ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Disability Retirement of: MICHELE G. DEGUZMAN, Respondent, and DEPARTMENT OF HEALTH CARE SERVICES, Respondent.	Case No. 2013-0015 OAH No. 2013030884

PROPOSED DECISION

This matter was heard before Floyd D. Shimomura, Administrative Law Judge, Office of Administrative Hearings, State of California, on December 10, 2013, in Sacramento, California.

Elizabeth Yelland, Senior Staff Counsel, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

Hank G. Greenblatt and Lisa J. Ventura, attorneys at law, appeared on behalf of respondent Michele G. DeGuzman (respondent).

Respondent Department of Health Care Services did not appear and was not represented.

Evidence was received and the matter submitted on December 10, 2013.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 7 Jan 20 14

FACTUAL FINDINGS

Jurisdictional Facts

1. On June 21, 2011 respondent, an Associate Governmental Program Analyst (AGPA) with the Department of Health Care Services, filed an application for disability retirement. Respondent described her disability as a "herniated L 4-5 disc" which "was caused by an accident."

2. On June 22, 2012, CalPERS denied respondent's application after reviewing medical evidence, including reports by an independent medical examiner.

3. On June 29, 2012, respondent submitted a written appeal to the CalPERS denial of her application for disability retirement.

4. On March 19, 2013, Anthony Suine, Chief, Benefit Services Division, CalPERS, filed a Statement of Issues concerning respondent's appeal. In filing the Statement of Issues, Mr. Suine was acting only in his official capacity and not personally.

5. On April 9, 2013, CalPERS served a notice for a hearing to be held on respondent's appeal for December 10, 2013, before an Administrative Law Judge of the Office of Administrative Hearings.

Respondent's Work History and Job Duties

6. Respondent was born on September 30, 1956. In May of 1995, at the age of 39, respondent started work for the State of California at the Secretary of State's Office as an office assistant. Over time, respondent received promotions and transferred to the Department of Social Services and then to the Department of Health Care Services where she was an AGPA.

7. The AGPA classification is a general analytical staff position which includes assignments such as program evaluation and planning, systems development, budgeting, accounting, or program research. In terms of physical requirements, it is basically a desk job. According to a "Physical Requirements" survey completed by respondent's manager, respondent's most frequent activity (three to six hours a day) is sitting and using a keyboard and mouse. Occasionally (up to three hours), respondent must also stand, walk, twist, bend, do simple grasping, some pushing and pulling, and light lifting or carrying of up to ten pounds. Her job did not require activities typically associated with outdoor work such as running, climbing, power grasping, squatting, reaching above her shoulders, driving, walking on uneven ground, or lifting heavier objects over eleven pounds.

Motor Vehicle Accident

8. On June 25, 2010, respondent was involved in a motor vehicle accident. She was on her way to a dental appointment when she was hit from the rear after coming to a stop at an intersection. She was wearing her seat belt and the collision scared her. Right after the accident she got out of the car and was able to walk. She felt sick and had a headache. She went home and called her husband who told her to contact her doctors.

9. At the time of the accident, respondent was 54 years old and had about 15 years of state service. Respondent had planned to work at least 20 years so she could get full medical and increase her retirement which is based on years of service. Her last day on the state's payroll was July 5, 2010.

Respondent's Back Injury

10. The day after the accident respondent went to Kaiser Permanente to seek medical assistance. At that point, respondent indicated that her back was very painful. She was given an x-ray and prescribed medication. Thereafter, respondent continued to receive treatment from doctors and other medical staff at Kaiser but she continued to complain of pain.

11. About a year after the accident, on June 4, 2011, respondent underwent spinal surgery for her back injury. The surgery was performed by Dr. Thomas L. Voegeli, a Kaiser physician.

12. A few weeks later, on June 21, 2011, respondent filed her application for disability retirement. Respondent described her disability as a "herniated L 4-5 disc" which "was caused by an accident." Respondent alleged that, "I cannot bend, lift more than 10 pounds, no sitting more than 30 minutes at a time, no twisting and my legs get tired easily." Respondent stated that the injury affected her ability to perform her job because "I have not returned to work since June 25th, 2010 [date of accident]. Basic housework and chores are impossible to do effectively without pain."

Independent Medical Examination

13. Dr. Joseph B. Serra, whose specialty is orthopedic surgery, is a physician retained by CalPERS to conduct an independent medical examination (IME) of respondent. Dr. Serra received his medical education at Wayne State University, College of Medicine. He did his residency in orthopedic surgery, Wayne State University Program, Detroit, Michigan. He has a private practice in Stockton, California. He teaches orthopedics at the doctorate program of physical therapy at the University of Pacific. He is also an adjunct professor at Stanford University Medical School. He is board certified in orthopedic surgery and has a special interest in sports medicine.

14. On December 2, 2011, Dr. Serra met with respondent face-to-face, obtaining a history and doing a physical examination. At that time, he noted "a paucity of records." During the physical examination, Dr. Serra conducted a number of tests to determine the extent of pain or impairment to movement resulting from the car accident and subsequent surgery. The results of his examination are summarized as follows:

Neck and Upper Body. Dr. Serra's examination of the cervical spine revealed "tenderness to palpation" at the back of respondent's neck and upper shoulders. Nevertheless, Dr. Serra found that respondent had normal posture of the neck. While the range of motion of the cervical spine revealed flexion, extension, rotation, and bending to be somewhat restricted, Dr. Serra found them to be pretty much within normal limits for a person of respondent's age. Dr. Serra did not find "any spasm, guarding, or crepitus with motion." Dr. Serra's neurological examination of respondent's upper extremities (shoulders to fingers) revealed her motor and sensory function to be intact in her upper arms, forearms, wrists, and hands. Dr. Serra's Jamar measurements for respondent's left and right grip revealed them to be within normal limits.

Back. Dr. Serra's examination of respondent's lower back revealed that respondent "can stand erect with no evidence of list." He found "no pelvic tilt, scoliosis, or muscle spasm present." Nevertheless, he found that respondent had "tenderness to palpation from L3 through L1." He also found "tenderness to palpation" along "a longitudinal midline scar" from respondent's surgery which appeared to be well healed and tenderness "over the paraspinous musculature throughout the entire lumbar spine extending down to include the sacroiliac joints and the glutei musculature on the right." Dr. Serra opined that the expressed tenderness covered a much wider area going up the spine than it should have. He found "no sciatic notch tenderness." Dr. Serra examined the range of motion of respondent's lumbosacral spine. He found that respondent's ability to bend over and back and rotate at the waist was 50 percent to 25 percent of normal "with a complaint of discomfort at the limits of motion referred to the lower back." He indicated that her "[f]ingertips failed to touch the toes by 20 inches." At hearing, Dr. Serra indicated that he found these results to be "unusual." He noted that, "with the physical therapy, with home exercises, with stretching, with activity, range of motion should have been greater than was demonstrated on her back."

Lower Body. Dr. Serra's examination of respondent's lower extremities revealed motor and sensory function to be intact and normal. He found respondent's squatting "is carried 50 percent bilaterally" which can be a normal result for a person who is not doing exercise. Significantly, there was no complaint of back pain when squatting. He found that respondent's "[h]eel and toe standing are carried out well." He also found "[h]er gait pattern reveals a slow, guarded pattern with no antalgic limp."

After his December 2, 2011 examination, Dr. Serra prepared his first report, which concluded that respondent "is not presently substantially incapacitated for the performance of her duties." At hearing, Dr. Serra stated that he thought there was "a moderate exaggeration of the subjective complaints" by respondent. He gave an example of her complaining about

sometimes experiencing numbness from her lower spine going all the way to the back of her neck despite the fact that no nerves run in that direction. The nerves from the lower back run downward and all indications were that she had normal posture in her neck. He found this complaint to be "unusual" and "subjective".

15. Over the next ten months, Dr. Serra followed up with supplemental reports on March 2, 2012, and on September 18, 2012, as he received additional medical reports and followed respondent's progress. Dr. Serra's professional opinion never varied from his initial conclusion that respondent was not substantially incapacitated from doing her state work. One additional medical record reviewed by Dr. Serra was a "Physician's Report on Disability" dated November 11, 2011 prepared by respondent's surgeon, Dr. Voegeli. At the hearing, Dr. Serra dismissed Dr. Voegeli's conclusion that that respondent was substantially incapacitated from performing her job duties because such conclusions were based only on what respondent had told Dr. Voegeli and not the result of a deeper medical examination and testing. Dr. Serra believed that Dr. Voegeli signed the disability retirement form as an act of friendship to his patient.

16. At hearing, Dr. Serra also testified that respondent's medical records indicate that after the accident respondent appeared to decide to retire and never really tried to do the therapy and exercise necessary to fully recover. She also did not attend the pain therapy classes that were prescribed. He believed she had an agenda to obtain a disability retirement and that her Kaiser doctors appeared to treat symptoms based on her complaints of pain without really trying to figure out what was causing the discomfort.

Respondent's Evidence Regarding Disability

17. At the hearing, Nicanor DeGuzman, respondent's husband, testified that there was a night and day difference in respondent's health after the accident. He indicated that before the accident, respondent was a very active person, loved her job, and enjoyed her grandchildren. After the accident, he indicated that she is in pain, takes pain pills, is lackadaisical, and not as sharp.

18. At the hearing, respondent indicated that she still experiences pain in her lower back that extends down to her leg. She indicated difficulty in moving her body in bed and crossing her legs. She indicated sharp pain going down her legs and numbness going down to her calves. She indicated taking medicines which helped her with the pain and made her sleep well. Respondent also indicated that her "pain meds" made her dizzy and gave her a nausea feeling.

19. Respondent did not call any doctors or other medical personnel to testify.

Discussion of Medical Evidence

20. After considering all the evidence, Dr. Serra's IME report, including his conclusions, and his hearing testimony are fully accepted as persuasive and thorough. The lay testimony of respondent concerning the extent of her pain and limitations on movement are given little weight as being exaggerated and motivated by a bias to qualify for disability retirement.

21. In sum, respondent did not establish by competent, objective medical opinion that, at the time of application, she was permanently disabled or incapacitated from performing her usual duties of an AGPA for the Department of Health Care Services due to the back injury she suffered in a vehicle accident on June 25, 2010.

LEGAL CONCLUSIONS

Eligibility to Apply

1. Respondent was employed by the Department of Health Care Services, is a miscellaneous member of CalPERS, and is eligible to apply for disability retirement under Government Code sections 20026 and 21150.

Burden of Proof on Respondent

2. In order to qualify for disability retirement, respondent must prove that, at the time of application, she was "incapacitated physically or mentally for the performance of ... her duties" in state service. (Gov. Code, § 21156.) Government Code section 20026 provides, in 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.

In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted similar language to mean "the *substantial* inability of the applicant to perform his usual duties." In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863, the court held that restrictions imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. Finally, in *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court indicated that an applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position.

Failure to Carry Burden of Proof

3. Respondent and her husband testified about how respondent's back was injured, how she has received treatment, including surgery, how she continues to feel pain and is affected by the pain medicine, and how her life has changed. However, respondent and her husband's lay testimony are insufficient. Government Code section 20026 requires a disability retirement to be based on "competent medical opinion". Respondent did not call any doctors to testify on her behalf or present other sufficient competent medical opinion[1] to establish her claim for a disability retirement.

4. The only doctor to testify was Dr. Serra, CalPERS' independent medical examiner. After a physical examination of respondent, review of her medical records, and following her medical progress over ten months, Dr. Serra's professional opinion never varied from his initial conclusion that respondent was not substantially incapacitated from doing her state work as an AGPA. Dr. Serra concluded that respondent engaged in "moderate exaggeration of the subjective complaints" of pain during his physical examination and some of her professed limitations on her ability to bend were "unusual" given other objective medical evidence. He believed respondent had an agenda to obtain a disability retirement because she never really tried to do the therapy and exercise necessary to recover and did not attend the pain therapy classes that were prescribed. Based on Dr. Serra's report and testimony, the lay testimony of respondent about the extent of her pain and limitations on movement are given little weight as being exaggerated and motivated by a bias to qualify for a disability retirement.

5. In sum, respondent did not carry her burden of proof. She did not establish by competent, objective medical opinion that, at the time of application, she was permanently disabled or incapacitated from performing her usual duties of an AGPA for the Department of Health Care Services due to the back injury she suffered in a vehicle accident on June 25, 2010.

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[1] Dr. Voegeli's "Physician's Report on Disability" (a CalPERS form) dated November 11, 2011, was one of the numerous medical records reviewed by Dr. Serra in preparing his IME report. At hearing, Dr. Serra was cross-examined by respondent's attorney about why his disability conclusion differed from Dr. Voegeli's conclusion. Among other things, Dr. Serra testified that he believed Dr. Voegeli may have been pressured to reach a favorable conclusion by respondent or that Dr. Voegeli may have done so as a friendly act for his patient. Later in the hearing, respondent, in rebuttal to Dr. Serra, testified about the circumstances surrounding how she presented the CalPERS form to Dr. Voegeli for him to fill out and sign. In this context, Dr. Voegeli's "Physician's Report on Disability" was accepted into evidence as relevant on the question of the circumstances surrounding its signing. Some parts were filled out by respondent and some parts by Dr. Voegeli or his staff. Nevertheless, the document is hearsay to the extent it is used to prove the truth of the matters asserted and cannot be considered sufficient "competent medical opinion" to support a finding of disability under Government Code section 20026.

ORDER

The application of respondent Michele G. DeGuzman for disability retirement is DENIED.

DATED: January 6, 2014

FLOYD D. SHIMOMURA
Administrative Law Judge
Office of Administrative Hearings