ATTACHMENT A

THE PROPOSED DECISION

Attachment A

BEFORE THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Of:	
CELIA L. KASTNER,	Case No. 2013-0255
Respondent,	OAH No. 2013041110
and	
DEPARTMENT OF STATE HOSPITALS, ATASCADERO STATE HOSPITAL,	
Respondent.	

PROPOSED DECISION

This matter came for hearing before Administrative Law Judge Samuel D. Reyes on September 11 and November 27, 2013, in San Luis Obispo, California.

Rory J. Coffey, Senior Staff Counsel, represented Anthony Suine (Petitioner), Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Edwin J. Rambuski, Attorney at Law, represented Celia L. Kastner (Respondent).

Department of State Hospitals (Department), Atascadero State Hospital (ASH), did not enter an appearance at the hearing.

On December 1, 2011, Respondent filed an application for disability retirement on the basis of her orthopedic (cervical radiculopathy and hand) conditions. CalPERS denied the application and filed the Statement of Issues after it concluded that the medical evidence did not establish Respondent's disability.

Oral and documentary evidence was submitted at the hearing, and the matter was submitted for decision on November 27, 2013.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED Dec 23 2013

FACTUAL FINDINGS

Parties and Jurisdiction

1. Petitioner filed the Statement of Issues in his official capacity.

2. Respondent was employed by Respondent Department at ASH as a custodian for approximately 7 or 8 years, until May 16, 2011. By virtue of her employment, Respondent is a state miscellaneous member of CalPERS.

3. On December 1, 2011, Respondent filed an application for disability retirement, which was received by CalPERS on December 7, 2011. She described her specific disability and the circumstances surrounding it as follows: "May 10, 2011, reported in logbook on unit 20.Worked until May 16, 2011. Went to Med+Stop in San Luis Obispo. Primary Care diagnose[d] as Cervical Radiculopathy in Hand and Wrist." (Exh. 1, at p. 2.)

Respondent's Duties

4. Respondent worked as a custodian at ASH, a position that involved cleaning (50% of her time), supervising patients to perform cleaning duties (35%), and operating housekeeping equipment (15%). As part of her duties, Respondent was required to squat, stoop, twist, kneel, and move about throughout her workday. She was required to operate scrubbers, buffers and other equipment and machinery, tasks that involved lifting 45 pounds and pushing and pulling 25 pounds. Many of her tasks, such as sweeping, dusting, scrubbing, and waxing floors, involved repetitive motions. Some of her tasks took place in secured areas. Absent other staff, she could be called upon to assist in restraining patients during incidents.

Respondent's Injury, Treatment, and Evaluation

5. On July 29, 2010, Respondent hurt her neck and shoulder while carrying about 25 pounds of trash down a set of stairs. At the time of the incident, she experienced excruciating pain in her shoulder and neck and pain in her lower back and left leg. She had been experiencing problems with her hands and legs prior to the injury.

6. Respondent filed a workers' compensation claim, which is still pending, and has been examined in connection with the claim. On October 18, 2010, she underwent a magnetic resonance imaging (MRI) study of the cervical spine at Templeton Imaging. The results of the test were reported by D. Young Shin, M.D., as "Small disc bulge at C5-6 Level is present, without significant central canal compromise. There is no central canal stenosis or neural foraminal narrowing." (Exh. 9.) The bulge was described as measuring at most 2 millimeters (mm).

7. a. In June 2011, Elmore G. Smith, M.D. (Smith) conducted an Agreed Medical Examination of Respondent in connection with the pending workers' compensation claim. He prepared an initial report dated June 20, 2011, and three supplemental reports and testified about his opinions at the hearing. Dr. Smith's June 2011 physical examination of Respondent was essentially normal, except for what he described as a "profound" lack of appreciation of sensory testing in the upper and lower extremities and "self-limitation" of range of motion of the upper and lower extremities. He reviewed numerous records, including those of Respondent's primary treating physician at the time, Anthony Sheplay, M.D. (Sheplay). Dr. Smith noted that on January 21, 2011, Dr. Sheplay had final diagnoses of cervical disc degeneration, cervical spinal stenosis, myalgia and myositis and found Respondent to have become "permanent and stationary" in workers' compensation terms, or the point at which no further medical improvement was expected. Dr. Smith also referred to Dr. Sheplay's January 27, 2011 determination that Respondent was capable of returning to work to her usual and customary duties.

b. In his report, Dr. Smith deferred to Dr. Sheplay's finding of disability, and set forth subjective and objective factors in support of the finding of disability. In addition to Respondent's reported neck and shoulder pain, Dr. Smith cited as evidence supporting the determination of disability the October 18, 2010 MRI, an October 22, 2010 electrodiagnostic test indicating evidence of moderate bilateral carpal tunnel, and her presentation as an individual manifesting pain behavior, demonstrating a profound lack of appreciation to sensory stimuli, and self-limitation of range of motion. He set forth the following diagnoses: anxiety/depression/panic disorder by record review; familial tremors affecting neck, upper extremities, and hands by record review; record review consistent with probable carpal tunnel syndrome, right, and possibly left; pain behavior; probable neck/shoulder girdle sprain/strain; small C5-6 disk bulge; and back and leg sprain, etiology uncertain.

c. Dr. Smith opined that Respondent was precluded from engaging in prolonged overhead use activities, activities requiring very prolonged motion and very prolonged positioning of the neck, prolonged heavy lifting, and prolonged force of pushing and pulling with the upper extremities. Because of the results of his physical examination and reported family history of tremors of the neck and hands, Dr. Smith recommended psychological and neurological consultations.

d. Dr. Smith testified that the October 18, 2010 MRI showed no pathology sufficient to cause neurological symptoms in the extremities, and that he would not make a diagnosis of cervical radiculopathy without objective findings to support it.

8. In his January 31, 2013 report, with which he agreed at the hearing, Dr. Smith concluded that Respondent has sustained bilateral carpal tunnel syndrome symptoms on an industrial basis due to cumulative trauma. He recommended treatment of her condition, but did not opine about whether she could perform her usual and customary duties absent such

treatment. In a subsequent report, dated June 17, 2013, Dr. Smith opined that returning to her position and performing repetitive tasks with her hands would make her condition worse, an indication that she could actually perform the duties of her position at the time.

9. a. Eric W. Dunlop, M.D. (Dunlop), is Respondent's primary care physician. Dr. Dunlop first saw Respondent on August 8, 2011. On the basis of Respondent's complaints of pain, Dr. Dunlop has diagnosed cervical radiculopathy, bilateral median nerve compression neuropathy, and suspected lumbar radiculopathy. Dr. Dunlop opined that Respondent would have difficulty with repetitive movements, sitting and standing for long periods, and difficulty lifting and carrying heavy objects. He further opined that Respondent was disabled for the performance of her duties.

b. Dr. Dunlop agreed that the October 18, 2010 MRI results were "pretty normal," but felt his diagnosis was appropriate on the basis of the patient's subjective complaints.

10. Dr. Dunlop referred Respondent to Kenneth Fryer, M.D. (Fryer), an orthopedic surgeon specializing in the hands, for evaluation of the bilateral numbness of the hands and arms, and his opinions and diagnoses are based, in part, on Dr. Fryer's opinion. On physical examination, Dr. Fryer noted that Respondent had full range of motion of the elbows, wrists and hands. She had no tenderness in the elbow, and stated that Respondent could not feel Dr. Fryer's touch of the ulnar nerve area. A percussion test of the median nerve area, Tinel's, was negative. She had no subluxation of the ulnar nerve with active flexion and extension of the elbow. Dr. Fryer noted that electrodiagnostic studies confirmed median nerve compression neuropathy at the wrist bilaterally with no other peripheral nerve involvement. He concluded: "The final impression is bilateral median nerve compression neuropathy at the wrist with bizarre presentation of sensory numbness and subjective complaints that cannot be substantiated with objective findings." (Exh. 7, at p. 3.)

11. Respondent testified that she continues to suffer pain in her neck and shoulders, tingling and numbness in her hands and arms, dizziness, and fainting. She has pain in both wrists and has decreased grip strength.

Post-Application Evaluation by CalPERS

12. a. On June 11, 2012, at the request of CalPERS, orthopedic surgeon Brendan V. McAdams, Jr., M.D. (McAdams), conducted an examination of Respondent. Dr. McAdams spent approximately 45 minutes with Respondent, taking a history and performing a physical examination. He reviewed Respondent's duty statement, initial treatment records from Med Stop Clinic, several records from Brian Roberts, M.D., several records from Dr. Sheplay, and Dr. Smith's June 20, 2011 report.

b. Respondent reported that she suffered a hand injury at work in 2004 and an injury to her neck and left shoulder in 2010. She received treatment from Dr. Sheplay and underwent an MRI. She also had a nerve conduction study and received injections, six times, in her neck. She returned to work in early 2011, but only lasted three weeks. At the time, her hands and wrists were swelling. She also suffered neck injuries during an automobile accident on February 8, 2011. She stayed off work for two months, before returning. She stopped working for a final time about three weeks later. She complained of neck pain in the left side that produced pain going into both arms; numbness and tingling in both hands; and lumbar spine pain, which throbs constantly and produces pain going to her entire left leg, front and back.

c. On physical examination, Dr. McAdams did not find objective evidence to support Respondent's complaints. She stood erect and was able to flex forward to a point at which her fingertips were 12 inches from the floor and resisted going any further. She was able to extend only to 10 degrees and to bend, in both directions, only to 20 degrees, complaining of low back pain. She hesitated to rotate her body more than 45 degrees because of complaints of discomfort. While in the sitting position on the examination table, Respondent had full flexion of the neck, but limited extension, rotating only 30 degrees in either direction. Lateral bending was restricted to 10 degrees bilaterally. In Dr. McAdams's opinion, Respondent was voluntarily controlling her movements. Respondent had full elevation of her arms at 180 degrees, and excellent strength in the arms at 90 degrees of abduction. Biceps, triceps, and brachial radialis reflexes were equal and active. She had excellent strength with dorsiflexion and volar flexion of the wrist. She had negative Tinel's sign and Phalen's sign, another diagnostic test for carpal tunnel. Deep tendon reflexes, knee jerks, and ankle jerks were equal and active. She had excellent strength of the extensor hallucis longus, extensor digitorum communis, anterior tibialis, and peroneal muscles.

d. Like Dr. Smith, Dr. McAdams concluded that the October 18, 2010 MRI showed no pathology sufficient to cause neurological symptoms in the extremities, and that he would not make a diagnosis of cervical radiculopathy without objective findings to support it.

e. Dr. McAdams concluded that Respondent was not disabled for the performance of her usual and customary duties of her position. Her multiple areas of subjective complaints were not corroborated by objective findings and the medical records he reviewed did not document positive findings to justify the given diagnoses.

Finding Regarding Disability

13. The credible medical evidence presented at the hearing did not establish that Respondent is incapacitated for the performance of duty by reason of any orthopedic condition. While Dr. Dunlop opined that Respondent is disabled by reason of her cervical radiculopathy, bilateral median nerve compression neuropathy, and suspected lumbar radiculopathy, his

opinion was conclusory, not supported by objective evidence, such as the MRI, and contradicted by more persuasive evidence, namely, the opinions of Drs. McAdams and Smith. Dr. Smith opined that Respondent suffered from carpal tunnel syndrome, which opinion was corroborated and supported by nerve conduction studies and the opinions of Drs. Sheplay and Fryer. However, neither Dr. Smith nor any of the other physicians opined that such condition prevented Respondent from discharging her duties. On the contrary, Dr. Sheplay concluded that Respondent was capable of discharging her duties and she in fact returned to work. In addition, Dr. McAdams affirmatively concluded that Respondent did not have an orthopedic condition that prevented her from discharging the duties of her position, which opinion is persuasive.

LEGAL CONCLUSIONS

1. Government Code[1] section 20026 defines the following relevant terms: "'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." Section 21156 provides, in pertinent part: "If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability. . . ."

2. In the seminal case of *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876 (*Mansperger*) the court stated: "We hold that to be 'incapacitated for the performance of duty' within section 21022 [now section 21151] means the substantial inability of the applicant to perform his usual duties." Inability to perform duties infrequently performed is insufficient to establish incapacity for performance of duty. (*Id.* at pp. 876-77.) Moreover, the condition in question must prevent the applicant from performing his or her customary duties in the present, not at some unspecified future time. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863).

3. Respondent has not established her disability pursuant to the CalPERS retirement law. Section 21156 requires disability to be established by competent medical opinion. As set forth in factual finding numbers 4 through 13, the competent medical evidence does not establish Respondent's disability. As Drs. McAdams and Smith agreed, with partial corroboration from Dr. Dunlop, the disc bulge in Respondent's back is small and unlikely to have caused the reported symptoms in her arms. Moreover, Drs. McAdams and Smith independently referred to Respondent controlling her movements to produce lower range of motion, which actions cast doubt on the validity of the reported symptoms.

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[1] All further references are to the Government Code.

Respondent's duties did not require the activities that Dr. Smith proscribed, namely, prolonged overhead use activities, activities requiring very prolonged motion and very prolonged positioning of the neck, prolonged heavy lifting, or prolonged force of pushing and pulling with the upper extremities. The heavy lifting of 45 pounds was not shown to have been prolonged. Her obligation to restrain patients, if actually performed, constitutes an infrequently performed duty, which under *Mansperger* is insufficient to establish incapacity for the performance of duty.

Accordingly, it was not established that Respondent is disabled for the performance of her usual duties pursuant to sections 20026 and 21156.

ORDER

The application for disability retirement of Celia L. Kastner is denied.

DATED: 12/20/03

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings