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: PAULETTE MANNING, Applicant/Respondent, and CALIFORNIA INSTITUTIONS FOR MEN, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION Contracting Entity/Respondent.	Case No. 2013-0271 OAH No. 2013040788

PROPOSED DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 6, 2014, in San Bernardino, California.

Elizabeth Yelland, Senior Staff Counsel, represented Petitioner Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California.

Applicant/Respondent Paulette D. Manning, represented herself and was present throughout the administrative proceeding.

No appearance was made by or on behalf of the California Institution for Men, California Department of Corrections and Rehabilitation.

On February 6, 2014, the matter was submitted.

ISSUE

Was Paulette Manning, permanently disabled or incapacitated from performing the usual and customary duties of a Correctional Case Records Analyst as a result of an

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RETIREMENT SYSTEM
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orthopedic condition when she filed her application on October 11, 2011 for a disability retirement?

FACTUAL FINDINGS

Preliminary Matters

1. Applicant/Respondent Paulette D. Manning was employed as a Case Analyst by Contracting Entity/Respondent the California Institution for Men, California Department of Corrections and Rehabilitation (Department). By reason of her employment, Ms. Manning was a state industrial member of the California Public Employees' Retirement System (CalPERS) and subject to Government Code section 21150.

2. On October 7, 2011, Ms. Manning signed a Disability Retirement Election Application (application) that she filed with CalPERS. CalPERS received Ms. Manning's application on October 11, 2011. In that application, Ms. Smith claimed the right to receive a disability retirement on the basis of an orthopedic condition effecting her right shoulder, bilateral elbows, hands, wrists and back. Ms. Manning represented that as a result of her medical condition and resulting disabilities, she could not engage in prolonged standing or sitting, was unable to focus and think clearly, and constantly experienced debilitating pain.

3. CalPERS obtained medical records and reports related to Ms. Manning's conditions. Alice Martinson, M.D., an orthopedic doctor selected by CalPERS performed a disability evaluation of Ms. Manning. Following its receipt of Dr. Martinson's report, CalPERS concluded that Ms. Manning was not permanently disabled or incapacitated from performing the usual and customary duties of a Case Records Analyst when she filed her application.

4. By letter dated October 15, 2012, CalPERS notified Ms. Manning of its determination that she was not entitled to a disability retirement.

5. By letter dated November 13, 2012, Ms. Manning timely appealed CalPERS' adverse determination.

6. On April 12, 2013, petitioner signed the Statement of Issues in his official capacity. The Statement of Issues and other jurisdictional documents were served thereafter on Ms. Manning and upon the California Institution for Men, California Department of Corrections and Rehabilitation. The matter was set for hearing.

7. On February 6, 2014, the record in the matter was opened and jurisdictional documents were presented. No appearance was made by, or on behalf of, the California Department of Corrections and Rehabilitation. Sworn testimony was received; official notice was taken; documentary evidence was produced; closing arguments were given; the record was closed; and the matter was submitted.

Ms. Manning's Background

8. Ms. Manning was born on October 18, 1960, in San Bernardino, California. She worked for the California Department of Corrections and Rehabilitation for twenty years at various locations. She first worked for the Department as an office technician. Eventually Ms. Manning became a Case Records Analyst. She worked in this position for four years. She stopped working for the Department in October 2012. In her position as a case records analyst, Ms. Manning was responsible for reviewing the court records of inmates in order to correctly document the time they spent in prison.

Ms. Manning lives with her four grandchildren, ages 18, 17, 15 and 9. She is the legal guardian of two of these children.

The Work of a Correctional Case Records Analyst

9. According to a memorandum describing the essential functions of a correctional case records analyst, a Case Records Analyst must identify, analyze and interpret a variety of highly complex technical legal documents and apply the appropriate set of sometimes highly complex, technical, laws, rules, and regulations to these legal documents, while being aware of changes to applicable judicial laws, rules, and regulations that may affect an inmate's release date. The Case Records Analyst also must identify, analyze and interpret potential legal errors or omissions in court documents and use a wide variety of resource materials. The Case Records Analyst also must be able to accept training and direction, multitask a high volume of fast paced, sometimes highly complex and technical work, meet deadlines and clearly communicate both verbally and in writing with inmates, courts and other department staff. The Case Records Analyst also must have sufficient manual dexterity to use a calculator and computer to accomplish daily work.

Ms. Manning testified that her work required prolonged sitting and the ability to concentrate and make decisions. In addition to working at a desk, she carried heavy files.

Ms. Manning's Physical Conditions

10. Ms. Manning provided numerous evaluation reports from her doctor, Jack H. Akmakjian, M.D., relating to Ms. Manning's workers' compensation claim, and two "Physician's Report on Disability" prepared by Dr. Akmakjian for CalPERS relating to Ms. Manning's permanent disability claim. In addition, Ms. Manning supplied two final MRI reports of her lumbar and cervical spine. Both reports included images from the MRIs.

In the reports submitted to CalPERS and to the state fund for her workers' compensation claim, Dr. Akmakjian diagnosed Ms. Manning with lumbar discogenic disease, chronic low back pain, cervical facet disease, possible tethered cord syndrome, right shoulder impingement, right elbow ulnar neuropathy and right elbow medical and lateral

epicondulitis. [1] Dr. Akmakjian limited Ms. Manning to lifting and pushing less than 15 pounds and he required that she be allowed to change positions frequently. Dr. Akmakjian added that he believes that Ms. Manning is substantially incapacitated because she is unable to sit for greater than 15 minutes consecutively; she is unable to stand for greater than 20 minutes consecutively; she is unable to lift, carry, push or pull more than 15 pounds; she is unable to work above chest level repetitively; and she is unable to use bilateral hands and wrists repetitively.

11. Ms. Manning's testimony was credible and consistent with Dr. Akmakjian's report. Ms. Manning stated that, when she filed her application for a disability retirement, she was in constant pain and, as a result, she was unable to concentrate and could not engage in prolonged sitting. During her testimony, Ms. Manning had difficulty remaining seated and would stand up from time to time in an apparent effort to relieve her back pain.

Ms. Manning noted that she recently began treating with a psychological therapist to help her deal with the pain. She felt that this therapy helps her.

Ms. Manning's testimony about her difficulties was corroborated by testimony of her niece, Shannon Smith and her niece's boyfriend, Albert Pinchem.

12. Ms. Manning, Ms. Smith and Mr. Pinchem testified credibly. However, their testimony does not constitute credible medical evidence.

The Testimony of Alice Martinson, M.D.

13. Alice Martinson, M.D. examined Ms. Manning as an independent medical evaluator and testified at the hearing. Dr. Martinson received her medical degree from George Washington University in 1967. Dr. Martinson completed a residency in orthopedic medicine at the Naval Hospital in San Diego in 1972. She then completed a fellowship in pediatric orthopedic at the University of Southern California School of Medicine in 2004. Dr. Martinson is board certified in Orthopedic Surgery, is certified by the American Board of Independent Medical Examiners and is certified as a Qualified Medical Examiner in California. At present she conducts independent medical evaluations for workers compensation, social security, and personal injury claims.

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[1] Lumbar discogenic disease involves the loss or the gradual deterioration of the discs that separate the large vertebrae in the lower back. Cervical facet disease is a syndrome in which the synovial joints in the neck cause pain. Right shoulder impingement is a clinical syndrome which occurs when the tendons of the rotator cuff muscles become irritated and inflamed. Right ulnar neuropathy is a disorder involving the ulnar nerve. Epicondulitis is a type of tendonitis, a swelling of the tendons, that causes pain in the elbow and arm. Tethered cord syndrome is a condition where the spinal cord is pulled at the base of the spinal canal, like a tethered cord.

14. Dr. Martinson concluded that Ms. Manning's symptoms did not preclude her from working as a Case Records Analyst. Dr. Martinson arrived at this conclusion after she reviewed Ms. Manning's medical records and reports from a numerous medical providers, Dr. Akmakjian's reports, two MRIs with images, Ms. Manning's work history, and the Case Records Analyst job description. Dr. Martinson also thoroughly examined Ms. Manning's shoulders, elbows, wrists and hands on July 21, 2012.

Ms. Manning told Dr. Martinson that sometime in 2004 she started having bilateral hand pain with some numbness and tingling in the fingers. She said she was working in a word processing position and she received physical therapy, acupuncture and some injections. Ms. Manning continued working.

On July 27, 2010, Ms. Manning said that she fell flat on her back at work. About three weeks after her fall, she started to feel pain "everywhere." She now has pain in her neck that radiates numbness and tingling to her extremities. She has pain in the medial aspect of her elbow. She has constant back pain that radiates into her thighs and causes her thighs to become very hard. She said the persistent hand pain is horrible and she is not able to hand write for very long. She said her pain is around the base of her thumbs. Ms. Manning takes Norco, a muscle relaxant, gabapentin and Ambien for sleep.

Based on the physical exam of Ms. Manning she performed, and the medical records and diagnostic reports she reviewed, Dr. Martinson believed that Ms. Manning's pain complaints were out of proportion to the medical evidence. Dr. Martinson diagnosed Ms. Manning with somatoform pain disorder and anatomic irregularity of the fourth sacral segment. This anatomic irregularity did not justify Ms. Manning's complaints, according to Dr. Martinson. Dr. Martinson also noted that the testing did not reveal that Ms. Manning had ongoing carpal tunnel syndrome.

Dr. Martinson emphasized that no objective anatomic abnormalities, or anatomic problems, would prevent Ms. Manning from doing her job based on her review of the diagnostic testing.

Specifically, Dr. Martinson observed that Ms. Manning flinched and cried in pain when she lightly touched her back. But, when she distracted Ms. Manning, Dr. Martinson was able to exert a substantial amount of manual stress on her thumb joints without a pain reaction. Dr. Martinson also noted that the MRI studies and images revealed no abnormalities in Ms. Manning's lumbar and cervical spine. Dr. Martinson commented that there were only miniscule bulges in the cervical spine without nerve involvement. She found this significant because this area is where most of the motion relating to Ms. Manning's pain complaints originates. She also found it significant that Ms. Manning tested negative for ankle clonus, in particular with respect to whether Ms. Manning has tethered cord syndrome as was suggested by Dr. Akmakjian.

In reaching her conclusions, Dr. Martinson disagreed with Dr. Akmajian that Ms. Manning had discogenic disease. She did not change her opinion after she reviewed Dr.

Akmajian's reports, including the MRIs with images, that Ms. Manning provided at the hearing.

Evaluation of the Evidence

15. A preponderance of the competent medical evidence did not establish Ms. Manning's right to receive a CalPERS disability retirement.

A Case Records Analyst's work requires prolonged sitting and a measure of concentration sufficient to respond to questions from court personnel, inmates, co-employees, and supervisors.

Ms. Manning testified credibly that the pain she experienced prevented her from performing the usual and customary duties of a Case Records Analyst when she applied to CalPERS for a disability retirement. However, her testimony does not constitute competent medical opinion.

By contrast, Dr. Martinson's testimony qualifies as competent medical opinion. She reviewed numerous records, studies and reports in reaching her opinions, and she thoroughly examined Ms. Manning. Based on the objective medical evidence in the record, Dr. Martinson determined that Ms. Manning could perform the usual and customary duties of a Case Records Analyst.

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 21150 provides in part:

> (a) A 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, unless the person has elected to become subject to Section 21076 or 21077. . . .

4. Government Code section 21156, subdivision (a), provides in part:

> (a)(1) If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability . . .
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> (2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process. . . .

Administrative Hearsay

5. Where Government Code section 11513 is applicable, as it is in this matter, the function of hearsay as substantial evidence is delimited by Government Code section 11513, subdivision (c), which declares that hearsay, unless admissible over objection in civil actions, shall not be sufficient in itself to support a finding. (*Carl S. v. Commission for Teacher Preparation & Licensing* (1981) 126 Cal.App.3d 365, 371.)

Competent Medical Opinion

6. Ms. Manning's testimony, together with that of Ms. Smith and Mr. Pinchem, do not constitute competent medical opinion. Dr. Akmajian's reports which Ms. Manning offered into evidence to support her claim of disability were inadmissible hearsay. Putting aside for the moment the lack of authentication, Ms. Manning did not establish any legal basis for the admission of those documents over objection in a civil action; thus, the reports do not constitute competent medical opinion sufficient to support a factual finding related to her disability.

Even if these reports could be considered as evidence, Dr. Akmajian's opinions are not substantiated by medical evidence and appear to be based on Ms. Manning's subjective pain complaints.

In contrast, Dr. Martinson's findings constitute competent medical evidence and are, further, substantiated by the medical evidence. She based her conclusion that the objective medical evidence did not support Ms. Manning's complaints on numerous medical sources, including medical information Ms. Manning supplied at the hearing.

Appellate Authority

7. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his usual duties. When an applicant can perform his customary duties, even though doing so may be difficult or painful, the 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.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.)

Cause Exists to Deny the Application

8. Cause does not exist to grant the application for a disability retirement filed by Paulette Manning. A preponderance of the competent medical evidence did not establish that Ms. Manning suffered from a physical or mental condition of a permanent or extended and uncertain nature that resulted in her substantial inability to perform the usual and customary duties of a Case Records Analyst for the California Department of Corrections and Rehabilitation when she filed her application for a disability retirement.

ORDER

The application for a disability retirement filed by Paulette D. Manning with the California Public Employees Retirement System is denied.

DATED: March 4, 2014

ABRAHAM M. LEVY
Administrative Law Judge
Office of Administrative Hearings