ATTACHMENT E

THE PROPOSED DECISION

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

In the Matter of the Application for the Disability Retirement of: CARLA D. IVORY, Applicant/Respondent, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, PAROLES AND COMMUNITY SERVICES DIVISION, Respondent.	Case No. 2010-0638 OAH No. 2013020106

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 1, 2013, in San Bernardino, California.

Jeanlaurie Ainsworth, Senior Staff Attorney, California Public Employees' Retirement System (CalPERS), represented petitioner Mary Lynn Fisher, Chief, Benefit Services Division.

Carla Ivory, applicant/respondent (Ivory), represented herself in these proceedings. She was assisted by her sister.

No appearance was made by or on behalf of respondent, California Department of Corrections and Rehabilitation, Paroles and Community Services Division (Department of Corrections).

The record remained open until November 14, 2013, to allow Ivory to submit her medical records and to give CalPERS an opportunity to respond. Ivory did not submit any medical records and the matter was submitted.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED 12-12 20 13
Debra Moore

ISSUE

Was Ivory permanently disabled or incapacitated from performing the regular and customary duties of a program technician with the Department of Corrections due to orthopedic (low back and radiculopathy) and psychological conditions (depression, anxiety, and chronic pain) when she filed her application for a disability retirement?

FACTUAL FINDINGS

Preliminary Matters

1. Ivory was employed by the Department of Corrections as a program technician. By virtue of her employment, Ivory was a state industrial member of CalPERS and was subject to Government Code sections 20048 and 21150.

2. On September 1, 2009, Ivory filed a Disability Retirement Election Application with CalPERS. She claimed the right to receive a disability retirement because of a back injury with pain that radiates down both legs. Ivory attempted to return to work, but the pain prevented her from being able to perform her job duties. Ivory also claimed that her injury caused depression. Ivory last received compensation on December 1, 2008.

3. CalPERS obtained medical records and reports related to Ivory's orthopedic and psychological conditions. CalPERS selected an orthopedic surgeon and a psychiatrist to perform disability evaluations. Both physicians provided CalPERS with narrative reports of their findings and conclusions. After reviewing those reports, CalPERS determined that when Ivory filed her application for a disability retirement, she was not permanently disabled or incapacitated from performing the usual and customary duties of a program technician.

4. On July 13, 2010, CalPERS notified Ivory that her claim was denied. CalPERS advised Ivory of her right to appeal that adverse determination.

5. On July 26, 2010, Ivory filed her appeal.

6. On January 4, 2013, petitioner filed the statement of issues in her official capacity. The statement of issues and other jurisdictional documents were served on all respondents. The Department of Corrections did not respond to the statement of issues or appear in this matter.

Evidence Presented at Hearing

7. Mohinder Nijjar, M.D., a board-certified orthopedic surgeon, performed an independent medical evaluation and testified in this hearing. Dr. Nijjar's testimony was consistent with his report. Dr. Nijjar performed a lengthy review of Ivory's medical records and performed a physical examination of Ivory on February 22, 2010. Dr. Nijjar noted that Ivory injured her back in 2003 while moving files at work. Ivory was initially treated

conservatively. In March 2006 Ivory underwent disk excision and fusion at the L4-L5 level. Ivory returned to work in January 2007 but went off work in March 2007. In July 2007 Ivory had her hardware removed. She returned to work in September 2008 but left her job in December 2008. Ivory has been off work since that time. After examining Ivory and reviewing her records, Dr. Nijjar diagnosed Ivory with sprain/strain of the lumbosacral spine; spondylolisthesis, L4-L5, status post surgical fusion and decompression at L4-L5 and L5-S1; degenerative disk disease and disk protrusion at L4-L5 and L5-S1; and status post removal of the hardware from her spine.

In his March 24, 2010, addendum, written after reviewing Ivory's job description, Dr. Nijjar concluded that Ivory was not substantially incapacitated from performing her job duties as a program technician.

8. Oluwafemi Adeyemo, M.D., a psychiatrist, conducted an independent psychiatric evaluation of Ivory on May 13, 2010, and wrote a report. Dr. Adeyemo testified consistently with his report at the hearing. Dr. Adeyemo reviewed Ivory's medical records. Dr. Adeyemo noted that Ivory reported a history of anxiety and depression related to the pain from her injury and the physical limitations caused by that pain. Dr. Adeyemo opined that claimant's psychiatric symptoms were not severe at the time of his evaluation. Ivory's symptoms were "of mild intensity" and increased with stress. Dr. Adeyemo concluded that Ivory was not substantially incapacitated from performing her job duties.

9. Although Ivory requested an opportunity to submit her medical records, she did not do so. However, the opinions of Dr. Nijjar and Dr. Adeyemo were based, in part, upon their review of those medical records. As such, it was unclear how introducing those records would refute the opinions of Dr. Nijjar or Dr. Adeyemo.

10. Ivory and her sister testified about the profound changes in Ivory's personality and life since her injury. While their testimony was sincere and heartfelt, it was insufficient to refute the opinions of CalPERS' medical experts.

Arguments

11. Ivory, who had the burden of proof, argued that she was unable to perform her usual and customary duties due to her injuries, related pain and psychiatric condition. However, Ivory introduced no evidence to support her position. She introduced insufficient evidence to rebut Nr. Nijjar's and Dr. Adeyemo's opinions.

12. CalPERS argued that Ivory had not met her burden of proof and that her appeal should be denied.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Applicable Statutes

2. Government Code section 20026 provides in part:

> '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.

3. Government Code section 21151, subdivision (a), provides that a member who is "incapacitated for the performance of a duty" shall receive a disability retirement.

4. Government Code section 21156 provides that if the medical evaluation or other evidence demonstrates that an eligible member is incapacitated physically or mentally, then CalPERS shall immediately retire the member for disability.

Appellate Authority

5. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the public employee is not "incapacitated" and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887.)

6. The fact that an injury increases an individual's chances of further injury does little more than demonstrate that the injury is prospective, hence, speculative, and presently not in existence. If is insufficient to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863).

Evaluation

7. Ivory was a very credible witness. She testified in a straightforward manner, made eye contact, and did not appear to be exaggerating her complaints. Her affect was very subdued and withdrawn. Before her injury, Ivory enjoyed working and loved her job. After the injury, her life changed dramatically because of her pain. She is limited in her activities and no longer engages in her previous activities. However, Ivory had the burden of proof in this matter. She simply did not provide sufficient evidence to refute the opinions of Dr. Nijjar or Dr. Adeyemo. The evidence did not support Ivory's claim that she was unable to

perform the usual and customary duties of a program technician for the Department of Corrections.

Cause Exists to Deny the Application

8. Cause exists to deny Ivory's application for a disability retirement. A preponderance of the evidence did not establish that Ivory became permanently disabled and incapacitated from performing the regular and customary duties of a Department of Corrections program technician when she filed her application for a disability retirement with CalPERS as a result of her orthopedic or psychiatric conditions.

ORDER

The application for a disability retirement filed by Carla D. Ivory with the California Public Employees Retirement System on September 1, 2009, is denied. CalPERS' denial of Ivory's application is affirmed.

DATED: December 11, 2013

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings