

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Industrial
Disability Retirement of:

ROXANNE STANLEY,

Respondent,

and

FALLBROOK UNION ELEMENTARY
SCHOOL DISTRICT,

Employer.

CASE NO. 2012-0159

OAH NO. 2012061022

(STATEMENT OF ISSUES)

PROPOSED DECISION

This matter came on regularly for hearing before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, in San Diego, California on August 1 and 2, 2013.

Roxanne Stanley (respondent) represented herself.

CalPERS' senior staff counsel Rory J. Coffey, Esq., represented the California Public Employees' Retirement System (CalPERS).

There was no appearance on behalf of the employer.

Oral and documentary evidence was received and the matter was submitted on August 2, 2013.

FACTUAL FINDINGS

1. Mary Lynn Fisher made and filed the Statement of Issues while acting in her official capacity as the Division Chief of the Benefit Services Division of CalPERS.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED August 30 2013

Jose R. Garcia

2. Respondent was employed as a school bus driver by the Fallbrook Union Elementary School District (employer). By virtue of this employment respondent is a local miscellaneous member of CalPERS subject to California Government Code section 21150. Respondent has the minimum service credit necessary for retirement.

3. On July 14, 2008, respondent signed and thereafter submitted a completed application for service retirement, pending Industrial Disability Retirement. Respondent's application was based on asthma and a psychological condition. Subsequent to filing the application respondent was diagnosed with Paradoxical Vocal Cord Dysfunction (PVCD), which is similar to asthma in its onset and symptoms, as it presents breathing difficulties. It appears that respondent's initial diagnosis of "asthma" was in reality PVCD; accordingly, respondent's motion to amend her application was granted and the issue presented in the instant hearing was whether respondent is permanently disabled or incapacitated from performance of her duties as a school bus driver for employer on the basis of PVCD.

4. By letter, dated March 13, 2009, CalPERS notified respondent that her application for disability retirement had been denied because "based on the evidence . . . it is our determination that your internal (asthma) and psychological conditions are not disabling. As a result, we have concluded that you are not substantially incapacitated from the performance of your job duties as a School Bus Driver with the Fallbrook Union Elementary School District." (Exh. 4)

5. By letter, dated April 7, 2009, respondent appealed CalPERS' March 13, 2009, denial of her disability retirement application.

6. As previously mentioned, on August 1, 2013, at the outset of the instant hearing, the basis for respondent's disability claim was changed from "asthma" to PVCD in conformity with respondent's most recent diagnosis, and respondent dropped her claim of disability based on a psychological condition. CalPERS' attorney was afforded the opportunity to discuss the changed disability claim with his expert witnesses and elected not to move for a continuance.

Respondent's Evidence

Respondent's Testimony

7. Respondent testified that she has been seen by approximately 20 different doctors since 2005. In 2005, respondent suffered a lung collapse due to bus exhaust (diesel) fumes. Respondent was "off work" for one month and gradually tried to return to work. Respondent was able to work for two to three days and then, due to the diesel fumes and stress (respondent was engaged in a dispute with employer over a Worker's Compensation claim), respondent had attacks of PVCD and was forced to take two to three weeks off. At times, respondent was bedridden

for several months. The “triggers” for respondent’s PVCD attacks are exposure to petroleum products, including diesel fumes; stress; and other environmental factors. Respondent “wears a mask,” uses a nebulizer and takes Vicodin for pain; however, none of these measures prevent the PVCD attacks, which incapacitate respondent.

Respondent’s Witnesses’ Testimony

8. Two bus drivers for employer testified during the hearing. Their testimony is summarized as follows: it is impossible for a bus driver to avoid diesel fumes, even if the exhaust system is intact and working properly, because of the number of buses running in the bus preparation lot and the need for a bus driver to fuel his/her bus. They witnessed respondent’s PVCD reactions, and the PVCD attacks incapacitated respondent for significant periods of time. Respondent used to play softball and golf with one of the witnesses, and due to her PVCD condition respondent had to quit playing softball. She went from walking on the golf course, to taking a cart, to taking a cart with a blue handicapped flag, to eventually quitting golf. According to the witnesses, when respondent has a PVCD attack she is completely incapacitated from performing any activities. Respondent is not malingering.

PVCD Diagnosis

9. Respondent presented a 2011 “Physician’s Report on Disability” and a 2013 “Multiple Impairment Questionnaire.” Both documents were prepared by Dr. Thomas Naegell, M.D., of the Scripps Coastal Medical Center. The reports state that respondent’s diagnosis is PVCD and that respondent cannot be exposed to diesel, petrochemical fumes, or exhaust.

CalPERS’ Expert Testimony

10. Kristof Siciarz, M.D., a physician specializing in Internal Medicine and Musculoskeletal and Neurologic Disability Evaluations, testified as the medical expert in this matter. Dr. Siciarz acknowledged that PVCD is a valid diagnosis and that someone who suffers from PVCD is incapacitated when he or she is having a PVCD attack. Accordingly, a person with PVCD cannot work around precipitating factors/conditions, which in respondent’s case, include diesel fumes, petroleum products and stressful environments.

Evaluation

11. CalPERS’ expert is commended for his candid, very objective testimony; and, based on the competent medical evidence produced during the instant hearing it was clear that respondent suffers from PVCD, a substantially disabling condition, which is triggered by exposure to diesel fumes, petroleum products, and stress. Consequently, respondent was, and currently is, permanently disabled and incapacitated from performance of her duties as a school bus driver for employer.

LEGAL CONCLUSIONS

Applicable Code Sections

1. California Government Code section 20026 provides, 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 . . . on the basis of competent medical opinion.”

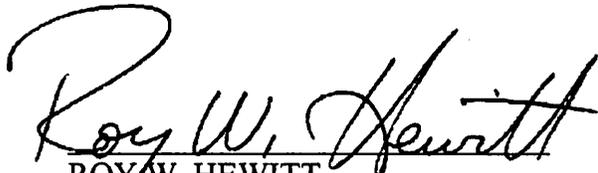
2. California Government Code section 21156 provides, in pertinent part: “In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion . . .”

3. In the present case, competent medical opinion established that respondent has a disability of permanent or extended and uncertain duration that prevents her from performing her duties as a school bus driver for employer, within the meaning of Government Code sections 20026 and 21156.

ORDER

Respondent’s appeal is granted. Respondent qualifies for Industrial Disability Retirement.

Dated: August 29, 2013


ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings