

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Application for
Disability Retirement of:

SYLVIA C. VALDEZ,

Applicant,

and

BAKERSFIELD CITY ELEMENTARY
SCHOOL DISTRICT,

Respondent.

Case No. 2013-0212

OAH No. 2013050075

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Fresno, California, on January 8, 2014.

Elizabeth Yelland, Senior Staff Attorney, represented the California Public Employees' Retirement System.

Applicant Sylvia C. Valdez appeared in pro per.

Respondent Bakersfield City Elementary School District, did not appear.

The record was closed and the matter was submitted on January 8, 2014.

PROCEDURAL AND JURISDICTIONAL FINDINGS

1. At all times relevant to this Decision, Sylvia C. Valdez (applicant) was employed with the Bakersfield City Elementary School District (the District).

2. Through her employment with the District, at all times relevant to this Decision, applicant has been and remains a local agency miscellaneous member of CalPERS.

At the time of her application (below), applicant had the minimum service credits necessary to qualify for retirement.

3. Applicant applied for and received a service retirement, effective July 27, 2011. Applicant has been receiving a service retirement allowance from CalPERS since her retirement effective date.

4. Applicant submitted an application for industrial disability retirement (the application) to CalPERS on October 7, 2011. At the time applicant signed and filed the application, she was employed by the District as an Aide, Level II.

5. Applicant claimed in the application to be permanently disabled from the performance of her duties as an Aide, Level II, with the District due to orthopedic injuries to her right ankle/foot, right wrist/hand, fingers, back, neck, and her right knee.

6. Applicant wrote addenda to the application providing the specifics of her disabilities as follows,

I have disability with my right ankle. The injury occurred at Horace Mann Elementary School while employed with Bakersfield City School District. I stepped into a pothole in the district parking lot and fell with my foot twisted underneath my body (January 24, 2001).

The second injury is to my right wrist (11-14-08). It happened at Compton Junior High when a box containing toner kit fell from a high shelf and landed on my wrist.

I received an injury to my back and neck while working my job for the County of Kern. I also have injuries to my knees. Injuries occurred while shelving books and repetitive motions such as squatting, bending, kneeling and lifting. There are two bulging discs in my back. There is pain also in my knees. I cannot squat for a long time and I can't do a deep squat. It is difficult and painful to kneel, so I avoid doing that.

7. Applicant wrote in the application that her orthopedic injuries injury to her right ankle/foot, right wrist/hand, fingers, back, neck, and right knee cause specific work limitations and preclusions as follows:

My limitations are:

Ankle injury-unable to climb large amount of stairs, when climbing steps, must lock each step single instead of foot over foot, pain/difficulty standing for long periods, limitations

squatting/kneeling, unable to crawl on all fours, pain/difficulty stepping up on curbs, pain/difficulty walking for long periods/no running;

Wrist injury-constant ache/pain in hand, numbness and fingers, pain/difficulty grasping anything in firm manner, pain/difficulty opening doors, pain/difficulty with repetitive motion

8. Applicant explained that her orthopedic injuries and the limitations those injuries prevent her from performing certain job required activities as follows:

Due to my ankle injury I am no longer physically capable of performing duties required of a special education aide. My job could call upon me to assist severely handicapped children. I would be unable to push a student in a wheelchair. I could be called upon to lift a student to help them with toilet duties. I would have to intercede in physical fights between students and I would not be able to stop a fight. I would not be able to assist with first aid if a student was on the ground or floor with an injury. I am not able to walk on uneven surfaces or stairs quickly. I am unable to run and if I need to chase after a student (such as an autistic child or behavioral student) I would be unable to do this.

My hand injury keeps me from lifting large items such as classroom books. I have problems carrying reams of paper. If I had to push a cart of school materials, I would not be able to do it. There were restrictions placed on my hand and the school district held a meeting with me. My supervisor stated in a letter that my restrictions could not be accommodated. I received temporary work assignments for my hand and ankle injuries. I have exhausted all approved leaves of absences through the district.

9. Applicant submitted medical records and other documentation in support of her claim to CalPERS. These medical records were largely from health care practitioners treating her for her work-related injuries for which she filed claims for Worker's Compensation. Among others, applicant has received medical treatment for her ankle/foot and her wrist injuries as follows:

Ankle injury: applicant has been treated by Dr. Michael Davies, Dr. Irene Sanchez, Dr. William Marshall, and Dr. Sal, all from Central Valley Occupational Medical Group, Bakersfield, California and by Doctor Richard Furkel of the Southern California Orthopedic Institute, who performed surgery on applicant's ankle in 2005.

Wrist injury: Applicant received treatment from Dr. William Marshall, Dr. Ruiz, Dr. Yung (a hand specialist), all with Central Valley Occupational Medical Group, and from Dr. Bowen and Dr. Auerbach of Southern California Orthopedic Institute.

10. Applicant's medical records were evaluated by the staff of CalPERS' Benefits Services Division, and were submitted for review by Dr. Nijjar, a board certified orthopedic surgeon retained by CalPERS to perform an independent medical evaluation (IME). Dr. Nijjar performed the IME on August 13, 2012. Dr. Nijjar also submitted a supplemental report to CalPERS dated February 1, 2003, in response to a letter from CalPERS requesting Dr. Nijjar's assessment and analysis of medical reports submitted by applicant from her treatment by David Pechman M.D., and whether any of that additional medical information from Dr. Pechman would change the opinions he expressed in his IME report.

11. CalPERS' Benefit Services staff rereviewed Dr. Nijjar's IME report and supplemental report, as well as the report from Dr. Pechman and all the medical and other information applicant submitted in support of the application.

12. CalPERS notified applicant in writing on December 3, 2012, that she had failed to produce sufficient persuasive medical evidence to demonstrate that she was substantially incapacitated from her duties as an Aide II with the District, and that therefore her application was denied.

13. Applicant timely appealed the CalPERS determination and denial of her application. In her appeal letter, applicant also requested a review of the medical file upon which the CalPERS denial determination was made. Applicant complained about the IME by Dr. Nijjar, complaining that the examination was not complete and that Dr. Nijjar refused to allow her to "explain my pain and how it has caused me to be unable to perform my job duties." Applicant also complained that there was no mention of review of a doctor's report from Roger Sohn M.D., of Los Angeles, California. Applicant enclosed the AME report written by Dr. Pechman referenced above. Dr. Pechman performed the AME as part of applicant's workers compensation claim. Applicant requested in her appeal letter that Dr. Pechman's report be reviewed, as it referred to "injuries received while I was employed by the District." As noted above, CalPERS did indeed review Dr. Pechman's AME report, resulting in a supplemental IME report by Dr. Nijjar.

Applicant also complained that the District refused to allow her to return to her job as a special education instructional aide. She mentioned that she had forwarded letters to CalPERS in her original application regarding her dispute with the District's personnel supervisor, where she was denied her right to return to her job because the District refused to permit her to work with the work restrictions and limitations required by her doctor. She complained that the District demanded that she must be physically able to perform all job duties of an Aide II, and that she is physically unable to do so.

14. Anthony Suine, Chief, Benefits Services Division of CalPERS, made the allegations contained in the Statement of Issues in his official capacity and caused it to be

filed. The Statement of Issues was made on April 12, 2013. Applicant timely filed a Request for Hearing on the Statement of Issues. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings.

15. Notice of the date, time and place of the evidentiary hearing was duly given to the respondent District. No appearance was made on behalf of the District. The matter proceeded as a default with respect to the District, pursuant to the provisions of Government Code section 11520.

FACTUAL FINDINGS

USUAL AND CUSTOMARY DUTIES

16. Applicant's official District job description as an Aide II is brief. In the portion of her job description entitled "Performance Responsibilities," the following job requirements are set forth:

1. Assigned to work with classroom teachers, special teachers, counselors or other personnel;
2. Assist in development of desirable social skills and habits, morals and mental and physical health for all pupils;
3. Assist with checking, care, preparation and arrangement of instructional materials and equipment;
4. Assist with enrollment procedures, cafeteria count, attendance verifications and other classroom routines and activities;
5. Assist with yard duty, first aid and physical education periods;
6. Help with record keeping, filing, checking and work with small groups of children under direction of the teacher or other certificated staff;
7. Assist classroom teacher with handicapped children to and from buses, with wraps and special equipment;
8. Assist with personal and health needs of pupils, assist with physical therapy, fire drill and rest periods;

9. Prepares laundry and makes beds, prepares and assists children during lunch and snack periods, checks and maintains lavatories; and

10. Performs other related duties as assigned.

17. The District's Director of Classified Personnel signed, and applicant approved, CalPERS Physical Requirements of Position/Occupational Title form (physical requirements form) provided to the District by CalPERS. It was not clear whether applicant made the entries on the physical requirements form, which were then signed by the District representative, or vice versa or whether both made entries before both signed it. On the physical requirements form it was reported that applicant frequently (3 to 6 hours per day) engaged in the following work related physical activities: sitting, standing, walking, bending her neck, bending at the waist, twisting at the neck, twisting at the waist, pushing and pulling, fine manipulation, simple grasping, repetitive use of hands, lifting between zero and 25 pounds, and walking on uneven ground. Applicant occasionally (up to three hours per day) performed the following work related physical tasks: running, crawling, kneeling, climbing, squatting, reaching above the shoulder, reaching below the shoulder, keyboard use, mouse use, lifting up to 50 pounds, and working with bio hazards. Applicant and the District reported applicant never performed the following duties: power grasping, lifting over 50 pounds, driving, working with heavy equipment, exposure to excessive noise, exposure to extreme temperature or humidity, exposure to dust gas fumes or other chemicals, working at heights, operation of foot controls or repetitive movement, and the use of special visual and auditory protective equipment.

18. Dr. Nijjar read and considered the CalPERS Physical Requirements form and the District job description in performing his IME and writing his supplemental report.

VERBAL DESCRIPTIONS OF ACTUAL JOB REQUIREMENTS

19. During her IME with Dr. Nijjar, applicant described her job with the District which she had held since November 1989. Applicant worked five days per week, five hours per day. She described her work as helping the students and teachers in the classroom and helping with yard duties. She explained that her duties consisted of lifting materials that were 8 to 10 pounds in weight, helping the teacher arrange furniture in the classroom, and providing any other classroom assistance.

20. Applicant also told Dr. Nijjar that she had another job at the same time as her job with the District, where she worked with the County of Kern as a library assistant at the Kern County Public Library. Applicant told Dr. Nijjar that she worked 20 hours per week at the library. She described her duties at the County Library as including pulling, pushing, lifting and carrying up to 15 pounds frequently, constant use of her hands, power grasping and gripping occasionally. She stood or walked most of the time that she was at work at the County Library, but seldom ran or jogged. She intermittently was required to turn her neck and low back and truck.

VERBAL DESCRIPTION OF JOB FUNCTIONS IN DR. PECHMAN'S AME

21. Dr. Pechman performed an Agreed Medical Examination (AME) as part of applicant's Workers Compensation claim on April 17, 2012. During Dr. Pechman's AME, applicant described her job with the District as follows:

Between 1989, when she started work for the District, and 1997, she was an Aide I. In 1997, she became an Aide II. Up to 2001, applicant described her job duties with the District as working with children with emotional and learning disabilities, which included making copies, group instruction, assisting with classroom discipline and assisting elementary students use the restroom. She worked five hours per day, five days per week.

She described the physical requirements of her job as requiring her to stand approximately 75 per cent of the time that she was at work. She stated there was occasional stair climbing and occasional overhead reaching. She was required to frequently bend, stoop and squat. Occasionally, she was required to push students in wheelchairs. At times, she had to restrain students. She described her work as "heavy physical labor." Occasionally, she was required to push and pull heavy things, and occasionally she performed computer work. She would occasionally carry up to 10 pounds for an unknown distance and did not believe that she ever had to lift more than 25 pounds.

In 2004, applicant requested to be transferred out of the classroom where she was required to work with autistic children. She was transferred to another school in a special education math class where the students were seventh and eighth graders with learning disabilities. She still worked five hours per day five days per week, and continued in that work assignment through November 2011.

Applicant described the physical requirements of her assignment in the District after 2004 as requiring her to stand approximately 65 per cent of her shift. She reported she still engaged in frequent bending, stooping, and squatting. She stated there was frequent gripping and grasping and constant use of her hands and arms. She described frequent computer work but no heavy physical labor and no heavy pushing or pulling. She often carried up to eight pounds for unknown distances. She was never required to lift over 10 pounds.

During the AME when the physical requirements of her work were being discussed with Dr. Pechman, applicant also described her job requirements for her work at the Kern County Library, where she reported she worked from 2000 until November 2009.

In her employment at the County Library, applicant reported she was frequently required to stand throughout her entire shift, and only occasionally was able to sit. She was required to frequently bend, stoop and squat. She reported constant grasping, gripping and fine finger manipulation. She was not required to perform any heavy labor, but occasionally had to push or pull something heavy. She frequently worked on a computer and often carried up to 10 pounds. She was never required to lift anything more than 10 pounds.

Applicant told Dr. Pechman during the AME that her job with the Kern County Library “aggravated the right foot injury due to prolonged standing, and aggravated her right hand injury as there was constant handling of books.” She told Dr. Pechman that the problem with her hands became so significant that she started to change to using her left hand more than her right, even though she is right-handed.

APPLICANT’S TESTIMONY ABOUT HER ACTUAL JOB

22. Applicant testified about her actual job physical requirements, but added very little beyond what she reported to Dr. Nijjar and Dr. Pechman, and what she wrote in her appeal letters and application.

APPLICANT’S DESCRIPTION OF HER ORTHOPEDIC INJURIES, PHYSICAL LIMITATIONS AND IMPACTS ON PERFORMANCE OF DUTIES

23. Applicant told Dr. Nijjar during the IME in August 2012 that she has pain in her foot which is constant, and that pain gets worse when standing and walking for more than five minutes. She described her pain in her foot as “10 on a 10 scale.” She also reported that she is having pain in her abdominal area with heavy pushing and pulling, due to an umbilical hernia. She complained of pain in her lower back, also constant, which she rated as five on a 10 scale. She complained that the pain in her low back gets worse with lifting, pushing, pulling or carrying 20 pounds. She complained that pain radiates to her right leg occasionally. Applicant also complained of constant pain in both of her knees, again rating the pain as five on a 10 scale. She complained her knees “pop and crackle.” She also noted that her pain in her knees increases with squatting. Applicant also said she has occasional pain in her right wrist, which she described as five on a 10 scale. She described her right wrist pain as increasing with power gripping activity.

24. Applicant testified that her physical limitations prevent her from performing the usual and customary requirements of her job, and that her employer will not permit her to return to work because her doctor imposed work restrictions. She testified she cannot climb stairs, or chase a student. Because of her low back pain, she is unable to lift a child out of a wheelchair. She is unable to stop a fight, push or pull carts, or lift books and/or test materials, as required by her job. Applicant told Dr. Nijjar that her supervisor site principal told her that she must be able to perform all her duties as part of her job, and on her duty statement, she must be able to intervene to stop a fight or to be able to physically assist students, such as one in a wheelchair.

APPLICANT’S TESTIMONY ABOUT THE IME

25. Applicant complained in her testimony that Dr. Nijjar did not listen to her, rushed her through the examination and refused to allow her to ask questions. She arrived at the IME two hours early for the examination and felt like he paid almost no attention to her and that his mind was already made up. She complained that Dr. Nijjar’s AME report did

not take into consideration Doctor Pechman's AME report or his surgical report, as he was the one who performed the surgery on her right ankle and then performed the AME for her Workers Compensation claims. Based on all of the evidence presented, these complaints have no merit. Dr. Nijjar's IME report reflects consideration of all of the points and complaints that applicant raised in her various claims, and although Dr. Pechman's report was not considered in Dr. Nijjar's original IME report, Dr. Nijjar's supplemental report was the product of Dr. Nijjar specifically reviewing, considering and addressing Dr. Pechman's AME report, as it may have added information and opinion to be considered by Dr. Nijjar in making his ultimate IME findings. Dr. Nijjar's reports and his testimony reflect a rather thorough and comprehensive examination of all of the areas that applicant complained caused her work limitations and incapacity, and several areas that were not included in the claim, but applicant raised his issues as well. It appears that Dr. Nijjar took the time necessary to perform a comprehensive battery of orthopedic and neurological tests during the IME, as well as a thorough physical examination to determine whether there was any objective evidence of pathology that would support applicant's claims, all of which is documented in detail in his reports. Dr. Nijjar's presentation in his testimony was similar, soft-spoken, professional, meticulous and careful. When referring to applicant's overstatement of her symptoms, he characterized her exaggeration of her complaints of pain and disability as "mild, and normal, we all do it."

THE INDEPENDENT MEDICAL EXAMINATION

26. The IME by Dr. Nijjar took place in August 2012. The stated objective of the IME was the medical assessment of whether applicant was substantially incapacitated from the performance of her duties due to her claimed orthopedic disabilities, as described in her application, and that she reported to Dr. Nijjar verbally and in writing during the taking of a history, physical and summary of present complaints during the IME. It did not appear that applicant understood that the standard for evaluation applied by Dr. Nijjar was significantly different in that it requires a substantially stronger showing of incapacity than the standard Dr. Pechman applied in evaluating whether applicant was disabled for the purposes of the workers compensation system. It also was not clear that applicant understood that the CalPERS IME performed by Dr. Nijjar was limited to an assessment of her capacity to perform her usual and customary job functions of her CalPERS-covered job with the District, and thus would not take into account any of her claims regarding incapacity to perform her job at the Kern County Library.

27. Dr. Nijjar conducted a physical and orthopedic examination, reviewed applicant's history and summary of present complaints, and reviewed applicant's medical records, including records and reports from physicians who treated applicant and evaluated her for her Workers Compensation claims. However, Dr. Nijjar did not have Dr. Pechman's AME report or his report of the surgery he performed on applicant's right ankle at the time of the first IME report. Thus, Dr. Nijjar did not review or consider the rather substantial workers compensation system AME report by Dr. Pechman in forming his opinion and making his report from the first IME. Dr. Pechman's surgical and AME reports (Exhibit B) were submitted to Dr. Nijjar after the first IME report had been written with a request to Dr.

Nijjar that he reevaluate and reconsider his IME opinions, based on any additional information or opinions found in Dr. Pechman's reports. Dr. Nijjar did so, which resulted in the issuance of the Supplemental IME report noted above.

HISTORY OF LOW BACK ISSUES

28. Dr. Nijjar noted that applicant started experiencing problems due to work injuries that began as early as 1998. Applicant was in a non-work-related car accident and hurt her lower back at about that same time. Applicant complained that she has been having some problems with her lower back ever since that accident. In 2010, applicant had a flare up of her lower back problem and received treatment for a diagnosis of low back sprain/strain with a protruding lumbar disk. The treatment she received was medication and exercise. Applicant began to complain of pain in her low back again in January 2010. An MRI showed mild spondylosis and mild disc protrusion at L5-S1.

HISTORY OF RIGHT FOOT AND ANKLE PROBLEMS

29. Applicant sprained her right foot and ankle at work in January 2001. She was treated with medication and physical therapy, but did not lose work and did not require surgery. Applicant sprained her ankle again when she caught her foot in a cord while she was walking and twisted her right ankle. It did not appear that this injury occurred at work. She did not fracture or dislocate any portion of her ankle as a result of the fall, and no significant pathology was noted upon tests and examination. Applicant had right ankle/heel surgery in 2005 to relieve plantar fasciitis. Applicant reported another injury to her ankles in 2009. She was noted to have mild degenerative changes of her right ankle on examination and diagnostic study.

HISTORY OF KNEE PROBLEMS

30. In 2008 applicant began to notice pain in her knees when she slipped in the parking lot (presumably in her District employment) and landed on her knees. She had an MRI scan of her knees, but no injury was noted. There was no additional treatment for her knees. Nevertheless, applicant continued to have occasional knee pain.

HISTORY OF INJURY TO WRISTS AND HANDS

31. Applicant told Dr. Nijjar that she had a continuing and persistent problem with pain in her right wrist. A MRI was performed in 2009 that showed the presence of a ganglion cyst. A repeat MRI showed that she had a mild tear in the lunotriquetral ligament.

OTHER

32. Applicant was diagnosed with an umbilical hernia in 2005. She had surgery to correct the injury. Applicant also had a procedure on her stomach in 2010.

33. Dr. Nijjar noted that applicant last worked for the District on July 31, 2010. At the time of the August 2012 IME, applicant was still working for the Kern County Library.

IME FINDINGS AND CONCLUSIONS

34. Dr. Nijjar concluded that applicant had sustained some work injuries, but she had always been able to return to work with few or no significant restrictions. He found upon physical examination that applicant was in no acute distress, had largely normal ranges of motion in all of her extremities, as well as normal sensation and motor strength. He found no significant abnormalities, no atrophy and no nerve damage or impairment. He found no evidence of carpal tunnel syndrome. He found applicant's right wrist to be slightly tender but not unstable, and upon administering several orthopedic and neurologic tests of her right wrist, found no significant positive results, no orthopedic or neurologic signs of impairment, and normal range of motion and normal nerve function. Examination of applicant's right ankle and foot proved to be normal, with normal range of motion, with evidence of a plantar fascial release procedure, indicating that she did previously have some plantar fasciitis which was corrected surgically. Applicant showed slight limitation in her low back range of motion upon straight leg lift testing, with a small decrease in range of motion in flexion and extension. Dr. Nijjar pointed out that this might be reflective of some mild pathology, but not indicative of any incapacity.

35. Dr. Nijjar pointed out that there was some exaggeration by applicant of her complaints, reflected in her presentation and effort exerted in tests such as grip strength and her reports of 10 on a 10 scale for pain.

36. At the conclusion of the IME, Dr. Nijjar diagnosed applicant is suffering from a previous sprain/strain of her right wrist, with a contusion, a sprain/strain of her lumbar spine with lumbar degenerative disc disease and disc protrusion at L5-S1. There was no finding of nerve root impingement or stenosis impacting the L5-S1 nerve root. Dr. Nijjar also found that applicant had mild degenerative changes of her right ankle with a sprain/strain of her right ankle.

37. Dr. Nijjar expressed his professional medical opinion that even though applicant has had occupational injuries beginning in 2001, when she sprained her right ankle and later fell in the parking lot bruising her knees, and sustained mild low back sprain in the automobile accident, his findings on physical examination and orthopedic and neurologic testing showed minimal evidence of pathology and minimal impairment. Dr. Nijjar wrote in his IME report, and reiterated in his testimony, that in his professional medical judgment, applicant is not substantially incapacitated from the performance of her usual job duties and is physically able to perform the essential functions of her job.

THE AME REPORT FROM DR. PECHMAN

38. Dr. Pechman's April 17, 2012 AME report assessed and evaluated applicant's Workers Compensation claims of injury and disability to her right wrist and hand and to her right ankle and foot. Dr. Pechman added a Supplemental AME Report on July 28, 2012, in order to assess and evaluate the results of a three-phase bone scan and electrical conductivity studies on applicant's right wrist and hand. Dr. Pechman did not testify. His AME report and supplemental reports were both offered by applicant as hearsay, and, as noted above, were read, considered and evaluated by Dr. Nijjar in forming his opinions.

39. Applicant's chief complaints to Dr. Pechman during the AME were right wrist/hand pain, present most of the time, with pain in the fingers and the wrists as primary areas of pain. Applicant described her pain as an ache at rest that increases to a sharp pain with gripping, grasping, parking or repetitive use. She reported temporary relief with use of the topical gel and reported wearing a wrist support most of the time, especially when driving and at night. She complained that her wrist and hand pain has increased since the date of her injury.

40. Applicant complained of right ankle pain that is present "all the time." She described the pain as occurring in her right foot and on the sole of her foot, and that her ankle swells at times. She complained that her ankle "gave way at times." She described pain at rest that increases to "a sharp and stabbing pain" with prolonged standing, walking, walking over uneven ground, climbing or descending stairs or when getting up after sitting for a prolonged period of time. She described some relief by taking medication and reported she wears an ankle support. She was using a cane for support at the time of the evaluation. She reported her right ankle and foot pain had also increased since the date of her injury.

41. Dr. Pechman's diagnostic impression for applicant's right hand and wrist was that applicant suffered from right-hand and wrist chronic pain, with lunotriquetral tear per MRI scan of 2001, with subsurface ganglion, per previous MRI scan. He recommended a bone scan and an EMG nerve conduction study. Dr. Pechman's diagnostic impression for applicant's right ankle and foot was that she was post 2005 arthroscopy for her right ankle subtalar joint, and that a subsequent workup showed mild degeneration in posterior subtalar joint, calcaneal cuboid joint and talonavicular joints. He recommended a bone scan.

42. Dr. Pechman concluded that applicant was in permanent and stationary condition from an orthopedic standpoint for the purposes of her Workers Compensation claims of injury and disability in her to her right hand and rest and her right ankle and foot. He noted "the patient's medical records reflect significant problems with depression and insomnia." He deferred on those issues to the appropriate specialists.

43. Upon examination of applicant's right hand and wrist, he noted that applicant continued with frequent slight to occasional moderate pain, and is restricted to no "very forceful activities." With respect to his examination of her right foot and ankle, he noted that

she continued with constant slight to moderate pain, and is restricted to no prolonged standing/walking, running, jumping, pivoting or repetitive stairs or climbing.

44. Dr. Pechman noted in the portion of his AME report entitled "Further Treatment" the following;

The patient does have chronic pain issues regarding the right hand and right foot. This is now 11 years with only mild degenerative joint disease. The patient does have chronic pain issues that are in part related to psychiatric issues, noting that she has a GAF score of 64. I think nonoperative care is a better plan, with therapy, pain medications and pain management.

45. Dr. Pechman also noted he could not find any evidence of carpal tunnel syndrome on clinical examination, and that her orthopedic examination for carpal tunnel syndrome or nerve impairment was negative. He observed that applicant's right ankle and foot will require future pain medication treatment and courses of physical therapy, and that she could benefit from orthotics in her shoes, but that surgery was not warranted. He reiterated that with regard to applicant's right ankle, the orthopedic findings and diagnostic studies in the records and upon his clinical examination are that applicant has mild degenerative changes in her right wrist, hand and ankle and foot. He stated "I would like to emphasize the surprising lack of pathology noted in the actual right ankle joint." Dr. Pechman imposed work restrictions to preclude prolonged standing and or walking, running, jumping, pivoting or repetitive stairs or climbing. He recommended further treatment of the right hand and the right ankle consisting of pain medication and physical therapy.

46. Dr. Pechman's Supplemental AME report, following the bone scan and EMG nerve conductivity studies he recommended, confirmed his initial impressions that there was no evidence of carpal tunnel syndrome in the right-hand and wrist, and that there was no evidence of anything other than mild degenerative changes in applicant's right ankle and foot.

ANALYSIS OF DR. PECHMAN'S AME BY DR. NIJJAR

47. As noted above, Dr. Nijjar was provided with Dr. Pechman's AME and attached medical records. He was asked whether his opinion would change, based upon Dr. Pechman's examination and AME findings and conclusions. Dr. Nijjar reviewed the 62 page document, which he noted covered over 10 years of history of applicant's right ankle injury beginning in 2001, and then added in records of applicant's right wrist complaints and treatment.

48. Dr. Nijjar noted that Dr. Pechman concluded that applicant continued to report a constant slight to moderate pain in her ankle and wrist and, was restricted only to no prolonged standing or walking, running, jumping, pivoting or repetitive stairs or climbing. Dr. Nijjar pointed out that the AME, "considered the overall status of this patient and in his

report he [Dr. Pechman] very clearly mentions that there are significant issues of depression, sleeping difficulty, and so forth.” Dr. Nijjar pointed out that he agreed with Dr. Pechman’s findings of no evidence of carpal tunnel syndrome, that nerve conduction studies on applicant’s wrists were normal, and that there was no need for surgical intervention on either her wrist or her ankle.

49. In his testimony, Dr. Nijjar pointed out that Dr. Pechman’s report largely addressed Workers Compensation related opinions and conclusions, reflecting a different standard of evaluation regarding restrictions and prophylactic measures. He noted that even Dr. Pechman’s report, although it has some recommended work limitations to it, does not preclude applicant from any specific job duty required of her District position as an Aide II.

50. Based on his review of Dr. Pechman’s AME report, Dr. Nijjar reiterated his opinion that applicant is orthopedically and neurologically able to perform all the duties mentioned in her job description. He reiterated a psychological evaluation for issues of depression noted by Dr. Pechman in his AME report could be warranted. Dr. Nijjar noted that there was no reason in Dr. Pechman’s analysis or evaluation, or in the medical records attached to Dr. Pechman’s report that would cause him to change his opinions previously expressed in his IME report.

51. Dr. Nijjar pointed out that his conclusion that applicant is not substantially incapacitated does not mean that some activities will not be somewhat uncomfortable and occasionally painful, especially upon overuse of her right hand and wrist, or the prolonged standing or walking on her right foot and ankle. Repetitive overuse of her hands and wrists, and prolonged standing or walking would be uncomfortable in any event, since applicant has normal age-related degenerative changes in her wrists, low back and ankles expected to be found in a woman in her mid-50s. Such discomfort would be expected due to applicant’s age and these degenerative conditions, with or without any other injury. Dr. Nijjar noted that expected discomfort should not prevent applicant from being able to do her job, if she were motivated to do so.

REASONABLE ACCOMMODATION-WORKPLACE RESTRICTIONS

52. Applicant and the District’s Director of Classified Personnel met on February 9, 2011 to discuss applicant’s “Temporary Work Restrictions,” as outlined by her treating Workers Compensation physician, Dr. Quesada. Also present was applicant’s site principal. A detailed discussion ensued regarding the various duties and physical requirements of applicant’s current assignment as well as any possible accommodations. The District’s Director of Classified Personnel wrote applicant a letter, dated February 10, 2011, in which she advised applicant on behalf of the district that,

... [W]e have concluded that we are unable to make suitable accommodations that would allow your return to work at this time. Accordingly, we will extend your medical leave for the dates indicated on the enclosed doctor’s statement. Please

notify us should there be a change in your work restrictions so that we may again consider a possible return to duty.

53. The limitations required were based on Dr. Quesada's Disability Status Evaluation, updated May 5, 2011, that continued the disability status he had previously imposed that was discussed at the February 9, 2011 meeting. Dr. Quesada's Disability Status Evaluation found that applicant was "Temporarily Totally Disabled." She was restricted to no lifting over 10 pounds; no standing/walking over one hour; no repetitive flexion/extension with her right upper extremity; no repeated climbing up/down stairs; no repetitive pushing/pulling with the right upper extremity; no forceful grasping with right upper extremity; and no running twisting or jumping. Dr. Quesada noted that if modified work is not available, then applicant was to remain on temporary total disability.

54. Dr. Quesada's report of temporary total disability and work restrictions was reconfirmed on July 12, 2011 and August 12, 2011, effective through September 23, 2011. Dr. Quesada's report and restrictions applied to both applicant's job with the District and her job at the Kern County Library. Dr. Quesada's reports and restrictions do not distinguish between applicant's limitations upon her work for the District and her limitations upon her work at the Kern County Library, which each had different physical requirements and demands, such as the fact that the Kern County Library job required persistent repetitive right hand use working with the computer and mouse, and often required pushing, pulling, and repetitive forceful grasping, seldom required in her position with the District.

55. Dr. Pechman's global AME evaluation blends the physical and performance requirements assessed for applicant's two different jobs, each of which requires different sets of physical capacities and capabilities. For the purposes of this Worker's Compensation related AME, all employment requirements were considered as a whole, and injuries, disabilities, limitations and restrictions were rated and apportioned. It is impossible to separate out Dr. Pechman's conclusions specific to applicant's District employment from the overall evaluation that assesses the cumulative effect of work injuries and work requirements, limitations and restrictions of both jobs together. The apportionment percentages in Dr. Pechman's report between the two jobs makes sense only in the Workers Compensation context to which they were addressed.

56. Applicant found herself in a predicament after her Workers Compensation doctor imposed limitations and restrictions on her work activities as an Aide II with the District. Although those workplace limitations and restrictions imposed by Dr. Quesada were described as temporary in his report, they were repeatedly renewed and extended. The imposition of these restrictions by Dr. Quesada prevented applicant from being able to perform her job in a manner satisfactory to her District employer and still abide by her doctor's imposed restrictions. In order to continue working and observe Dr. Quesada's restrictions, applicant required employer accommodation. For a time, the District permitted applicant for have limited duty and allowed her to avoid activities and duties she found uncomfortable. But the period during which the District permitted applicant to continue on accommodated limited duty was itself limited, and the District did not permit applicant to

continue on indefinite work restrictions/limited duty. The District ultimately advised applicant that it would not continue to accommodate her, but she could return to work if she could work without some or all of the restrictions. The meeting with the District noted above sought to determine whether applicant was willing to relax some or all of the restrictions. Applicant declined, believing the work restrictions continue to be necessary, which resulted in termination of her employment.

57. Applicant has always been able to return to work after her work injuries, and continued to work at her District job as long as the District was willing to accommodate her and allow her to work with limited duty involving workplace limitations and restrictions that allowed her to not have to perform tasks or duties that she found uncomfortable.

58. Applicant's primary complaint is not so much that she is substantially incapacitated from being able to continue to perform her job duties, but rather that her employer has refused to continue to allow restrictions and limitations on her work obligations that made it easier and more comfortable for her to perform her job duties. The District did not prevent applicant from returning to work, but did condition her return to work upon relaxation or removal of some or all of the work restrictions imposed by Dr. Quesada. Applicant did not insist that Dr. Quesada remove or moderate the work restrictions so that she could return to work when presented with the opportunity by the District. On the one hand, it was evident that if applicant returned to work with some or all of the restrictions removed, work would be uncomfortable at times, perhaps painful on occasion, and there might be an occasional task she could not perform without assistance. But there was no evidence, then or now, that applicant was physically incapable of performing her usual and customary job duties with the District if some or even all of the work restrictions were removed. Applicant elected to not continue working for the District not because of substantial physical incapacity that prevented her from performing, but because she decided she did not want to continue performing tasks that were physically uncomfortable, at times painful, and on rare occasions, requiring assistance.

WORK RESTRICTIONS AND SUBSTANTIAL INCAPACITY

59. The existence of physician-imposed workplace limitations and restrictions do not necessarily equate to substantial incapacity to perform the ordinary and customary requirements of one's employment. Workplace restrictions and limitations imposed through a physician or other healthcare provider through Workers Compensation can address a potentially very wide variety of situations, and may relate to either temporary incapacity or disability, or longer lasting conditions, up to and including permanent disability. Worker's Compensation work restrictions can reflect conditions or pathology that may or may not be substantially incapacitating.

60. In addition, substantially less proof is required to prove a compensable injury in the no-fault Workers Compensation system than is required to meet the proof of substantial incapacity threshold for a disability retirement. The systems have different objectives and different mechanisms to evaluate what constitutes compensable injuries or

conditions. Even a finding of permanent total disability under the Worker's Compensation standards does not necessarily equate to and require a finding of substantial incapacity in the disability retirement system. The nomenclature and the rating system of the Workers Compensation system for disability finds no parallel and has no meaning in evaluating whether a person is substantially incapacitated from the ability to perform their usual and customary job duties.

61. In this instance, even under the Workers Compensation system, applicant's disability is mild, and her incapacity minimal. She has been able to continue to work with minimal restrictions and limitations, and those usually addressed to work activities not particularly common, until the accommodations were removed. Applicant's remedy for the circumstances presented is not a disability retirement, for which she failed to present sufficient evidence to meet her burden to prove that she is substantially incapacitated, but rather to work with her Workers Compensation treating physicians and her employer to revisit her workplace restrictions such that she can continue to work, if that is truly her desire. Applicant must decide whether she wants to continue to work, which will, as many persons in her mid-50s age group with degenerative arthritic changes in their wrists, low back, feet and ankles do, involve some measure of physical discomfort and even pain from time to time. Dr. Nijjar found applicant is orthopedically and neurologically quite capable of doing so, should she so desire, and there is nothing precluding applicant from asking for help on the few occasions when she might have to lift a child into a wheelchair or intervene if there is a scuffle on the playground. Or applicant can continue to insist upon the District accommodating her and observing her workplace limitations, which it has refused to continue to do, and is likely to continue doing so. The District's refusal to accommodate applicant is not an issue resolvable in this forum, nor is it evidence of substantial incapacity.

CONCLUSION-MEDICAL EVIDENCE OF INCPACITY

62. Dr. Nijjar's testimony and the report of his IME and supplemental report were the only competent medical evidence received in this matter upon which a Factual Finding may be based. Dr. Nijjar's testimony and his reports were thoughtful, thorough, well-reasoned and very credible and persuasive. Dr. Pechman's hearsay report was considered to the extent that Dr. Nijjar considered it and relied upon it in the rendering of his own opinions. The medical reports, records and notes written by other physicians and healthcare professionals, which were recited at considerable length in Dr. Pechman and Dr. Nijjar's reports, and the opinions and conclusions expressed in those records and reports that Dr. Nijjar reviewed, but which were not produced, nor their authors produced to testify, are all hearsay upon hearsay, and may not be relied upon to make any Factual Finding here.¹ Of particular concern with most of these records containing medical opinion that Dr. Nijjar considered in his IME report and testimony was the fact that the authors of most of these other medical reports of what were considered to be treating physicians who wrote disability letters and work excuses for applicant could not be identified, because the reports did not have headings or letterhead, and the signature(s) of the evaluator(s) was, in almost all

¹Government Code section 11513.

instances, illegible. Finally, as of the date of the IME, applicant was still working for the County of Kern at the County Library. It was not clear as of the date of the evidentiary hearing whether she was still working at the County Library. If so, it is manifestly inconsistent to claim that she is substantially incapacitated from working for the District but is not substantially incapacitated from continuing to work the same number of hours per week for the County Library, especially when both positions require substantial amounts of standing and walking and use of the right hand and rest. In sum, the record does not contain any competent medical evidence in this record that supports applicant's claim that she is substantially incapacitated from the performance of her duties as an Aide II with the District.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. "As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of the evidence."² It has been repeatedly held that the applicant for a disability retirement has the burden of proving eligibility for the benefit, including presenting satisfactory evidence of substantial incapacity to perform the usual and customary duties of his or her position.³ An applicant for a CalPERS disability retirement bears the burden of proof and the burden of going forward with the evidence.⁴ *Mansperger* requires the applicant for disability retirement to prove that he or she is "substantially incapacitated" from the performance of his or her usual and customary duties.⁵

2. "'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."⁶

3. "If the medical examination and other available information show to the satisfaction of the board ... that the member is incapacitated physically or mentally for the

² *McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, 1051.

³ *Id.*, *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332, *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App. 3d 873, 876.

⁴ *Id.*, *Harmon v. Board of Retirement* (1976) 62 Cal.App. 3d 689, 691, *In Re: Theresa V. Hasan*, Board of Administration of the California Public Employees' Retirement System Precedential Decision No. 00-01.

⁵ *Mansperger, supra.*

⁶ Government Code section 20026, in pertinent part.

performance of his or her duties in the state service and is eligible to retire for disability, the board shall immediately retire him or her for disability....”⁷

4. “We hold that to be ‘incapacitated for the performance of duty’ within section 21022 means the substantial inability of the applicant to perform his usual duties.”⁸ *Mansperger* continues to be the definitive statement of California courts to date regarding the meaning of the language of section 21156 “incapacitated for the performance of duty,” in the context of an application for a disability retirement.

5. In applying the *Mansperger* standard, it has been held that the fact that a person has a limiting and painful physical condition, or an emotionally troubling psychological condition that limits, but does not preclude, the person’s ability to perform his or her usual duties; or makes performing the usual and customary duties of one’s occupation more difficult or unpleasant physically or mentally does not necessarily constitute a substantial incapacity for the purposes of a disability retirement.⁹ The fact that the physical or psychological condition may preclude the applicant from performing some but not all usual and customary job duties does not necessarily mean the applicant is substantially incapacitated within the meaning of *Mansperger* and section 21156.¹⁰

6. As set forth in the Factual Findings, applicant failed to carry her burden of proof to prove by a preponderance of the evidence that she is substantially incapacitated for the performance of her usual and customary duties as an Aide II with the District. The only competent medical evidence in this record comes from Dr. Nijjar, whose credible and persuasive opinion is that although applicant has some limitations and discomfort with the performance of her job duties, she is nevertheless capable of performing the great majority of his job duties, especially if she makes some adjustments to performing repetitive or uncomfortable tasks with her right hand, or by using both hands, with the left supporting the right, and avoids “prolonged” standing, walking, especially on uneven surfaces, or unnecessarily going up and down stairs. Applicant does experience mild to moderate discomfort or pain from time to time with prolonged use of her right wrist and hand, and with prolonged standing, walking, walking on uneven surfaces, and going up and down stairs. But the discomfort and pain proved was not proved to be substantially incapacitating or an insurmountable obstacle to the performance of a majority of her work required tasks. There are significant contributing factors to applicant’s orthopedic problems, including normal, mild degenerative conditions to be expected due to aging and the wear and tear of the years on her feet and using her hands at work. Applicant also has a lengthy history of problems with depression and insomnia. There were also several references to the fact that applicant

⁷ Government Code section 21156, in pertinent part.

⁸ *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App. 3d 873, 876.

⁹ *Hosford v. Board of Administration* (1978) 77 Cal.App. 3d 854, 861-863.

¹⁰ *Id.*

has a propensity to overstate her symptoms of pain and discomfort, and that the medical evidence reviewed by both Dr. Pechman and Dr. Nijjar do not support the existence of objective pathology in applicant's right wrist and hand or in her right ankle and foot to support the level of pain, discomfort and disability applicant reports. The evidence shows that applicant does have some mild to moderate limitations in her ability to perform some of her job functions, but there was no evidence that her limitations prevent or substantially interfere with her ability to perform commonly required job functions. In sum, it was not proved that applicant is substantially incapacitated from the usual and customary duties and functions of his position.

7. From all indications, applicant has given many years of dedicated service to the District. These determinations have nothing to do with the quality and nature of applicant's service. Applicant has decided that the pain and discomfort of continuing to work under the circumstances and conditions of her employment as an Aide II with the District were more than she could continue to bear, leading to this application for disability retirement. The legal standards for proof of substantial incapacity require more than what applicant presented. The admissible medical evidence upon which this Decision may rely to make Factual Findings and Legal Conclusions, particularly the orthopedic findings made by Dr. Nijjar, in part relying upon the orthopedic findings made by the orthopedic surgeon who repaired applicant's right ankle and evaluated her for the purposes of her workers compensation AME, Dr. Pechman, do not support applicant's claim that she is substantially incapacitated due to her orthopedic disability claims.

8. Applicant was not able to prove by competent medical opinion, that at the time she filed her application for disability retirement, she was substantially incapacitated, within the *Mansperger* standard, as a result of orthopedic condition in her right wrist and hand and her right ankle and foot from the performance of her usual and customary duties. There is no option but to deny the application.

ORDER

The application of Sylvia C. Valdez for a disability retirement is DENIED. The determination of the CalPERS Benefits Division that applicant is not substantially incapacitated from the performance of her duties as an Aide, Level II, for the Bakersfield City Elementary School District, is AFFIRMED.

DATED: February 7, 2014



STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings