

**ATTACHMENT E**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA

In the Matter of the Statement of Issues  
(Application For Disability Retirement) Of:

STACEY ALLEN,

Respondent,

and

CALIFORNIA DEPARTMENT OF  
MOTOR VEHICLES,

Respondent.

Case No. 2010-0556

OAH No. 2012050851

**PROPOSED DECISION**

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on November 29, 2012.

Carol A. McConnell, Senior Staff Counsel, represented petitioner Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Although properly served with the Statement of Issues and Notice of Hearing, respondent Stacey Allen did not appear and was not otherwise represented. There was also no appearance on behalf of respondent California Department of Motor Vehicles. The matter was conducted as a default pursuant to Government Code section 11520.<sup>1</sup>

Evidence was received as well as closing oral argument. The matter was submitted on November 29, 2012.

<sup>1</sup> Government Code section 11520, subdivision (a), permits an agency to act without taking evidence in a default when the respondent has the burden of proof. Although respondent Allen carried the burden of establishing her entitlement to a disability retirement, complainant elected to present evidence in support of its denial of respondent's application.

## ISSUE PRESENTED

Whether respondent Stacey Allen was substantially incapacitated from the performance of her usual duties as a Motor Vehicle Field Representative with respondent California Department of Motor Vehicles at the time she applied for an industrial disability retirement?

## FACTUAL FINDINGS

1. Petitioner/complainant Anthony Suine filed the Statement of Issues solely in his official capacity as Chief of the CalPERS Benefits Services Division.
2. Respondent Stacey Allen<sup>2</sup> was employed by respondent California Department of Motor Vehicles. At the time respondent filed her application for retirement, she was employed as a Motor Vehicle Field Representative. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to government code section 21150.
3. On or about January 27, 2009, respondent signed an application for disability retirement. In filing the application, disability was claimed on the basis of an orthopedic (right shoulder) condition.
4. CalPERS obtained medical reports concerning respondent's orthopedic condition from competent medical professionals. After review of the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of the usual duties of a Motor Vehicle Field Representative at the time the application for disability retirement was filed.
5. Respondent was notified of CalPERS' determination and was advised of her appeal rights by letter dated January 28, 2010.
6. Respondent filed a timely appeal by letter dated February 24, 2010, and requested a hearing.

### *Usual Duties for a Motor Vehicle Field Representative Employed by Respondent California Department of Motor Vehicles*

7. A Position Duty Statement and a CalPERS' Physical Requirements of Position/Occupational Title for Motor Vehicle Field Representative were received in evidence. The duties most relevant to respondent's application and claimed disability were the requirements that respondent constantly, over six hours, reach over shoulder height (to

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<sup>2</sup> All future references to "respondent" refer only to respondent Stacey Allen, unless otherwise indicated.

access the counter separating a field representative from the public) , push and pull, repetitively use her hands, use a keyboard, and use a computer mouse. The duty statement described the day-long processing of documents relating to California driver licenses and registration, including collecting fees, issuing receipts, license plates, stickers and permits, entering transaction information in automated systems. In her application, respondent asserted that her injuries prevented her reaching to the counter, counting money, typing, reaching the money drawer, or pulling paper from a printer.

### *Competent Medical Opinion*

8. The only “competent” medical opinion received in evidence comprised the testimony of James G. Fischer, M. D., board-certified in orthopedic surgery and sports medicine. Dr. Fischer evaluated respondent for CalPERS on July 13, 2009. Respondent described her right shoulder as her primary problem. She related significant tightness throughout the shoulder with significant increased pain when lifting, especially above shoulder level. She also complained of neuropathy in the inside of her right elbow and a right hand middle “trigger finger.” Dr. Fischer noted that respondent had arthroscopic surgery on her right shoulder on January 24, 2007. This included debridement of the glenohumeral joint and partial rotator cuff repair with subacromial decompression and distal clavical excision. Respondent continued to have pain in the shoulder following the surgery and her surgeon recommended a second surgery for assessment and to free her “frozen shoulder” through manipulation under anesthesia. Respondent initially agreed to have the surgery but later changed her mind. At the time that Dr. Fischer saw respondent, she had been evaluated by another orthopedic surgeon who also suggested follow-up surgery and respondent reported to Dr. Fischer that she was waiting for authorization for the surgery.

9. Dr. Fisher’s physical examination confirmed a “significant frozen [right] shoulder” with limited range of motion. He also confirmed ulnar nerve impingement in her right elbow and a right hand middle trigger finger.

10. Dr. Fisher reviewed respondent’s duties described in the documents described above, and concluded that respondent was not incapacitated from her usual duties. His opinion was based on two rationales. First, all of respondent’s presenting complaints are resolvable by relatively “routine” surgeries with an excellent prognosis for each. More specifically, the right shoulder required no additional “repairs” rather, debridement and manipulation under anesthesia would likely free up the frozen shoulder. The ulnar nerve at respondent’s right elbow could be released with a fairly simple surgical procedure. The trigger finger only required a surgeon to “nick the pulley” to release the tendon. Dr. Fischer’s other rationale was that respondent’s left shoulder had full range of motion and he reasoned that she could use her left shoulder, arm and hand to reach up to the counter, avoiding respondent’s most difficult maneuver with her right shoulder.

## *Conclusion*

11. To summarize the factual findings, respondent does suffer from a frozen shoulder, ulnar nerve impingement and a mild trigger finger. As a result, she is unable to perform the continuous reaching above her shoulder level required by her position with her right arm. She could do so with her left shoulder, arm and hand. She could also have each condition surgically repaired, and may be in process of doing so. Thus, respondent is not substantially incapacitated from her usual job duties as a Motor Vehicle Field Representative.<sup>3</sup>

## LEGAL CONCLUSIONS

1. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement absent a statutory provision to the contrary. (*Greatorex v. Board of Administration* (1979) 91 Cal. App.3d 57.)

2. Government Code section 20026 reads, in pertinent part:

‘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 performance of duty means the substantial inability to perform usual duties. (*Mansperger v Public Employees’ Retirement System* (1970) 6 Cal. App.3d 873, 876.) In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, at page 860, the court rejected contentions that usual duties are to be decided exclusively by State Personnel Board job descriptions or a written description of typical physical demands. The proper standard is the actual demands of the job. (See also, *Thelander v. City of El Monte* (1983) 147 Cal. App.3d 736.) The ability to substantially perform the usual job duties, though painful or difficult, does not constitute permanent incapacity. (*Hosford, supra*, 77 Cal. App.3d 854, at p. 862.)

4. Respondent failed to establish that she was substantially unable to perform her usual job duties as a Motor Vehicle Field Representative at the time that she applied for industrial disability retirement. Respondent is therefore not entitled to disability retirement and her application should be denied.

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<sup>3</sup> It is possible that switching to her left shoulder, arm and hand would not be practical, but as respondent was not present, no evidence regarding the feasibility of this change was presented to challenge Dr. Fischer’s assumption that the use of respondent’s other shoulder would work.

ORDER

Respondent's appeal from CalPERS' determination that she was not permanently disabled or incapacitated from performance of her usual duties as a Motor Vehicle Field Representative at the time that her application for disability was filed is denied.

Dated: December 21, 2012

  
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KARL S. ENGEMAN  
Administrative Law Judge  
Office of Administrative Hearings