

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:

Case No. 2011-1023

SHARON L. FRANKLIN,

OAH No. 2013080667

Applicant,

and

COALINGA-HURON UNIFIED SCHOOL
DISTRICT,

Respondent.

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Fresno, California, on May 20, 2014.

Preet Kaur, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Applicant Sharon L. Franklin did not appear.

Respondent Coalinga-Huron Unified School District, did not appear.

The record was closed and the matter was submitted on May 20, 2014.

PROCEDURAL AND JURISDICTIONAL FINDINGS

1. At all times relevant to this Decision, Sharon L. Franklin (applicant) was employed by the Coalinga-Huron (the District), as a Senior Administrative Clerk.

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

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

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of her application (below), applicant had the minimum service credits necessary to qualify for a service retirement, and has been receiving a service retirement benefit from CalPERS since 2010.

3. Applicant applied for a service retirement pending industrial disability retirement from CalPERS approximately May 19, 2010. Applicant's effective retirement date for service was March 1, 2010, and she has been receiving a service retirement allowance from CalPERS since that date. At the time applicant signed and filed the application, she was employed by the District as a Senior Administrative Clerk. Applicant's last day of work in CalPERS covered employment was May 17, 2010. It was not clear in the evidence how much CalPERS covered employment service credit applicant had earned at the time of her last day of work.

4. Applicant claimed in the application to be permanently disabled from the performance of her duties as a Senior Administrative Clerk with the District due to "small strokes, hole in heart, liver problems, white matter in brain. Started about a year ago."

5. Applicant's description in her application of her work limitations as a result of her claimed disabling medical conditions were "Loss of memory, fall a lot. Not so good with handwriting. Having trouble with organizing and motor skills."

6. Applicant submitted medical records and other documentation in support of her claim to CalPERS.

7. Applicant's medical records were evaluated by the staff of CalPERS' Benefits Services Division, and were submitted to Samuel B. Rush, M.D., a Board certified Internal Medicine specialist, retained by CalPERS to perform an Independent Medical Evaluation (IME). Dr. Rush performed his IME on January 10, 2011 and submitted the report of his examination to CalPERS' Benefits Services Division for review.

8. CalPERS' Benefit Services staff reviewed the medical and other reports submitted by applicant, as well as Dr. Rush' IME report.

9. CalPERS notified applicant in writing on February 18, 2011, that she had failed to produce sufficient persuasive medical evidence to demonstrate that she was substantially incapacitated from her duties as a Senior Administrative Clerk with the District, and that therefore her application for a disability retirement allowance was denied. Applicant's service retirement benefit continued unimpaired.

10. Applicant timely appealed the CalPERS determination and denial of her application.

11. Mary Lynn Fisher, Chief, Benefits Services Division of CalPERS, made the allegations contained in the Statement of Issues in her official capacity and caused it to be filed. The Statement of Issues was made on February 14, 2012. 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.

12. Notice of the date, time and place of the evidentiary hearing was duly given to applicant and respondent the District. No appearance was made on behalf of applicant or the District. At the commencement of the evidentiary hearing, counsel for CalPERS advised that she had received a phone message from applicant that applicant was "not coming," to the evidentiary hearing, and that she "just wanted to stay on her service retirement." There was no information provided regarding whether applicant's claimed disabilities were a factor in her failing to appear. In the absence of any better information regarding applicant's intention to pursue her request for hearing, the matter proceeded as a default with respect to applicant and the District, pursuant to the provisions of Government Code section 11520.

FACTUAL FINDINGS

USUAL AND CUSTOMARY DUTIES

1. Applicant's job description with the Coalinga-Huron Unified School District as a Senior Administrative Clerk requires her to perform, under general supervision, the more difficult clerical tasks in the school office related to attendance and record-keeping, and related work as required. Essential duties and qualifications include the following:

- a. Acting as a receptionist, screening telephone calls and visitors to a school site;**
- b. Obtaining and giving out information to various parties concerning school or office functions requiring detailed knowledge of standards, procedures, programs and policies;**
- c. Scheduling appointments, arranging meetings in transmitting confidential or controversial information;**
- d. Maintaining attendance records and compilations of daily master attendance lists and monthly attendance reports;**
- e. Checking absences, recording admit slips and absence excuses;**
- f. Determining reasons for unexplained absences and recording extended absences;**
- g. Independently compose correspondence requiring the exercise of discretion and a broad understanding of applicable rules and regulations;**
- h. Establishing and maintaining confidential and complex files;**

- i. **Compiling and typing various detailed reports and statistical data from independent research or information supplied by administrators;**
- j. **Receiving, counting and recording monies;**
- k. **Assisting in enrollment of students, posting records, and handling grade cards;**
- l. **Receiving, reading, sorting, routing and responding to mail;**
- m. **Handling financial accounting including budget, student body funds and related financial matters;**
- n. **Handling clerical details for specialized programs such as driver training, athletic eligibility and so forth;**
- o. **Ordering and issuing supplies and equipment;**
- p. **Supervising student assistants in the office;**
- q. **Operating various office equipment and machines; and**
- r. **Graduation from high school, the ability to type at a corrected rate of 50 words per minute from clear copy, and four years of increasingly responsible clerical experience.**

2. **The physical requirements of applicant's job required applicant to constantly sit, engage in fine manipulation, and repetitive use of her hands, including constant keyboard and mouse use. She is frequently required to stand, bend from her neck, waist, and back and to reach and grasp. She is occasionally required to walk, kneel, squat, reach above her shoulders, push or pull, lift up to 25 pounds, walk on uneven ground and drive.**

INDEPENDENT MEDICAL EXAMINATION (IME)

3. **Dr. Rush reviewed and considered both applicant's Job Description and the Physical Requirements Form referenced above in performing his IME. At the time of the IME, in January, 2011, applicant reported having trouble concentrating, and reported developing swelling of her extremities. She reported that she had gone to a referral clinic in Santa Barbara where a complete evaluation showed that she had cirrhosis of the liver, but there was no etiologic diagnosis that could be found to explain the cirrhosis, and she has no history of alcoholism. She also has no history of any other liver difficulties. She also reported that she has Diabetes mellitus, Type II currently requiring insulin. Applicant also reported a long history of chronic headaches, dating back more than 20 years, to the time that she was in high school, and her taking of analgesics of various kinds in an attempt to treat the headaches and pain. She also reported a heart murmur, describing a "hole" in her heart, but that the heart hole was too small to require surgery. She reported awaiting consultation with**

the liver specialist at University of California, San Francisco School of Medicine, where she is waiting to be placed on a liver transplant list.

4. When asked about her current complaints, applicant reported to Dr. Rush that she is "actually improving," and her diabetes is under better control. She reported she was on medication for depression, but stopped taking it and still feels depressed at times. She was under medical care and treatment for neck pain, insomnia, degenerative arthritis of her neck and was receiving physical therapy for the arthritis.

5. Dr. Rush's diagnostic impressions following his IME were as follows:

a. Cirrhosis of the liver with splenomegaly, esophageal varices seen on esophagoscopy, and peripheral edema. Etiology is not clear, but it is strongly suspected that this is from chronic analgesic use;

b. Diabetes mellitus, Type II, currently insulin-dependent. The applicant stated her diabetes was under control;

c. Chronic headaches;

d. Trouble concentrating, much improved. Mental status examination appeared normal;

e. Degenerative joint disease of the neck with decreased range of motion;

f. History of high blood pressure, good control on current medications. Blood pressure is 130/80, pulse is 80 and regular;

g. Suspect depression, but normal mental status;

h. History of tremor, not clinically apparent upon examination; and

i. Heart murmur probably benign. There are some records that indicate echocardiogram noting significant abnormalities, probably murmur.

6. Dr. Rush was furnished additional records and was asked to render a supplemental opinion on IME following review of the records. Dr. Rush issued a Supplemental Report on August 20, 2012, after having reviewed the additional medical records. The records included the results of a stress myocardial perfusion scan, done in October 2009, showing abnormal electrocardiogram, shortness of breath and bundle branch block. But the myocardial perfusion scan was deemed within normal limits. In addition, there were records regarding an MRI scan of the brain, and electroencephalogram, testing for patent foramen ovale, and abdominal CT scan, a carotid Doppler flow study, a neurological evaluation, and the result of liver biopsies.

7. Following the review of these additional records, which largely covered the period of 2009 and 2010, Dr. Rush concluded that there was nothing in the additional medical records that would cause him to change his medical opinions expressed in his January 10, 2011 IME report. Specifically, he stated that there are no specific job duties that he felt she was unable to perform as a result of her medical conditions.

8. In summary, Dr. Rush described applicant is having cryptogenic cirrhosis of the liver, which he suspected was caused by long term analgesic abuse. He noted extensive records that he reviewed showing some abnormal liver function on tests, but jaundice was not noted and her electrolytes were normal. Dr. Rush observed that applicant's mental status appears to be much improved from what is reported in her history. She showed no orthopedic limitations. Dr. Rush concluded applicant could return to her work as a Senior Administrative Clerk with the school district. He did note that the long-term prognosis for her cirrhosis of the liver is poor, and at times she may have difficulty performing particular job duties, dependent on the etiology of the cirrhosis, but there is not enough information at the time of his examination to make a definite long-term prognostic estimate. Dr. Rush opined in his testimony at the hearing that applicant is not substantially incapacitated for the performance of her duties as a Senior Administrative Clerk.

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."¹ 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.² An applicant for a CalPERS disability retirement bears the burden of proof and the burden of going forward with the evidence.³ *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.⁴

¹ *McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, 1051.

² *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 (*Mansperger*).

³ *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.

⁴ *Mansperger, supra.*

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.”⁵

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 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....”⁶

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.”⁷ *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.⁸ 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 21156.⁹

6. Ms. Franklin failed to appear at the evidentiary hearing on her appeal of the CalPERS determination to deny her application for disability retirement. Good cause did not appear to excuse her failure to appear and present evidence in support of her application. The matter was conducted as a default.¹⁰

7. The applicant for disability retirement must prove that he or she is “substantially incapacitated” from the performance of his or her usual and customary duties. Failing this, there is no secondary inquiry. Ms. Franklin failed to appear at the evidentiary hearing. No evidence in support of her application was presented. Thus, Ms. Franklin failed

⁵ Government Code section 20026, in pertinent part.

⁶ Government Code section 21156, in pertinent part.

⁷ *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App. 3d 873, 876.

⁸ *Hosford v. Board of Administration* (1978) 77 Cal.App. 3d 854, 861-863.

⁹ *Id.*

¹⁰ Government Code section 11520.

to produce evidence required to meet the burden of proof she must carry to prevail in her appeal. The appeal must be dismissed for failure of proof.

ORDER

The application of Sharon L. Franklin 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 a Senior Administrative Clerk for the Coalinga-Huron Unified School District, is AFFIRMED.

DATED: June 21, 2014



STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings