

ATTACHMENT A
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:

Case No. 9065

LYNN R. DANE,

OAH No. 2012120803

Respondent,

and

METROPOLITAN WATER DISTRICT OF
SOUTHERN CALIFORNIA,

Respondent.

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on June 26 and October 1, 2013.

Elizabeth A. Yelland, Senior Staff Attorney, represented petitioner Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Respondent Lynn R Dane appeared and represented herself.

Respondent Metropolitan Water District of Southern California did not appear and was not otherwise represented.

Evidence was received and the matter was submitted on October 1, 2013. In addition to exhibits, petitioner submitted a CalPERS' Closing Brief in Support of Determination, CalPERS Request for Official Notice (of two prior decisions), and CalPERS Brief Re: Exclusion of Medical Testimony. These were marked petitioner's exhibits 16, 17, and 18, respectively, and made a part of the record.

ISSUE PRESENTED

Whether respondent Lynn R. Dane was substantially incapacitated for the performance of her usual duties as a Team Leader I with respondent Metropolitan Water District of Southern California 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 Lynn R. Dane was employed by respondent Metropolitan Water District of Southern California. At the time respondent Dane filed her application for retirement, she was employed as a Team Leader I. By virtue of her employment, respondent Dane is a local miscellaneous member of CalPERS subject to government code section 21150.
3. On or about September 19, 2007, respondent Dane signed an application for disability retirement. In filing the application, disability was claimed on the basis of an orthopedic (neck, shoulder, upper back and bilateral arm pain/muscle spasm) condition and Myofascial Pain Syndrome. Respondent Dane retired for service effective October 7, 2007, and has been receiving her retirement allowance from that date.
4. CalPERS obtained medical reports concerning respondent Dane's orthopedic condition from competent medical professionals. After review of the reports, CalPERS determined that respondent Dane was not permanently disabled or incapacitated from performance of the usual duties of a Team Leader I at the time the application for disability retirement was filed.
5. Respondent Dane was notified of CalPERS' determination and was advised of her appeal rights by letter dated August 25, 2008.
6. Respondent Dane filed a timely appeal by letter dated September 22, 2008, and requested a hearing.

Usual Duties for a Team Leader I Employed by Respondent Metropolitan Water District of Southern California

7. A Classification Description and a CalPERS' Physical Requirements of Position/Occupational Title for Motor Vehicle Field Representative were received in evidence. The Classification Description describes generic and very general administrative and supervisory tasks. The Physical Requirements document includes among the physical tasks frequently performed: sitting, standing, bending from the waist, twisting from the waist, simple grasping, keyboard use and mouse use. Respondent Dane described her duties as the

supervision of 40 to 50 direct-report employees working at five pump sites spread over southern California. She was responsible for quarterly evaluations of her subordinates, many of whom were "recurrent" or part-time, as needed employees. She traveled among the pump sites and spent a great deal of time at her computer. In her application, respondent Dane described her limitations and work preclusions due to her injury as a limited ability to perform computer tasks and other aspects of her job and the inability to attend work on a regular basis. She asserted that pain and loss of muscle movement in her arms, neck, shoulders, hands and fingers and incidents of pain and Myofascial Pain Syndrome limited her work.

Competent Medical Opinion

8. At the request of CalPERS, respondent Dane was examined by independent medical examiner Mark Mikulics, M.D. a board-certified orthopedic surgeon. Dr. Mikulics examined respondent Dane on May 21, 2008. He prepared a report that was received in evidence. Dr. Mikulics testified by telephone at the administrative hearing.

9. Dr. Mikulics took a history from respondent Dane that included that respondent Dane spent 60 to 80 percent of her time as a team leader using her computer. She also traveled to various sites in the Desert Region to which she was assigned for meetings, training, and counseling. Respondent was injured on September 1, 2004, when the automobile she was driving left the road and flipped over three and a half times. She was wearing her seat belt and sustained what seemed to be minor injuries including mild soreness. Over the next two to three weeks, she experienced severe soreness and muscle spasms in the right side of her neck, radiating into her trapezius muscle and upper extremity. She was seen by rehabilitation specialists and ultimately diagnosed with Myofascial Pain Syndrome. She continued to work until she retired in October of 2007. At the time of the examination by Dr. Mikulics, respondent Dane complained of neck pain, upper back pain and right shoulder and arm pain. She reported that her hands would cramp and she experienced muscle spasms in the painful areas.

10. Dr. Mikulics performed a physical examination of respondent Dane, focusing on the areas of complaint. He performed a grip strength test and respondent Dane averaged 25 pounds on the right and 45 pounds on the left. In the absence of a serious injury impairing a person's ability to squeeze, most people have similar grip pressure in both hands and respondent Dane's reading of 25 was so abnormally low, that Dr. Mikulics concluded the result was due to respondent Dane's lack of effort and he concluded that she was exaggerating her symptoms. A cervical spine examination was performed and respondent Dane complained of tenderness on the right side, but there were no palpable spasms. Range of motion was within normal limits. The shoulder examination also revealed no palpable spasms and there was full range of motion. Respondent Dane complained of diffuse tenderness about the right side of her neck, upper back, trapezius and parascapular musculature. There were no objective signs of diminished muscle strength suggesting nerve damage and her reflexes were normal and equal.

11. Dr. Mikulic' review of respondent's medical records included that respondent Dane had been seen by a neurologist, Dr. Chabay, beginning on or about April 11, 2005. Dr. Chabay authored a report dated November 10, 2005, relating to respondent Dane's worker's compensation claim following her car accident that occurred when she on the job. At that time, Dr. Chabay considered respondent Dane "permanent and stationary." Dr. Chabay reviewed electrodiagnostic studies, including an EMG and nerve conduction study performed on respondent Dane's right upper extremity, which revealed no nerve damage. When Dr. Chabay examined respondent Dane in connection with the report, respondent Dane complained of minimal to severe pain in her right neck, occurring about once a week lasting for one and a half days with each episode. She had occasional hand cramping. Dr. Chabay's physical examination revealed no tenderness or muscle spasms on either side of the cervical spine. Grip strength was 60 pounds right and 55 pounds left. Sensory and reflex tests were normal. Neck range of motion was normal except the left lateral flexion of 30 degrees. An MRI performed on July 29, 2005, showed degenerative discogenic changes. Dr. Chabay concluded that "[a]t this time, the patient continues to be able to perform her usual job duties without restrictions." She added: "This was my opinion on April 11, 2005, and this has not changed on review of her clinical course from that initial visit to the present time."

12. Respondent Dane was also seen by Dr. Snyder at the Mayo Clinic in Scottsdale, Arizona, for the Myofascial Pain Syndrome. On June 23, 2006, Dr. Snyder approved respondent Dane's return to work without restrictions.

13. Dr. Mikulic's review of medical records summary also included a description of reports prepared by another worker's compensation evaluator, Dr. Jacob Rabinovich. Dr. Rabinovich's specialty was not included. Dr. Rabinovich's initial diagnoses were probable herniated cervical disk with right upper extremity radiculopathy and right shoulder impingement syndrome. Following an MRI on September 5, 2007, that reported degenerative changes with disk narrowing and desiccation of the disk at C4-C5 and C5-C6, Dr. Rabinovich determined that respondent Dane suffered from cervical sprain/strain, impingement of the right shoulder, and bilateral carpal tunnel syndrome per neurodiagnostic studies. He felt that respondent Dane should be precluded from heavy lifting, repeated twisting of the cervical spine, holding her head in an awkward position, and repetitive pushing and pulling.¹

14. Dr. Mikulic's diagnoses for respondent Dane were: (1) Status post motor vehicle accident; (2) Cervical degenerative disk disease; and, (3) Myofascial Pain Syndrome. He concluded that from an orthopedic perspective, she is not substantially incapacitated for performance of her usual duties as a Team Leader I. He acknowledged her Myofascial Pain Syndrome, but noted that a neurologist and a specialist in Myofascial Pain Syndrome at the

¹ Respondent Metropolitan Water District of Southern California offered to "accommodate" the work restrictions listed by Dr. Rabinovich. This offer was included in a letter to respondent Dane dated January 29, 2008. Respondent Dane declined the offer of modified or alternative work.

Mayo Clinic both concluded that respondent Dane was able to work at her job without restrictions despite the diagnosis.

15. At the conclusion of the first day of the administrative hearing, the Administrative Law Judge reminded respondent Dane that she bore the burden of establishing her incapacity for the performance of her usual duties and she needed to offer competent medical evidence to support her claim. She was given the opportunity to retain legal counsel and the time to produce the required medical expert evidence. On the second day of the administrative hearing, respondent Dane appeared without legal counsel and offered the telephonic testimony of E. Franklin Livingstone, M.D., a board certified physiatrist (physical medicine and rehabilitation). Dr. Livingstone is the Director of Rehabilitation Medicine at the Havasu Regional Medical Center in Lake Havasu, Arizona. He evaluated respondent Dane on September 30, 2005, in connection with an insurance disability claim for the same conditions at issue in this proceeding. Dr. Livingstone took a history, conducted a physical examination of respondent Dane and reviewed medical reports including an MRI that revealed what he described as "significant degenerative joint disease and degenerative disk disease between C4 and C5 with marked narrowing at C4-C5." His physical examination demonstrated relatively normal neuromuscular function. He found no reflex abnormalities. He noted that respondent Dane complained of pain and tenderness related to her right neck and upper extremity region. There was palpable tenderness in the paraspinal muscles on the right at C3-C4 and diffusely along the cervical spine and also in the upper trapezius and levator scapulae muscles. His diagnosis was Myofascial Pain Syndrome, but he believed it important to rule out some radiculopathy or brachial plexopathy. He recommended physical therapy and opined, "if this is just Myofascial in nature, I would expect the patient to improve over a 3-to 4-week period of appropriate therapy."

16. Following an electrodiagnostic study and a follow-up visit with respondent on August 17, 2010, Dr. Livingstone authored a more thorough independent medical examination report dated August 17, 2010. Dr. Livingstone noted that respondent Dane had received extensive treatment since her automobile injury, but continued to have subjective pain complaints, primarily involving the right occipital region, the right neck, and right shoulder but also more diffuse pain complaints of a waxing and waning nature. A cervical spine MRI revealed "mild degenerative changes and mild osteophytosis." An electrodiagnostic evaluation was within normal limits. Dr. Livingstone performed a physical examination of the areas of complaint and respondent Dane complained of pain and tenderness in the same areas she had mentioned in earlier evaluations. Otherwise, range of motion and reflex testing were normal and there was no indication of numbness. Dr. Livingstone's diagnoses were Myofascial Pain Syndrome (more specifically levator scapulae syndrome), bilateral with right greater than left; chronic pain syndrome; high ANA without a diagnosis of Lupus; depression; mild obesity; and cardiopulmonary and musculoskeletal deconditioning. Dr. Livingstone was asked to answer whether respondent Dane had work capacity on a full-time, consistent basis. He answered that she was physically capable of sedentary level work activities, but there would likely be periodic absenteeism based on her history of systematic flares. He stated: "There is no physical reason that she cannot work at a

sedentary level on a full-time basis; but again, the waxing and waning of her pain problems and the level of subjective pain experience will at times prevent her from maintaining a regular schedule.” Earlier in the report, Dr. Livingstone noted that respondent Dane was not following recommended treatment including frequent daily cold pack therapy and stretching. These were prescribed to lessen muscle tension and increase blood flow and allow her muscles to completely heal. He explained in his report that the treatment of Myofascial Pain Syndrome typically involves strengthening the muscles, after they have healed.

17. In his telephonic testimony, Dr. Livingstone said that respondent Dane met with him the week before the second day of the administrative hearing. He gave her a document and CD describing effective treatment for her condition. He testified that respondent Dane’s Myofascial Pain Syndrome is treatable, and his recommendations were the same as he provided to respondent Dane in 2010. He continues to feel that respondent is capable of performing sedentary work on a full time basis, except for the days on which her symptoms are exacerbated.

18. Respondent Dane offered her own testimony, the testimony of her sister, and the letters written by other persons including her treating internist to establish that she is not “malingering.” This evidence established that before the automobile accident, respondent Dane was an outgoing person who loved other people and was physically very active. She participated in strenuous sports. She had a strong work ethic and had been involved in some form of volunteer or paid work since high school. She was dedicated to her job and was heart-broken when she felt she could no longer work for respondent Metropolitan Water District of Southern California. Respondent’s sister and the letter writers confirmed that after the accident, respondent greatly limited her activities and interactions with others. Respondent Dane explained that she did not put forth full effort on the grip test administered by Dr. Mikulics because she was afraid that doing so would cause a resumption of pain. She was not experiencing spasms on the day that he examined her. She related that she stopped working because she was unable to work her usual four day-ten hour work schedule. She was encouraged by the information that Dr. Livingstone recently provided her about Myofascial Pain Syndrome and somewhat optimistic that she might get better by following his recommended therapies.

Conclusion

19. There was a clear consensus among evaluating physicians that respondent Dane suffers from Myofascial Pain Syndrome. However, all of the physicians who have evaluated respondent Dane for either this matter or a worker’s compensation claim based on the same condition, have concluded that she is able to perform her usual duties. Dr. Rabinovich did describe work preclusions, but none of the tasks he listed were part of respondent Dane’s usual duties and respondent Metropolitan Water District of Southern California agreed to “accommodate” the work restrictions recommended by Dr. Rabinovich. Thus, as a factual matter, respondent Dane was not substantially incapacitated for the performance of her usual duties of her job as a Team Leader I at the time that she filed her application for industrial disability with CalPERS.

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 Dane failed to establish that she was substantially unable to perform her usual job duties as a Team Leader I at the time that she applied for industrial disability retirement. Respondent is therefore not entitled to disability retirement and her application should be denied.

ORDER

Respondent Dane's appeal from CalPERS' determination that she was not permanently disabled or incapacitated from performance of her usual duties as a Team Leader I with respondent Metropolitan Water District of Southern California at the time that her application for disability was filed is DENIED.

Dated: October 29, 2013


KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings