

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

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

In the Matter of the Involuntary  
Reinstatement From Disability Retirement  
of:

KIM A. DRAGO,

Respondent,

and

CALIFORNIA DEPARTMENT OF  
SOCIAL SERVICES,

Respondent

Case No. 2013-0040

OAH No. 2013040085

**PROPOSED DECISION**

This matter was heard on December 17, 2013, before Floyd Shimomura,  
Administrative Law Judge, Office of Administrative Hearings, State of California.

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

Respondent Kim A. Drago (respondent) represented herself.

Respondent California Department of Social Services did not appear and was not  
represented.

Evidence was received and the matter submitted on December 17, 2013.

## FACTUAL FINDINGS

### *Jurisdictional Facts*

1. On April 2, 2013, Anthony Suine, Chief, Benefit Services Division, CalPERS, filed an Accusation against respondent, who was approved for retirement for disability on February 24, 2004, alleging that she is no longer disabled or incapacitated from the performance of her duties as an Executive Secretary I with the California Department of Social Services. He requests that she be reinstated to her former usual job duties. Mr. Suine was acting only in his official capacity and not personally.

2. On April 16, 2013, respondent requested a hearing to present her defense to the charges in the Accusation. A hearing was noticed for December 17, 2013.

### *Respondent's Work History and Job Duties*

3. Respondent was born on July 20, 1966. On April 4, 2003, at age 37, respondent submitted an application for disability retirement from her position as an Executive Secretary I with the California Department of Social Services. CalPERS approved respondent's application on February 24, 2004, effective January 29, 2004, on the basis of hand, wrist, and arm conditions.

4. Respondent's job duties as an Executive Secretary I consisted of reviewing material for adherence to department policy, format, and style for documents prepared for the deputy director's signature (30 percent), typing correspondence and documents using a personal computer (20 percent), reviewing and delegating incoming correspondence for appropriate action (20 percent), maintaining the daily schedule for the deputy director (ten percent), screening incoming telephone calls and visitors (ten percent), providing secretarial assistance to other deputy directors (five percent), and other duties as necessary (five percent).

### *Independent Medical Examination*

5. Dr. Robert K. Henrichsen has been a physician with the Auburn Orthopaedic Medical Group, Auburn, California, since 1973. He received his Medical Doctor Degree from Loma Linda University. He did his residency at the Los Angeles Orthopaedic Hospital. He holds an Orthopaedic Board Certification and is a Fellow of the American Academy of Orthopaedic Surgeons. He has received specialized study of congenital pseudarthrosis of the tibia, cerebral palsy, total joint replacements, arthroscopic surgery, injuries of the knee, and spine surgery.

6. On October 17, 2012, Dr. Henrichsen saw respondent for an independent medical examination (IME) at the request of CalPERS. As part of the IME, Dr. Henrichsen obtained a history and conducted a physical examination. Dr. Henrichsen also reviewed

respondent's medical records and surveillance CDs provided by CalPERS investigators. His IME report is summarized as follows:

**Medical History.** Dr. Henrichsen's review of respondent's records from 2001 to 2003, revealed treatment to her arms, hands, and wrists by a variety of physicians based upon symptoms and tenderness reported by respondent but without sufficient objective documentation. Respondent indicated a gradual onset of pain in her wrists and elbow and some numbness in her fingers. Respondent attributed these symptoms to her secretarial job, which required typing, using the telephone and computer, and doing copying work. However, Dr. Henrichsen found that electrical studies and x-rays done at that time were normal. Also, an injection for presumed right carpal tunnel syndrome made her worse, which led Dr. Henrichsen to believe that carpal tunnel syndrome was not present. Dr. Henrichsen concluded that respondent "was taken off work without good supportive objective documentation ... either by examination or advanced studies."

**Physical Examination.** Dr. Henrichsen's IME report described respondent as an alert, 46-year old lady who walks with a normal gait and is not in distress. His tests of respondent's neck, spine, and shoulders showed normal range of motion without pain. She could shrug her shoulders well without evidence of tendinitis or impingement. His tests of respondent's elbow showed normal range of motion and no effusion or crepitus. However, Dr. Henrichsen reported "some tenderness over the lateral epicondyle on the right and the left [elbows] but not on the medial side." Resistance testing of her forearms produced some pain. Tests of respondent's wrists showed range of motion to be normal, radial pulses equal, and neither swelling nor tendon injury. Dr. Henrichsen reported that "[h]er Finkelstein test has reports of pain in the radial aspect of her distal forearm mostly on the right and a small amount on the left." He found her finger range of motion to be normal and "no synovial swelling within all joints of her fingers." In general, Dr. Henrichsen's diagnosis was that respondent had chronic symptoms of pain and numbness in her right and left upper extremities (i.e., primarily elbows and forearms).

**Activities.** Based on his meeting with respondent at the IME, Dr. Henrichsen reported that respondent "is able to ... carry groceries, wash a car, do lawn work, and make a bed." Dr. Henrichsen also reported reviewing over two hours of surveillance CDs taken by CalPERS investigators<sup>1</sup>, which, among other things, show respondent walking her dog on a leash, putting items in a shopping cart and carrying bags, using a cell phone, driving a vehicle and putting gas in it, and moving her belongings by lifting and carrying boxes and placing them in the back of her SUV and closing the deck lid. Dr. Henrichsen reports that, "[w]hen she was moving from her apartment to her home she did have repetitive motion of her arms and upper extremities including her hands." At no time did Dr. Henrichsen observe on the CDs "any functional difficulty or evidence of any pain."

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<sup>1</sup> The principal CalPERS investigator, Mr. Troy Shinpaugh, testified about how and when the images on the CDs were captured and also his own investigative reports based on his surveillance.

Dr. Henrichsen ends his IME report dated October 17, 2012, by noting respondent's cooperation in the IME, but concluded that "she is not substantially incapacitated for her duties on an objective basis." In a supplemental IME report dated October 31, 2013, Dr. Henrichsen reaffirmed his original conclusion after reviewing additional surveillance CDs of respondent.

### *Respondent's Evidence*

7. At the IME, respondent told Dr. Henrichsen that she had pain in her right forearm and lateral elbow, which was a throbbing phenomenon. She also indicated she had some wrist pain if she does pinching and hand use. Her left side was similar but her right symptoms were more than the left. She also indicated she has pain in her elbow if she lifts anything. She related her pain as a five on a scale of zero to ten.

8. At hearing, respondent indicated that her everyday activities captured on the CDs were short term activities and different from repetitive activities that occurs at her secretarial job. She believed repetitive motion at work caused her arm problems. Short term activities allowed her time to rest and control her pain. Regarding her two-day move, respondent stated she needed help from over 30 people and after the move her pain level went up. She also introduced evidence showing that she used a cart to hold her tray while getting breakfast at Ikea.

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

### *Discussion of Medical Evidence*

10. After considering all the evidence, Dr. Henrichsen's IME reports, including their conclusions, are accepted as thorough and based upon competent medical evidence and opinion. The lay testimony of respondent that she feels moderate pain in her elbows and forearms when engaged in certain activities involving their use is accepted and is not denied by Dr. Henrichsen.

11. It is found that the evidence supports Dr. Henrichsen's finding that respondent "is not substantially incapacitated for her duties on an objective basis." While respondent might experience some pain in her elbows and forearms when performing certain movements, there was abundant evidence of respondent's ability to cope and to perform everyday activities without any functional difficulty or evidence of any pain.

## LEGAL CONCLUSIONS

### *Statutes Governing Involuntary Reinstatement from Disability Retirement*

1. Government Code section 21192 provides, in pertinent part, that:

The [CalPERS] board ... may require any recipient of a disability retirement allowance ... to undergo medical examination .... The examination shall be made by a physician or surgeon, appointed by the board .... Upon the basis of the examination, the board ... shall determine whether ... she is still incapacitated, physically or mentally, for duty in the state agency ... where ... she was employed and in the position held by ... her when retired for disability ....

Government Code section 21193 provides, in pertinent part, that:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability ... her disability retirement allowance shall be canceled immediately, and ... she shall become a member of this system.

### *Burden of Proof on CalPERS*

2. In order to involuntarily reinstate respondent from disability retirement, CalPERS must determine whether respondent is still incapacitated, physically or mentally, for duty in her former position. (Gov. Code, §§ 21191 and 21192.) 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 disability retirement must be based on competent, objective medical evidence to establish that an employee was permanently disabled or incapacitated from performing the usual duties of his or her position.

### *Burden of Proof Carried By CalPERS*

3. The evidence supports Dr. Henrichsen's IME report that respondent “is not substantially incapacitated for her duties on an objective basis.” Dr. Henrichsen's review of respondent's medical records from 2001 to 2003 revealed that respondent was taken off work

based on symptoms and tenderness as reported by respondent without good supportive objective documentation by her physicians either by examination or advanced studies. After his physical examination, Dr. Henrichsen's diagnosis was that respondent did have chronic symptoms of pain and numbness in her right and left upper extremities (i.e., primarily elbows and forearms). However, at no time did Dr. Henrichsen observe on the surveillance CDs any functional difficulty or evidence of such pain. Thus, the IME report supports the general conclusion that while respondent experienced moderate pain in her elbows and forearms in doing certain movements, she had learned how to cope with the pain while performing her normal daily activities such as shopping, driving, filling her gas tank, lifting and carrying boxes, using her cell phone, washing her car, doing lawn work, walking her dog on a leash, and making her bed.

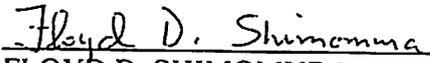
4. At hearing, respondent's primary argument was that her everyday activities captured on the CDs were short term activities and different from repetitive activities that occurs at her secretarial job. She believed repetitive motion at work caused her arm problems. Short term activities allowed her time to rest and control her pain. While respondent's lay assessment might have some validity, she produced no competent medical evidence to support her position. Respondent did not call any doctors or other medical personnel to testify or submit any other competent medical evidence. As indicated, Government Code section 20026 requires a finding of incapacity for performance of duty to be established "on the basis of competent medical opinion."

5. It is concluded that respondent is not incapacitated, physically or mentally, for performance of her usual job duties as an Executive Secretary I at the California Department of Social Services under Government Code section 21192.

#### ORDER

Respondent Kim A. Drago shall be reinstated to her former usual job duties with respondent California Department of Social Services as an Executive Secretary I pursuant to Government Code section 21193.

Dated: January 9, 2014

  
FLOYD D. SHIMOMURA  
Administrative Law Judge  
Office of Administrative Hearings