

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

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

In the Matter of the Statement of Issues  
Against:

BONNIE MATTHEWS,

Respondent,

and

CALIFORNIA DEPARTMENT OF  
MOTOR VEHICLES,

Respondent.

Case No. 2010-0085

OAH No. 2013060161

**PROPOSED DECISION**

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter on September 24, 2013, in San Jose, California.

Staff Attorney Preet Kaur represented petitioner California Public Employees' Retirement System.

Respondent Bonnie Matthews represented herself.

There was no appearance by or on behalf of respondent California Department of Motor Vehicles.

The record closed and the matter was submitted on September 24, 2013.

**FACTUAL FINDINGS**

1. Respondent Bonnie Matthews (respondent) is a Senior Motor Vehicle Technician for the California Department of Motor Vehicles. By virtue of her employment, respondent is a member of the California Public Employees' Retirement System (CalPERS). On June 18, 2009, respondent submitted to CalPERS an application for disability retirement. On the application form, respondent stated the nature of her disability as "Back pain about 15

years. Arthritis, Sciatica, Knee replacements. Degenerative Joint Disease, Carpal Tunnel.” CalPERS denied the application on December 31, 2009. Respondent filed a timely appeal. On April 18, 2013, Anthony Suine, Chief of the Benefit Services Division of CalPERS, filed a statement of issues, and this hearing followed.

*Respondent's job duties*

2. The position of Senior Motor Vehicle Technician is a sedentary office job. Respondent works in the DMV's Salinas Field Office, where she processes various types of customer transactions, such as driver's license applications and vehicle registrations, and assists new employees in the processing of those transactions. There are different windows that the technicians staff, and where members of the public seek assistance. Respondent works primarily at Window 11 (incorrectly marked "10" on the floor plan), where she is assigned for three-to-four weeks at a time, and then rotates to another window. Regardless of which window she works, the physical requirements are essentially the same: during an eight-hour workday, respondent spends about seven hours sitting, about 20 to 30 minutes standing, and she has two 15-minute breaks. During the day, respondent can change positions as needed, to stand, move or walk around. Respondent is never required to kneel, crawl, climb, stoop or squat. She may have to bend to retrieve something from a bottom drawer. She may reach over her shoulder to take forms from a cabinet for a customer, but she can also ask the customer to do that. Respondent does not have to lift or carry more than 10 pounds. She does not have to drive, walk on uneven ground, or perform vehicle inspections.

*Respondent's medical and employment history*

3. Respondent started work for DMV as a Motor Vehicle Technician and then became a Senior Motor Vehicle Technician. She was assigned to the department's Hollister office until 2009. Since February 2010, she has worked in the Salinas field office. Respondent will be 53 years old in November 2013.

4. Respondent's primary complaint is severe, unrelenting back, knee and wrist pain. Her back and knee pain began in 1996. Respondent was referred to physical therapy and prescribed pain medications. She had periods of time off work, after which she returned to work.

5. Beginning in 2006, respondent started to miss significant amounts of time from work. She had left knee replacement surgery in 2007 and was off work for three months, followed by right knee replacement surgery in 2008, after which she was off work for 15 months. Respondent was off work for all of 2009.

6. Respondent applied for disability retirement in January 2009 but, according to respondent, CalPERS mistakenly cancelled her application and therefore she applied again in June 2009. When CalPERS informed her, in December 2009, that it had denied her

application, respondent returned to work in February 2010. Respondent testified that she returned to work because otherwise she would have lost her home.

7. Respondent has continued to perform her usual duties at DMV, with periods of time off, up to the present. Julie Guerrero Ferreira is the office manager of the Salinas Field Office. From her desk, Ferreira can see Window 11, which is just a few feet away; when respondent is assigned to other windows, Ferreira still sees respondent throughout the day. Based on Ferreira's observations, respondent is performing the essential functions of her job.

8. Respondent maintains that she cannot perform her usual duties without substantial time off work. Respondent testified that she works until she has saved enough leave credits to go off work under the Family Medical Leave Act for four or five weeks. She missed 300 hours of work in 2010, over 400 hours in 2011, over 700 hours in 2012, and has missed over 300 hours in 2013, through September.

9. Respondent testified that for the past three and one-half years, she has been living with severe, constant pain on a daily basis. She states that she is "living on pain pills" and that the only way to relieve her pain is to lie in bed for a couple of hours. (Annu Navani, M.D., provides comprehensive pain management to respondent, which has included numerous kinds of medications, including opioids, physical therapy, radiofrequency ablation and epidural injections.) It appears that respondent's pain is relieved somewhat when she is off work, as she states that the pain immediately comes back as soon as she returns to work. Respondent states that the pain has had a drastic impact on her life, as she cannot keep her house clean and cannot socialize. Respondent stresses that retiring for disability would not be financially advantageous for her, as she would lose about \$800 per month.

#### *Medical opinions*

10. Respondent submitted medical reports from Maury K. Harwood, M.D., M.P.H., her surgeon; Smitha Kumar, M.D., her primary care physician; Dr. Navani, her pain management specialist; Scott A. Graham, M.D., who is treating her for bilateral thumb pain; and Stephen Whitelaw, D.C., a chiropractor who examined her in connection with a workers' compensation proceeding. She also submitted several imaging and electrodiagnostic studies.

The reports of Dr. Kumar, Dr. Navani and Dr. Graham discuss their treatment of respondent, but do not offer opinions on whether she is disabled from performing her usual duties.

In a report August 31, 2011, Dr. Harwood states that respondent is "unable to perform the essential functions of her job anymore." He imposed work restrictions on her, restrictions that Dr. Whitelaw supported in his report dated June 20, 2013.

None of these medical professionals, Dr. Harwood, Dr. Kumar, Dr. Navani, Dr. Graham or Dr. Whitelaw, testified at hearing. Complainant timely objected to their reports as hearsay, and they were admitted pursuant to Government Code section 11513, subdivision

(d). That section states that “hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.”

11. Orthopedic surgeon William R. Stearns, M.D., examined respondent on September 23, 2009, at the request of CalPERS, and prepared a report that bears the same date. He later wrote supplemental reports dated December 4, 2009, September 12, 2013, and September 20, 2013. The only time Dr. Stearns examined respondent was in September 2009.

When he examined respondent in 2009, Dr. Stearns concluded that she had mild lumbar spondylosis, probable bilateral carpal tunnel syndromes, and bilateral total knee replacements. He found her cooperative with the examination, but felt that she expressed certain nonanatomic complaints (“glove and stocking distribution of diminished sensation in each arm and leg”) that were suggestive of symptom embellishment. Overall, Dr. Stearns concluded that respondent’s conditions justified certain restrictions, but that the restrictions should not prevent her from doing the light duty office work that her job required.

In his supplemental reports, Dr. Stearns reviewed additional medical records, including the records of Dr. Navani; Dr. Harwood’s August 31, 2011 report; Dr. Whitelaw’s report; and a July 25, 2013 MRI of the lumbar spine. These records did not alter Dr. Stearns’s opinion that respondent is not disabled from performing her usual duties. Dr. Stearns emphasized, however, that his opinion was based on his 2009 examination.

12. Umesh K. Sab, M.D., examined respondent on November 13, 2009, at the request of CalPERS. Dr. Sab is board certified in rheumatology, as well as other specialties. Dr. Sab wrote a report dated November 13, 2009, and testified at hearing.

In his 2009 report, Dr. Sab concluded that respondent has lower back pain related to degenerative disc disease, generalized osteoarthritis and bilateral carpal syndrome, bilateral trochanteric bursitis, and that she had had bilateral knee replacements. In Dr. Sab’s opinion, respondent was temporarily disabled for the performance of her duties when he saw her. Dr. Sab has not examined respondent since 2009.

At hearing, Dr. Sab reviewed MRI’s of respondent’s lumbar spine performed in 2010 and 2013. He testified that the studies revealed significant degeneration since 2009. The studies, however, did not cause him to change his opinion that respondent is not permanently disabled from performing her usual duties.

## LEGAL CONCLUSIONS

1. A miscellaneous member of CalPERS who becomes “incapacitated for the performance of duty,” and who has sufficient service credit, shall be retired. (Gov. Code, § 21150.) The term “incapacitated for the performance of duty” is defined by the Public Employees’ Retirement Law to mean “disability of permanent or extended and uncertain

duration . . . on the basis of competent medical opinion.” (Gov. Code, § 20026.) To determine whether an applicant is “incapacitated for the performance of duty,” the courts look to whether the applicant is substantially disabled from performing her usual duties. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876; accord *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.)

2. The burden of proof is on respondent. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691.)

3. To meet her burden, respondent must establish by competent medical evidence that she is incapacitated for the performance of duty within the meaning of Government Code section 21150. No such evidence was presented. The medical reports of Dr. Harwood, Dr. Kumar, Dr. Navani, Dr. Graham and Dr. Whitelaw would not be admissible over a hearsay objection in a civil action. Under Government Code section 11513, subdivision (d), therefore, they are not sufficient to support a finding that respondent is incapacitated for the performance of duty.

4. The opinions of the doctors who appeared at hearing, Dr. Stearns and Dr. Sab, do not support the conclusion that respondent is incapacitated for the performance of her duties. Both of these witnesses opined to the contrary. It is true that these physicians have not examined respondent in four years. Weaknesses in their conclusions, however, do not cure respondent’s failure of proof.

5. For reasons not explained at hearing, almost four years elapsed between the date CalPERS denied respondent’s application, and the date it issued the statement of issues. It is plain that there have been changes in respondent’s physical condition in the interim. It is regrettable that neither CalPERS, nor respondent, brought to hearing a medical professional familiar with respondent’s current condition. Based on this medical record, however, and the fact that respondent is performing her usual duties, albeit with pain and periods of time off, respondent has not met her burden of proving that she is incapacitated for the performance of duty by reason of a disability of permanent or extended and uncertain duration.

ORDER

The application for disability retirement of respondent Bonnie Matthews is denied.

DATED: October 22, 2013

  
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DAVID L. BENJAMIN  
Administrative Law Judge  
Office of Administrative Hearings