

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for
Disability Retirement of:

CATHERINE E. GARBACZ,

Respondent,

and

DEPARTMENT OF REHABILITATION,

Respondent.

Case No. 2011-0973

OAH No. 2012080006

PROPOSED DECISION

This matter was heard before Administrative Law Judge Danette C. Brown, State of California, Office of Administrative Hearings, Sacramento, on February 7, 2013.

Elizabeth Yelland, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Catherine E. Garbacz (respondent) did not appear and was not represented.

There was no appearance by or on behalf of the California Department of Rehabilitation (respondent DOR).

Evidence was received, the record was closed, and the matter was submitted on February 7, 2013.

FACTUAL FINDINGS

1. CalPERS filed the Statement of Issues by and through Mary Lynn Fisher, Chief, Benefit Services Division, acting in her official capacity.

2. Respondent was employed by respondent DOR as a Senior Vocational Rehabilitation Counselor. By virtue of her employment, respondent is a local miscellaneous

member of CalPERS subject to Government Code sections 21150. Respondent has the minimum service credit necessary to qualify for retirement.

3. On September 30, 2010, respondent signed an application for disability retirement that was received by CalPERS on October 10, 2010 (disability retirement application). In filing that application, disability was claimed on the basis of an orthopedic condition (carpal tunnel syndrome) due to repetitive typing, writing, filing, sitting, and "signing" with the use of sign language. When explaining her specific disability, respondent wrote, "I am deaf, diabetic, have carpal tunnel syndrome. Born deaf, diabetic since 1996 & CTS since 1990."

4. CalPERS obtained medical reports concerning respondent's orthopedic (carpal tunnel syndrome, right shoulder) condition from competent medical professionals. After review of those documents, CalPERS determined that respondent was not permanently disabled, nor was she incapacitated from performance of her duties as a Senior Vocational Rehabilitation Counselor at the time the application for disability retirement was filed.

5. Respondent was notified of CalPERS' determination and advised of her appeal rights by a letter dated April 12, 2011.

6. On May 13, 2011, respondent filed an appeal from the denial of disability retirement which was deemed timely by CalPERS, and requested a hearing.

7. This appeal is limited to the issue of whether respondent is permanently incapacitated from performance of her duties as a Senior Vocational Rehabilitation Counselor with respondent DOR on the basis of her orthopedic (carpal tunnel syndrome, right shoulder) conditions.

8. A Physical Requirements of Position/Occupational Title (CalPERS form PERS01M0050DMC (Rev. 9/05)), jointly prepared by respondent and her employer, submitted to CalPERS on or about October 11, 2010, listed respondent's job activities and frequencies as follows:

Never: Running; Crawling; Climbing; Squatting; Mouse Use; Lifting/Carrying 26-50 lbs, 51-75 lbs, 76-100 lbs, 100+lbs; Walking on uneven ground; Working with heavy equipment; Exposure to excessive noise; Exposure to extreme temperature, humidity, wetness; Exposure to dust, gas, fumes, or chemicals; Working at heights; Operation of foot controls or repetitive movement; Working with bio-hazards (e.g. blood-borne pathogens, sewage, hospital waste, etc.)

Occasionally (Up to 3 hours): Standing; Walking; Kneeling; Bending (neck); Bending (waist); Twisting (neck); Twisting (waist); ; Reaching (above shoulder); Reaching (below

shoulder); Pushing & Pulling; Fine Manipulation; Power Grasping; Simple Grasping; Lifting/Carrying 0-10 lbs; 11-25 lbs; Driving; Exposure to excessive noise; Use of special visual or auditory protective equipment.

Frequently (3-6 hours): Sitting; Repetitive use of hands; Keyboard Use.

Constantly (Over 6 hours): None listed.

9. According to her disability retirement application, respondent's last day on the payroll was November 24, 2010.

10. At the request of CalPERS, Dr. Erin E. Forest, M.D., an orthopedic surgeon, performed an orthopedic examination of respondent on January 27, 2011. Dr. Forest prepared a report of her examination, dated January 27, 2011, which, although hearsay, was received in evidence for all purposes because respondent defaulted, pursuant to Government Code section 11520, subdivision (a). At the time of the examination, respondent was 61 years old, five feet seven inches tall, and weighed 277 pounds.

Review of Respondent's Medical History

11. Dr. Forest reviewed respondent's medical records dating back to February 2007. These records are summarized in her report. On February 21, 2007, when respondent was seen by a Dr. Christian for neck and bilateral hand pain, she was found to have a large ganglion cyst at the right wrist, and possible recurrent carpal tunnel syndrome. Respondent's neck pain symptoms were stable, and respondent was referred to acupuncture.

12. On June 1, 2007, respondent saw Dr. John Porter for a reading of her cervical - spine x-rays. Dr. Porter's impression was degenerative disease, noting marked disc space narrowing at C5-6 and C6-7, anterolisthesis of C3, C4, and C5, and retrolisthesis of C5 on C6.

13. On June 1, 2007, Dr. John Hunter read respondent's right shoulder x-rays. He found no evidence of calcific tendinitis, fracture, or dislocation. He noted some degenerative changes in the subacromial arch and acromioclavicular joint. Dr. Hunter wrote, "Impression: Impingement changes."

14. On June 3, 2007, respondent saw Dr. Perez, her family doctor, for a follow up on her asthma exacerbation and right shoulder pain. Dr. Perez noted a history of a motor vehicle accident. He noted that respondent works typing 50 percent of the workday, and drives four hours per day to and from work in San Francisco. He advised transferring to the Sacramento office, if possible. Shoulder x-rays were ordered.

15. On June 22, 2007, Dr. Shin requested electrodiagnostic testing, physical therapy, and acupuncture.
16. On July 30, 2007, Dr. Christian noted that electrodiagnostic testing revealed “no evidence of a right-sided cervical radiculopathy, plexopathy, or peripheral neuropathy.”
17. On August 28, 2007, Dr. Perez noted a “new problem” of “increased neck pain due to motor vehicle accident on August 25, 2007.” Respondent denied increased hand or arm numbness or weakness. Respondent was referred to chiropractic treatment.
18. On November 6, 2007, Dr. Szabo noted respondent’s complaint of right hand pain and numbness. His impression was cervical degenerative joint disease (DJD) and possible carpal tunnel syndrome. He recommended acquiring prior electrodiagnostic testing values, conservative therapy for cervical DJD, and “cock-up” wrist splints.
19. On November 8, 2007, respondent saw Dr. Martin, a chiropractor and qualified medical examiner, for left neck pain. Dr. Martin noted, “Able to maintain normal ADL’s. Continue with chiropractic manipulation, modalities.”
20. On November 30, 2007, Dr. Andrew Burt’s Panel Qualified Medical Examination report regarding causation of respondent’s bilateral hand discomfort noted diagnoses of chronic subdeltoid bursitis due to overuse, postoperative bilateral carpal tunnel release, chronic “FCR” tendinitis, right dominant wrist, and recurrent carpal tunnel syndrome symptoms on the right. Dr. Burt felt that respondent was at maximal medical improvement, and that future medical treatment included the possibility of new electrodiagnostic testing, possible surgical intervention for recurrent carpal tunnel syndrome. Dr. Burt did not feel vocational rehabilitation was required.
21. On December 14, 2007, respondent saw Dr. Shin, for an evaluation and discussion of her neck and hand symptoms. Respondent was provided a referral (but it is not known to whom).
22. On February 25, 2008, Dr. Moehring evaluated respondent for recurrent carpal tunnel syndrome, noting increased symptoms with dysesthesia, numbness, and tingling in the right hand. Dr. Moehring also noted significant weight loss through the bariatric clinic without surgery. He noted “Phalen’s sign” was “equivocally positive on the right, negative on the left.” He scheduled carpal tunnel release on an outpatient basis.
23. On April 17, 2008, Dr. Allen noted a right carpal tunnel release procedure “done under local with sedation.” There is no comment on the integrity of the nerve.
24. On May 2, 2008, Dr. Allen’s post-operative note indicates “pillar pain but upper arm pain and fullness in patient’s hand have largely disappeared. Sutures removed. Return as needed. Return to work 5/12.”

25. On May 9, 2008, Dr. Perez's status note indicates "off work 4/14/2008 through 4/16/2008, for preoperative evaluation, doctor appointments, and forms."

26. On May 16, 2008, Dr. Burt provided a comment on Panel Qualified Medical Examination, answering a question about electrodiagnostic testing.

27. On September 19, 2008, Dr. Perez noted that since respondent's right wrist has not healed as well as the left wrist, respondent still needs support staff to assist her in her regular work. Respondent did well with the 16-hour support staff but has more pain and stiffness in her right wrist as well as cramping in the right hand since her support staff was decreased to 10 hours. Dr. Perez also noted that respondent will also need to time train for the voice recognition system. He recommended a name and date stamp, as respondent could not sign her name over 20 times a day. He noted that overuse of respondent's right hand is a problem, and that respondent definitely has decreased range of motion in the right wrist.

28. On June 26, 2009, Dr. Burt's evaluation was completed in Elk Grove with the help of a certified sign language interpreter. He noted that respondent's symptoms began in 2007, with aching and cramping in the right hand, shoulder to wrist. Respondent had a prior history of industrial injury to both upper extremities and carpal tunnel syndrome. He notes respondent's last evaluation with "chronic subdeltoid bursitis and overuse of the right dominant shoulder" and postoperative status post bilateral carpal tunnel release with chronic flexor carpi radialis (FCR) tendinitis at the right dominant wrist and recurring carpal tunnel syndrome on the right. He noted the revision carpal tunnel syndrome on April 17, 2008 by Dr. Allen. Respondent returned to her regular job on May 12, 2008, with restricted activities. Reasonable accommodations were met. He commented, "Ms[.] Garbacz is overwhelmed at her job at this point because of short staffing and cutbacks[.]" Dr. Burt went on to note the medical records as reviewed by Dr. Forest in the findings above.

29. On July 30, 2009, a problem list for UC Davis was generated for respondent, which included "type 2 diabetes, hypertension, asthma, allergic rhinitis, carpal tunnel syndrome, motor vehicle collision, driver, from November 28, 2008, hit from behind in Berkeley. Car in front of her car totaled, unspecified hearing loss, hearing aids bilaterally and reads lips, mild non-proliferative diabetic retinopathy, history of anaphylactic shock following sting."

30. On August 7, 2009, Dr. Perez noted that recent tests for carpal tunnel syndrome are "still quite abnormal on the right, normal on the left. Needs restrictions on typing. All of this is the same as her prior note."

31. On May 28, 2010, Dr. Perez noted that tests for carpal tunnel were still abnormal. "Absolutely needs restrictions on typing not more than three hours total per day, not more than 30 minutes at a time with at least 30 minutes in between. Can answer phones unlimited, talk on phones, read unlimited. Cannot do any heavy lifting, nothing over 10 pounds, per Dr. Burt's report, as well as needs to avoid prolonged repetitive typing, grasping,

filing over 30 minutes at a time not more than three hours per day. Recommend voice recognition system. Also needs an aide to complete paperwork.”

32. On October 1, 2010, Dr. Perez wrote a Physician’s Report on Disability for CalPERS indicating “carpal tunnel syndrome, calcific tendinitis in the right shoulder with decreased range of motion, chronic deafness, reads lips, hearing test attached. Noted limited in typing due to the carpal tunnel syndrome.”

Dr. Forest’s Physical Examination of Respondent

33. Respondent was examined by Dr. Forest on January 27, 2011 in Sacramento, California, for the purpose of a CalPERS disability evaluation. Respondent reported to Dr. Forest that she began working as a Vocational Rehabilitation Counselor for DOR after 1991. Respondent had previously worked for the school district in Pomona, California. She was diagnosed with carpal tunnel syndrome, and underwent surgery on her right and left hands in 1990 and 1991. Thereafter, she did well. Respondent is hearing-impaired and “signs” on a regular basis. In 2006, respondent was doing a great deal of signing and typing when she began to have worsening problems in her right hand. She filed a worker’s compensation claim, and was eventually evaluated by Dr. Szabo and Dr. Allen, hand surgeons at UC Davis. Dr. Allen performed a “revision carpal tunnel release” on respondent’s right hand in 2008. Respondent was then seen by a qualified medical examiner following her surgery. The qualified medical examiner assigned respondent permanent disability with her right hand, and respondent was placed on permanent restrictions at work. Respondent worked with reasonable accommodations in 2010, which consisted of no heavy lifting, no filing, and no typing greater than three hours per day.

34. Respondent further reported to Dr. Forest that she had pain, swelling, and cramping in both hands. She dropped things, and experienced occasional nighttime awakening with pain. Respondent wears splints. Respondent noted that following her right-sided surgery, the warmth returned to her hand, but numbness and tingling continue. She also noted that her left hand is sore, with increased numbness and tingling in the thumb and index finger. She also noted a prior history of a diagnosis of “thumb tendinitis with mousing.” Respondent also noted that she had neck pain and had to take breaks from typing. She was diagnosed with a “strain” and was sent to acupuncture. Respondent noted no problems with her lower back or legs.

35. Respondent’s current medical problems (at the time of her examination with Dr. Forest) included diabetes, with which she has some decreased visual acuity, deafness, seasonal allergies, and asthma symptoms.

36. Dr. Forest noted that respondent is a pleasant 61 year-old woman in no distress. Respondent appeared to be her reported height of five feet seven inches, and weight of 277 pounds. Dr. Forest noted in her examination the following:

There is no evidence of atrophy in either upper extremity. She appears to have full range of motion of her shoulders, elbows, wrists, and digits. No discrete areas of tenderness are found. She has well-healed surgical incisions from extended carpal tunnel releases bilaterally with no significant adhesions with the exception of mild adhesions in underlying tissue. She is able to make a full composite grip without difficulty, has intact strength in her extensor pollicis longus (EPL), abductor pollicis brevis (APB), and first dorsal interosseous muscles. She has some mild tenderness in the dorsal aspect of the right wrist with minimal synovial thickening. She has some discomfort at the extremes of dorsiflexion and palmar flexion but appears to have full, unrestricted range of motion. Her elbow range of motion is full. There is mild discomfort at the right thumb carpometacarpal (CMC) joint with subluxation and grind, no discomfort on the left thumb CMC joint with subluxation or grind. Median nerve compression/wrist flexion testing is equivocal. Bilateral Tinel's are present at the carpal tunnels on the right greater than left sides with tingling into the index, long, and ring digits. No evidence of ulnar nerve subluxation at the elbow is seen. No other anatomic abnormalities are found. The right shoulder has very mild impingement signs with no discrete areas of tenderness.

37. Upon CalPERS's denial of respondent's disability claim, respondent asserted that she was not provided an ASL interpreter during her IME with Dr. Forest, that she had enormous difficulty in understanding Dr. Forest, and that the IME was "not appropriate or legally done and needs to be re-done with another IME physician with an ASL interpreter present." However, Dr. Forest noted in a supplemental report, dated May 25, 2011, that it was true that the scheduling service was not able to find an interpreter, and that they contacted respondent. Through her mother, respondent informed the scheduler that they would be comfortable in proceeding with the evaluation. Dr. Forest noted that respondent did not offer to speak in sign language, nor did she try to speak through her mother, who said that she would be able to interpret for respondent and Dr. Forest. Dr. Forest also noted that respondent was able to lip read well and had a good grasp of all the concepts of her claim and medical issues. Respondent presented in a straightforward manner. Respondent signed her responses to each question, and appeared to have good coordination without fatigue.

38. Dr. Forest provided the following diagnosis upon her examination of respondent:

- 1 Bilateral hand pain, status-post bilateral carpal tunnel releases with right revision carpal tunnel release most recently in 2008
- 2 Type 2 diabetes

- 3 **Hearing impairment**
- 4 **History of right shoulder bursitis**
- 5 **Hypertension**
- 6 **Likely right thumb CMC joint osteoarthritis**

39. Based upon her review of respondent's medical records and her physical examination of respondent, Dr. Forest concluded that while respondent had an impairment that warranted some of her work restrictions, they appeared to be somewhat excessive. Respondent was accommodated, and respondent expressed at the time of the qualified medical evaluations that she was working well through the accommodations. Dr. Forest felt that with an administrative assistant, voice recognition software, and the ability to limit her hand use, respondent was an asset to the DOR and was not contributing to any damage as far as her carpal tunnel syndrome was concerned. Respondent's shoulder impingement appeared to resolve.

40. Dr. Forest determined that respondent is unable to perform the following specific duties because of her carpal tunnel condition: "prolonged typing and writing; prolonged ASL use; limited repetitive forceful grasping possible; and limit lifting greater than 5 lbs."

41. Dr. Forest's Independent Medical Evaluation Report was the only report admitted into evidence in this case. Dr. Forest is a well-qualified orthopedic surgeon, and her medical opinion is reasonable, supported by the evidence, and is not refuted. None of the other physicians that examined respondent specifically applied the CalPERS disability standard, set forth in Legal Conclusions 1 through 6. Thus, Dr. Forest's opinion is credible, reliable, and persuasive in this case.

42. Dr. Forest identified specific job duties that respondent is unable to perform in a repetitive and prolonged manner, and that in her professional opinion, respondent is not substantially incapacitated for the performance of her duties. Dr. Forest found that respondent's carpal tunnel syndrome was reasonably accommodated, and her work restrictions appeared excessive. Respondent's shoulder impingement appeared to resolve.

43. Respondent presented no competent direct medical evidence that she is substantially incapacitated from the usual and customary duties of her employment.

LEGAL CONCLUSIONS

Applicable Statutes

1. Government Code section 20026 provides in pertinent part 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.”

2. Government Code section 21150, subdivision (a) provides that: “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, unless the person has elected to become subject to Section 21076 or Section 21077.”

3. Government Code section 21152 provides, in pertinent part:

“Application to the board for retirement of a member for disability may be made by:

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

(d) The member or any person in his or her behalf.

4. Government Code section 21152 provides:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

5. Government Code section 21154 provides, in pertinent that:

The application shall be made only (a) while the member is in state service....On receipt of an application for disability retirement of a member...the board shall, or of its own motion it 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....

6. Government Code section 21156 provides in pertinent part that, "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 in the state service and is eligible to retire for disability, the board shall immediately retire him or her for disability...."

Burden of Proof and Legal Standards for Determining Disability

7. Respondents' burden of proof is to establish by a preponderance of evidence that respondent is "incapacitated for the performance of duty," which courts have interpreted to mean "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) The applicant in *Mansperger* was a warden with the Department of Fish and Game whose physician opined that he could no longer perform heavy lifting and carrying. The evidence established that such tasks occurred infrequently, and that his customary activities were the supervision of hunting and fishing. The *Mansperger* court found that the applicant was not entitled to disability retirement because, although he had diminished arm strength, he could presently perform most of his usual job duties.

Subsequently, the Third District Court of Appeal in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, applied the *Mansperger* test to the disability retirement claim of a California Highway Patrol Sergeant whose back and leg injuries restricted his ability to carry out some patrol functions, including driving for lengthy periods. As a supervisor, the applicant was unlikely to be faced with apprehending a fleeing suspect over rough terrain or comparable strenuous activities. The court held that in determining whether the applicant was substantially incapacitated from his usual duties, neither an official job description nor the employer's written list of duties was controlling. The proper measure is the duties actually and usually performed by the applicant. (*Hosford, supra*, 77 Cal.App.3d 854, 860-861.)

In *Hosford*, the medical evidence established that the applicant was capable of carrying out the normal duties of a sergeant. The court found:

As the *Mansperger* court enunciated, Hosford is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of time in a patrol car would 'probably bother his back' does not mean that in fact he cannot so sit; and of course he can stop and exercise as needed. [Lieutenant] Workman testified that because of office work, 'as a general rule, if a sergeant got half his time in the field, he is very lucky.'

work, 'as a general rule, if a sergeant got half his time in the field, he is very lucky.'

...As for the more strenuous activities, [Dr.] Forcade testified that Hosford could run, and could apprehend persons escaping over rough terrain. Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function, renders Forcade's conclusion well within reason. (77 Cal.App.3d 854, 862)

In *Hosford* the applicant further argued that he was incapacitated because his physical status increased the chance of aggravation of his condition or further injury in the event of a physically demanding emergency. The court rejected his contention, stating, "As the Board correctly points out, however, this assertion does little more than demonstrate his claimed disability is only prospective (and speculative), not presently in existence." (77 Cal.App.3d 854, 863.)

Conclusion Re: Eligibility for Disability Retirement

8. As set forth in Findings 33 to 43, the evidence established that respondent is not permanently disabled or incapacitated from performance of her usual duties as a Senior Vocational Rehabilitation Counselor on the basis of an orthopedic condition (carpal tunnel syndrome, right shoulder) due to repetitive typing, writing, filing, sitting, and "signing" with the use of sign language. Respondent failed to sustain her burden of proof, by failing to produce competent medical evidence to establish that respondent is incapacitated for the performance of her usual duties (Findings 33 to 43, and Legal Conclusion 7).

ORDER

The application of Catherine E. Garbacz for disability retirement benefits is DENIED.

Dated: March 13, 2013



DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings