

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:

LINDA L. WATSON,

Respondent,

and

SAN BERNARDINO CITY UNIFIED
SCHOOL DISTRICT,

Respondent.

Case No. 9346

OAH No. 2012031066

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Bernardino, California, on October 8, 2013.

Rory J. Coffey, Senior Staff Counsel, represented Mary Lynn Fisher, Chief, Benefit Services Division, California Public Employees Retirement System, State of California.

Linda L. Watson represented herself.

There was no appearance by or on behalf of San Bernardino Unified School District.

The matter was submitted on April 2, 2014.¹

¹ The following is the procedural history of this case.

- The hearing in this case was scheduled for September 12, 2012. Respondent Watson made a Motion for a Continuance; Petitioner objected; Respondent Watson's Motion for a Continuance was denied.

FACTUAL FINDINGS

1. Mary Lynn Fisher (Petitioner) made and filed Statement of Issues, Case No. 9346, in her official capacity as Chief, Benefits Services Division, California Public Employees Retirement System (CalPERS).
2. San Bernardino City Unified School District (Respondent District) employed Linda L. Watson (Respondent Watson) between 1997 and May 26, 2009.
3. On August 21, 2008, Respondent Watson signed an application for disability retirement on the basis of migraine headaches.

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- On the date of hearing, Respondent Watson called the Office of Administrative Hearings and said that she would not attend the hearing because she was experiencing a migraine headache. During the hearing, while on the record, the administrative law judge contacted Respondent Watson, who stated that she wanted to withdraw her Request for Hearing because the administrative law judge had indicated that she was inclined to deny Respondent Watson's request for a continuance of the hearing. Petitioner's counsel stated that he would send Respondent Watson a letter confirming the statements made by Respondent Watson while on the record, specifically that she withdrew her request for a hearing; if she did not respond, he would re-schedule the hearing.
 - Petitioner's counsel sent the letter to Respondent Watson, dated September 17, 2012. Respondent Watson did not respond. By letter, dated October 18, 2012, Petitioner's counsel requested the opportunity to take a default judgment in the case. By letter, dated October 24, 2012, the administrative law judge denied Petitioner's request and ordered Petitioner to reset the matter for hearing, based on the statement made by Petitioner's counsel during the hearing on September 12, 2012. The hearing was scheduled for October 8, 2013. A hearing occurred on that date.
 - On January 24, 2014, the administrative law judge reopened the record and ordered, among other things, an evaluation by an orthopedist. Respondent Watson provided a copy of the Physical Requirements of the Position on February 12, 2014. By letter, dated April 2, 2014, Petitioner objected and requested that a decision be issued, based on the evidence in the record. The record was closed without taking additional evidence on April 2, 2014.

4. CalPERS obtained or received medical reports concerning Respondent Watson's neurological condition (migraine headaches) from competent medical professionals. After review of these reports², CalPERS determined that Respondent Watson was not permanently disabled or incapacitated from performance of her duties as a Warehouse Worker when the application for disability retirement was filed.

5. By letter, dated March 27, 2009, Petitioner notified Respondent Watson of the determination and her appeal rights.

6. By letter, dated April 21, 2009, Respondent Watson appealed and requested a hearing.

7. The appeal is limited to the issue of whether Respondent Watson is permanently disabled or incapacitated from performance of her duties as a Warehouse Worker for Respondent District on the basis of a neurological condition (migraine headaches).

8. The duties of the position of Delivery Driver/Warehouse Worker are set forth in the San Bernardino City Unified School District Personnel Commission's job description for Delivery Driver/Warehouse Worker.

The duties of the position require the employee to drive trucks and vans to deliver a variety of items, such as supplies and equipment, interoffice mail and foods and food-warming cabinets to Respondent District and other locations; to perform various warehouse-related functions, such as receiving, storing, order processing, taking inventory, delivery truck routing, performing activities related to equipment/materials salvage and assisting in central mailroom.

9. No evidence was offered regarding the physical requirements of the position, except as set forth in the job description, which stated, in part, "lifting objects weighing up to 60 pounds; performing duties involving heavy physical labor."

10. In her application, Respondent Watson stated that she had a five-year history of migraine headaches and that her limitations/preclusions due to her injury or illness included heavy lifting and carrying, fumes, odors, noise, humidity, stress and becoming over heated; regarding how her illness affected her ability to perform her job, Respondent Watson stated that it was necessary for her to take time off from work when symptomatic.

11. In support of its decision, Petitioner submitted reports from (1) Mumtaz A. Ali (Dr. Ali), and (2) Robert Moore, M.D. (Dr. Moore).³ Both of these physicians performed a

² According to the letter, dated March 27, 2009, Petitioner's review included reports prepared by Beverly Nester, M.D., Rajan Kamani, M.D. and Mumtax Ali, M.D.

neurological evaluation of Respondent Watson that included taking a history, performing a physical and neurological examination, and reviewing records, including the duties and physical requirements of the Warehouse Worker. The records Doctors Ali and Moore reviewed were not available for review in this case. The records Doctors Ali and Moore reviewed expressed opinions on the issue of whether Respondent Watson was disabled. However, there is no evidence that the physician(s) who drafted the reports Doctors Ali and Moore reviewed relied on the relevant CalPERS standard in rendering such opinions.

12. Dr. Ali's report is dated January 28, 2009. He stated that Respondent Watson reported her chief complaint was frequent uncontrolled migraine headaches, moderate-to-severe in nature, associated with nausea and sometimes vomiting, along with sensitivity to light and noise. She reported experiencing the onset of migraines in the early 1990's, but she noticed that the migraines had gotten worse over the six years prior; within the year before the examination by Dr. Ali, Respondent Watson reported that her migraines occurred more frequently and had gotten worse, and that she was experiencing migraine headaches four to five times per month, with the headaches lasting two to three days each time.

Dr. Ali reported that a neurologist last saw Respondent Watson in April 2008.

In his report, Dr. Ali stated that Respondent Watson had been treated with a variety of medications, including Topamax, Inderal, Fioricet/Cod, Fionnal, Imitrex injections, Maxalt, Zomig, Darvocet, Elavil, Propranolol, and Vicodin.

Respondent Watson reported to Dr. Ali that her migraine headaches completely interfered with her general activities, ability to concentrate, and ability to interact with other people. She reported that the frequency of the migraines seemed to increase when she became overheated.

Dr. Ali reported that the previous CT scan of the brain was normal. Dr. Ali's neurological examination was normal. His diagnosis was uncontrolled migraine headaches.

Dr. Ali reviewed reports of Rajan H. Kamani, M.D. (Dr. Kamani) and Beverly J. Nester, M.D. (Dr. Nester). Those reports contained the following.

- Dr. Kamani's notes indicated that he initially saw Respondent Watson on April 17, 2008, for a problem of migraine headaches she reported having for 10 years. She reported having such headaches three to four times a month. In his report, Dr. Kamani listed the medications he prescribed in treatment of the headaches. Respondent Watson saw Dr. Kamani again on August 25, 2008, and September 5,

³ During the hearing on September 12, 2012, Petitioner learned that following the evaluation by Dr. Ali in January 2009, Dr. Ali became Respondent Watson's treating physician. Therefore Petitioner requested an additional evaluation. Robert Moore, M.D. performed this evaluation in July 2013.

2008, with complaints of migraines. On November 29, 2008, he noted she had a permanent incapacity for her job.

- According to Dr. Nester's notes, she initially saw Respondent Watson on November 8, 2008, and October 6, 2008. On both dates, Dr. Nester noted, "initially migraine headaches are episodic, incapacity permanent – she answered no." On October 6, 2008, Dr. Nester noted "patient unable to open eyes and head pain severe. She would not be able to do anything. Permanent incapacity".

In his report, Dr. Ali described the duties and physical requirements of the position of Delivery Driver/Warehouse Worker. He stated that he relied on the same document that was submitted in evidence in this case (Finding 8) to reach that opinion. Though the duties are substantially the same as those described herein (Finding 8), his description of the physical requirements was more expansive than the document submitted into evidence as part of this case.

Dr. Ali concluded that Respondent Watson was able to perform the "essential functions of her job." Based on the duty statement/job description and physical requirements of her current position, Dr. Ali's professional opinion is that Respondent Watson is not substantially incapacitated for the performance of her usual duties.

13. During the hearing on September 12, 2012, Petitioner learned that Dr. Ali had been Respondent Watson's treating physician since his evaluation in 2009. As such, Petitioner obtained a subsequent independent neurological evaluation of Respondent Watson. Dr. Moore performed this evaluation and issued a report.

14. Dr. Moore's report is dated July 29, 2013.

Dr. Moore reviewed the job description for Delivery Driver/Warehouse Worker; based on his report, as in Dr. Ali's case, it appears that this job description was somewhat different than the document submitted in this case (Exhibit 8).

Dr. Moore reviewed medical records between April 17, 2008, and January 28, 2009. Of significance, Dr. Moore noted (in a physician's note, dated April 17, 2008) that Respondent Watson's neurological examination was normal.

Based on the history from Respondent Watson, Dr. Moore reported that Respondent Watson sees a neurologist quarterly; she provided him with an MRI scan of the brain, dated April 2009. In April 2009, she had an MRI scan of the neck, which revealed diffuse one to two millimeter disc protrusions. She provided him with a list of medications that she has taken for her headaches, including hydrophone Motrin, Cymbalta, Depakote, Butalbital, Relpax, Dilaudid, Tramadol, Celebrex, Gabapentin, and Inderal.

Respondent Watson reported that she experienced six to eight headaches (associated with right-sided neck pain) per month that lasted several days at a time. They tended to

occur over the right occiput and traveled to the right temple. They were sometimes associated with seeing “floaters” and “little spots,” with nausea (but not vomiting), photophobia, and phonophobia.

At the time of Dr. Moore’s evaluation, Respondent Watson reported that she was taking Zonisamide, Axert, Sumavel, Cyclobenzaprine, Diclofenac, and Lunesta (to help her sleep).

Dr. Moore’s diagnosis was mixed migraine and muscle contraction headaches.

Dr. Moore’s objective findings included: (1) slight decreased range of motion of the neck; (2) her neurological examination was always nonfocal; (3) normal MRI scan of the brain; (4) MRI scan of the neck revealed some spondylotic changes.

In response to the question about whether Respondent Watson was unable to perform the usual and customary duties of her employment because of her physical condition, Dr. Moore opined that Respondent Watson’s complaints of “headaches are related to her migrainous phenomena as well as the underlying cervical spondylosis”; regarding the migraine headache attacks, Dr. Moore believed she might need to leave work on an unpredictable basis two to three times per month because she would not be able to perform various functions; however, there were no duties that she would not be able to perform if she had no migraine attacks. He further stated, “I would emphasize that the applicant has been diagnosed as having cervical spondylosis and an AME examiner in orthopedics did not provide functional limitations on this applicant, which would might preclude usual and customary duties and these issues should be addressed by an orthopedist and will not be further discussed at this time.”

In response to the question about whether Respondent Watson was substantially incapacitated for performance of her usual duties, Dr. Moore stated: “If it is determined that missing two to three days per month on an unpredictable basis would substantially incapacitate the applicant from performing her usual duties, then from a neurological standpoint, these functional limitations would have existed as of May 26, 2009.

In response to Dr. Moore’s report, Petitioner contacted Dr. Moore and asked for clarification of his report; specifically his statement set forth the foregoing paragraph. She stated:

“We are unable to make a determination as you did not provide your medical opinion as to whether or not the member is substantially incapacitated from performing her usual job duties due to her migraines. It appears your answer is based on prophylactic restrictions or modified duty. Please note that prophylactic restrictions are not a basis for disability retirement, and we do not take into account modified duties – the issue of modified duty or the member needing to take time off due to her migraines is between her and her employer. Please answer the following question: On a

neurological basis, is the member's alleged disabling condition due to a neurologic (migrainlmuscle [sic] contraction headache) condition substantially incapacitating."

Dr. Moore responded "No" and explained that given Petitioner's explanation, Respondent Watson's condition would not be considered substantially incapacitating under the circumstances Petitioner asked him to assume.

15. Respondent Watson testified in this proceeding regarding her condition. Based on the application, the statements in her appeal, and the complaints to her physicians, there is no dispute that Respondent Watson has migraine headaches that can be disabling for up to three days at a time; in 2008, she suffered from migraine headaches three to four times a month; now the headaches occur three to five times a month. She testified that her migraine headaches require her to be in a dark room, and that she is unable to perform anything but the basic activities of daily living, such as toileting, when she experiences these headaches. She no longer engages in many of the physical activities that she has participated in or performed in the past, such as cooking, getting dressed and going to church; she gets out of bed only to go to church.

16. Respondent Watson provided medical evidence in support of her position. It consisted of reports from Rosebel R. Young, M.D. (Dr. Young), dated December 3, 4 and 10, 2009. As a qualified medical examiner, Dr. Young performed a neurological evaluation that included, taking a history, performing electrodiagnostic tests, completing a records review, performing an appropriate medical examination, and issuing a supplemental report and final disability rating. Dr. Young's review of medical records was thorough. Her evaluation was related to Respondent Watson's worker's compensation case. As such, in rendering her opinion about Respondent Watson's disability status, Dr. Young relied on the worker's compensation disability standards rather than the CalPERS disability standard. For the foregoing reasons, Respondent Watson's medical evidence was of no real significance in evaluating this case.⁴

LEGAL CONCLUSIONS

1. Respondent Watson, a local miscellaneous member of CalPERS, seeks disability retirement pursuant to Government Code sections 20026 and 21150.⁵ She has the minimum service necessary to qualify for retirement. The sole issue in this proceeding is

⁴ Medical opinions of a permanent disability for purposes of a workers' compensation claim are not binding on the issue of eligibility for a disability retirement because the focus of the issues and the parties are different. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

⁵ Hereinafter all reference is to Government Code.

whether Respondent Watson has a neurological condition (migraine headaches) that renders her “incapacitated for the performance of duty.”

2. The following Government Code provisions are relevant to disability retirement.

Section 20026 states, in part:

“Disability” and “incapacity for performance of duty” as a basis for retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

Section 21150 states:

Any member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age

Section 21152 states, in part:

Application to the board for retirement of a member for disability may be made by:

[¶] . . . [¶]

- (c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.
- (d) The member or any person in his or her behalf.

Section 21153 states:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

3. In 1970, the Court of Appeal held that to be “incapacitated for the performance of duty” within Government Code section 21022 (now section 21151) means “the substantial

inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.)

In *Mansperger*, the appellate court found that while a game warden’s disability incapacitated him from lifting or carrying heavy objects, which was sometimes a remote occurrence, the game warden was not entitled to a disability retirement because he could *substantially* perform most of his *usual* duties. (*Ibid.*, at pp. 876-877.) The appellate court drew a crucial distinction between a person who suffers some impairment that does not impact his performance of his customary and usual duties, and one who suffers the substantial impairment that prevents him from performing those duties.

4. Respondent Watson has the burden of proving entitlement to disability retirement by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

5. The facts of this case are not in dispute. Respondent Watson’s statements/testimony is consistent with the complaints that she made to the several physicians who evaluated her. She has experienced migraine headaches for more than 15 years. Her headaches have increased in frequency and duration. She has obtained relief from the headaches by remaining in a dark room, which requires that she be away from work, frequently for more than a day. When she does not have the headaches, she is able to return to work, perform her duties, and meet the physical requirements of her employment. There is no neurological or other medical evidence that she is unable to perform the duties and/or physical requirements of the position when she does not have the migraine headaches.

6. Having considered the actual and usual duties of Warehouse Worker (the last position held by Respondent Watson), it is concluded that Respondent Watson did not provide sufficient competent medical evidence to establish that her migraine headaches prevented her from performing the usual and customary duties of a Warehouse Worker employed by Respondent District.

7. Respondent Watson is not substantially incapacitated from performing her usual and customary duties as a Warehouse Worker employed by Respondent District on the basis of a neurological condition (migraine headaches).

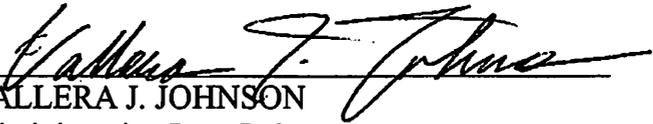
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ORDER

The application for disability retirement of Linda L. Watson is denied.

DATED: April 16, 2014


VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings