain in her hands to be her disabling condition.

LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21150, subdivision (a), which provides in pertinent part:

A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age...

2. Government Code section 20026 provides that:

“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... on the basis of competent medical opinion.

3. “Incapacity for the performance of duty” under 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, 876.) Substantial inability to perform usual duties must be measured by considering the applicant’s abilities. Discomfort, which makes it difficult to perform ones duties, is insufficient to establish permanent incapacity from performance of one’s position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.)

4. An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of 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; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.)

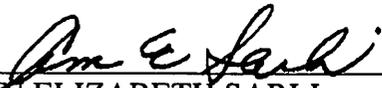
5. As set forth in the Findings, respondent has not met her burden. There is no competent, objective medical evidence that respondent is permanently and substantially disabled or incapacitated from the performance of her job duties as a Staff Secretary II. She

is not entitled to disability retirement pursuant to Government Code section 21150, subdivision (a).

ORDER

1. Respondent's appeal of the CalPERS determination that she is not eligible for disability retirement is DENIED.
2. Respondent's application for disability retirement is DENIED.

DATED: February 26, 2013



ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings