ATTACHMENT A

THE PROPOSED DECISION

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BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues Against: MARIA ROSA RIVERA, Respondent, and LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	CalPERS Case No. 9703 OAH No. 2013060647

PROPOSED DECISION

This matter came on regularly for hearing on January 30, 2014, at Los Angeles, California, before David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California. Petitioner California Public Employees' Retirement System (CalPERS or Petitioner) was represented by Christopher C. Phillips, Staff Counsel. Neither Respondent Maria Rosa Rivera nor her counsel, Thiago Shields, was present, despite having been properly served with notice of the hearing. Respondent Los Angeles Unified School District was not present, despite having been properly served with notice of the hearing.

Documentary evidence was received. The record was closed and the matter was submitted for decision on January 30, 2014.

FINDINGS OF FACT

The Administrative Law Judge finds the following facts:

1. The Statement of Issues was signed on behalf of Petitioner by Anthony Suine in his official capacity as Chief, Benefits Services Division of CalPERS.

2. Respondent Rivera was employed by the Los Angeles Unified School District (LAUSD) as a special education assistant. Respondent Rivera has the minimum service

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credit necessary to qualify for retirement. By virtue of her employment and service credit, Respondent Rivera is a state miscellaneous member of CalPERS subject to Government Code section 21150, under which a state member who is "incapacitated for the performance of duty shall be retired for disability."

3. Notice of the hearing was properly served on Respondent Rivera, her counsel, and LAUSD. Due to the failure to appear at the hearing of Respondent Rivera, Rivera's counsel, and LAUSD, their defaults are noted pursuant to Government Code section 11520. (All further references to Respondent refer to Respondent Rivera.)

4. Respondent's application for disability retirement was signed November 17, 2008. In the application Respondent claims disability on the basis of orthopedic and/or neurologic conditions. More specifically, where the application (Exhibit 3) asked for the specific disability claimed, Respondent wrote, among other things, "low back pain, numbness in both legs, . . . upper back and neck." The treating physician listed is Barbara Scott, M.D.

5. Based upon receipt of reports from Dr. Scott, H. Harlen Bleeker, M.D., and Robert Moore, M.D., CalPERS notified Respondent by letter dated October 27, 2009 (Exhibit 4), of its determination that Respondent's orthopedic and neurological conditions were not disabling and the conclusion that she was not substantially incapacitated from performance of her duties.

6. Respondent filed a letter of appeal dated November 16, 2009 (Exhibit 5), and this hearing ensued.

7. The following medical reports were received in evidence: Dr. Bleeker, dated June 4, 2009 (Exhibit 8) and supplemental report dated December 5, 2012 (Exhibit 9); and Dr. Moore, dated October 2, 2009 (Exhibit 11) and supplemental report dated January 22, 2013 (Exhibit 12). The curricula vitae of Dr. Bleeker and Dr. Moore were also received in evidence (Exhibits 7 and 10). Also in evidence is a description of job duties for a special education assistant (Exhibit 13).

8. Dr. Bleeker, an orthopedic surgeon, examined Respondent on June 3, 2009, and performed various tests. He reviewed medical records starting with a report of injury on August 10, 2005, which is the first injury noted in Respondent's disability application. Dr. Bleeker also reviewed records referring to an injury on March 3, 2008, which is also noted in Respondent's disability application. Many of Dr. Bleeker's notes relating to the records he reviewed do not identify the doctor(s) who prepared the notes, but he does make reference to Dr. Scott's report from Kaiser dated December 26, 2007, and several later reports from Kaiser.

9. Based on his exam and record review, Dr. Bleeker noted that there was "not much in the way of abnormality as far as her x-rays or CAT scan is concerned. I feel that there is a significant amount of exaggeration in her complaints. . . . I feel the applicant is

able to perform her work within the job requirements as specified." (Exhibit 8, p. 6.) Dr. Bleeker also recommends a gynecological evaluation and pelvic MRI as, in his opinion, "many of her complaints point to a pelvic problem and not an orthopedic problem." (Exhibit 8, p. 7.)

10. In another section of his report, Dr. Bleeker was asked to respond to specific questions. When asked whether there were specific job duties that Respondent was unable to perform because of her physical condition, Dr. Bleeker responded that he had reviewed the job duties and there were no duties she could not perform. When asked if Respondent was substantially incapacitated from performance of her usual duties, Dr. Bleeker responded that she was not.

11. Dr. Bleeker issued a supplemental report, dated December 5, 2012 (Exhibit 9), after reviewing two inches of additional medical records. He notes he had previously reviewed several reports of Dr. Scott. Dr. Bleeker did not find anything in the subsequent records that changed his opinion that Respondent is able to continue her regular work without any restrictions.

12. Dr. Moore performed a neurologic exam of Respondent on July 20, 2009, and issued a report dated October 2, 2009. (Exhibit 11.) He reviewed various records, including medical reports, Respondent's written description of her medical history and injuries, and a job description. He diagnosed mild facet arthropathy (a general term for any joint disease) with associated low back pain and possible right S1 radiculopathy (disease of the nerve root in the sacrum, at the bottom of the spine near the pelvis and hips). Other than the possible sensory loss at this location, Dr. Moore noted no objective findings to support a disc herniation. He believes that Respondent could perform her specific job duties and does not believe that Respondent is substantially incapacitated from performing those duties.

13. Dr. Moore issued a supplemental report, dated January 22, 2013 (Exhibit 12), after reviewing two inches of additional medical records. Dr. Moore did not find anything in the subsequent records that changed his opinion that Respondent is able to continue her regular work without any restrictions. He notes that Respondent does warrant functional limitations, but they were such that they would not preclude her from performing her usual and customary job duties.

14. By virtue of their training and experience, as set forth in their curricula vitae (Exhibits 7 and 10), Dr. Bleeker and Dr. Moore are qualified to render the expert opinions set forth in their reports.

15. The totality of the evidence submitted at the hearing establishes that Respondent is not physically incapacitated from performing her duties and functions as a special education assistant for LAUSD.

CONCLUSIONS OF LAW AND DISCUSSION

Based upon the foregoing findings of fact, the Administrative Law Judge makes the following conclusions of law.

1. CalPERS' decisions on disability are governed by the following sections of the Government Code:

Section 20026 defines "disability" and "incapacity for performance of duty" as meaning disability of permanent or extended and uncertain duration, on the basis of competent medical opinion.

Section 21154 provides that the Board may order a medical examination to determine if a member is incapacitated for the performance of duty.

Section 21156 states that a member may be retired for disability if the medical examination and other available information show that the "member in the state service is incapacitated physically or mentally for the performance of his or her duties . . . ."

Section 20069 defines "state service," in pertinent part, as "service rendered as an employee . . . of the state . . . or a contracting agency, for compensation . . . ."

2. "Incapacitated for the performance of duty" has been interpreted as the "substantial inability of the applicant to perform his usual duties," as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) The increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d at 862 - 863.)

3. When reviewing the denial of an application for benefits, the burden of proof is on the applicant. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits); *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 (retirement benefits).) In this matter, Respondent had the burden to prove she was entitled to disability benefits.

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4. The weight of the evidence supports the conclusions of Dr. Bleeker and Dr. Moore that Respondent is not incapacitated for the performance of her duties for LAUSD. Respondent has not sustained her burden of establishing that she is incapacitated physically for the performance of duty, as required under Government Code sections 21154 and 21156, and is therefore not entitled to disability retirement. See Findings 2, and 4 through 15.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that:

The application for disability retirement of Respondent Maria Rosa Rivera is denied.

DATED: February 3, 2014.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings