

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:

KAREN L. HODGES,

Respondent,

and

EMPLOYMENT DEVELOPMENT
DEPARTMENT,

Respondent.

Case No. 2010-0688

OAH No. 2011090110

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on June 13, 2014, in Sacramento, California.

JeanLaurie Ainsworth, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Karen L. Hodges was present and represented herself.

Kristi Beckley, Senior Staff Counsel, represented the Employment Development Department (Department).

Evidence was received, the record was closed, and the matter was submitted for decision on June 13, 2014.

ISSUE

The issue on appeal is whether, on the basis of orthopedic (neck and shoulder) and neurological (headaches) conditions, respondent is permanently disabled or incapacitated from performance of her duties as a Personnel Specialist for the Department.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED July 14, 2014
Sharon Moore

PROCEDURAL FINDINGS

1. On October 26, 2009, David Keenan, Chief of the Human Resource Services for the Department signed and thereafter filed with CalPERS an application for disability retirement on behalf of respondent. At the time, respondent was employed as a Personnel Specialist with the Department. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150.
2. On the application, the Department claimed that respondent suffered a “workers compensation injury” to her left shoulder, neck and head, while she was setting up a table and chairs at work. The application further states that respondent suffered “shoulder pain, neck pain and chronic migraines.”
3. CalPERS obtained reports prepared by Jonathan Rutchik, M.D., Wenchiang Han, M.D., Amir Jamali, M.D. and Steven McIntire, M.D., concerning respondent’s orthopedic and neurological conditions. After reviewing the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of her duties as a Personnel Specialist at the time the Department filed an application on her behalf.
4. On August 2, 2010, CalPERS notified respondent and the Department that the application for disability retirement was denied. Respondent was advised of her appeal rights. Respondent filed an appeal and request for hearing by letter dated August 22, 2010.
5. On August 31, 2011, Mary Lynn Fisher, in her official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, signed and thereafter filed the Statement of Issues.

FACTUAL FINDINGS

Background

1. In April 1994, respondent was hired by the Department. In the morning of January 21, 2003, respondent was setting up a conference room to get it ready for a training presentation. At one point as respondent moved a conference table, she felt something pull on the left side of her neck and she felt a sharp pain. Respondent immediately reported the injury to her supervisor and placed ice on her neck. Respondent finished her work day in pain. That evening she sought treatment at an urgent care clinic. Respondent was prescribed a muscle relaxant and placed on modified duty.
2. At the time of respondent’s injury she was an Office Technician. Eventually, to accommodate respondent’s medical restrictions, the Department moved respondent into the Personnel Specialist classification and she began to work in Human Resource Services. Respondent worked in this position until approximately February 2009, when she was taken off work by her worker’s compensation doctor. Respondent was 46 years old.

Duties of a Personnel Specialist

3. As set forth in the Department's position statement, the duties of a Personnel Specialist for the Department entail personnel and payroll duties, of which 50 percent of the time respondent was expected to process payroll and personnel transactions. Respondent was required to interpret and apply laws, rules and policies of the State Personnel Board, State Controller's Office, CalPERS, the Department of Personnel Administration and the Department. Approximately 20 percent of the time, respondent was required to act as a consultant for employees who had questions or problems related to personnel or payroll transactions. Approximately 15 percent of the time, respondent was required to audit monthly attendance reports submitted by Department units to ensure that the reports were complete and accurate. The remaining time, respondent was required to maintain a roster of employee leave records, track positions within the Department, verify transfer eligibility of potential hires and participate in special projects.

4. On March 29, 2010, the Department submitted to CalPERS a completed "Physical Requirements of Position/Occupational Title" (Physical Requirements) for respondent's position, signed by Lori Trejo, Personnel Specialist II, with the Department. At hearing, Ms. Trejo testified that she supervised respondent until December 2008, when Ms. Trejo was promoted to another position.

According to the Physical Requirements, when working as a Personnel Specialist, respondent: (1) frequently (three to six hours a day) sat, bent her neck, engaged in fine manipulation, repetitively used her hands, and used a mouse and a keyboard; (2) occasionally (up to three hours) stood, walked, kneeled, squatted, bent at the waist, twisted her neck and waist, reached above and below her shoulders, pushed and pulled, power and simple grasped, and lifted between one and 10 pounds; and (3) never ran, crawled, climb, lifted over 11 pounds, worked on uneven ground, drove, worked with heavy equipment, was exposed to excessive noise, extreme temperatures, dust, gas, fumes or chemicals, worked at heights, operated foot controls or repetitive movement, used special visual or auditory protective equipment, or worked with bio-hazards.

At hearing, Ms. Trejo testified that Personnel Specialists work at a computer approximately 65 to 70 percent of the time.

Expert Opinions

5. CalPERS retained two doctors to conduct independent medical evaluations (IME) of respondent. Steven L. McIntire, M.D., Ph.D. conducted an evaluation of respondent's neurological condition and Amir Jamali, M.D. conducted an evaluation of respondent's orthopedic conditions. Both doctors prepared reports and testified at hearing.

STEVEN L. MCINTIRE, M.D., PH.D.

6. Dr. McIntire obtained his medical degree and Doctor of Philosophy degree in neuroscience in 1992 from Harvard Medical School. He is a Diplomate of the American Board of Psychiatry and Neurology and a consulting professor at the Stanford University Medical Center, Department of Neurology.

7. On May 18, 2010, Dr. McIntire conducted an IME of respondent. Dr. McIntire reviewed respondent's duty statement and the physical requirements of her position. He also interviewed respondent, obtained a personal and medical history, conducted physical and neurological examinations, and reviewed respondent's medical records related to her neurological condition.

8. Respondent provided Dr. McIntire information about her January 21, 2003, work injury to her neck and her history of migraines. She informed Dr. McIntire that her migraine headaches started within a couple of months after her work injury. She attended physical therapy after the injury, but she felt there was no improvement. She described her headaches as occurring behind her left eye and described the pain as a sensation of a "hot poker behind her eye." There was no change in the amount of pain she suffered since the headaches started back in 2003. She estimated that she had headache pain three times per day and that the pain lasted two to three hours. She also reported nausea, photophobia and phonophobia with the headaches.

Respondent reported that Dr. Han, a neurologist, prescribed her medication for her migraines. She took Vicodin or Dilaudid for pain and approximately once a month she went to the emergency room for a morphine injection. Respondent estimated that she used narcotic medication for the pain every day and used 30 tablets of Dilaudid every two months. Respondent reported that she tried different migraine medications, without substantial improvement.

9. Dr. McIntire conducted a neurological examination of respondent that included a mental status, cranial nerve, motor, sensory, reflexes, cerebellar, and gait. The purpose of the neurological examination was to test respondent's nervous system to find any abnormalities that may provide insight into her reported symptoms. Dr. McIntire found no significant neurological deficits. Respondent's neurological examination was normal.

10. Dr. McIntire reviewed respondent's medical records related to her work injury from Anthony Tseng, M.D., Michael Levin, M.D., Jonathan Rutchik, M.D., Wenchiang Han, M.D., Ramila R. Gupta, M.D., Sutter Medical Group, and emergency room records from Rideout Memorial Hospital.

Respondent's medical records indicate that after her work injury, she attended physical therapy from February 2, 2003, until approximately September 2003, with some improvement. A radiographic study of respondent's cervical spine was conducted in April 2003, which was normal. A magnetic resonance imaging (MRI) of respondent's cervical

spine was conducted in May 2003. Thereafter, Dr. Tseng diagnosed respondent with cervical and shoulder sprain and cervical disc herniation. She was referred to Sherry Taylor, M.D. for a neurosurgical evaluation. An electrodiagnostic report prepared by Dr. Han on July 10, 2003, found that respondent's electrophysiologic findings were normal and there were no findings to indicate a cervical radiculopathy.¹

Progress notes from September 2004 through July 2006, indicate respondent reported that she had recurrent migraine headaches off and on for a number of years. She reported that the headaches were well maintained on her medication, but she would have occasional "breakthrough" headaches. Respondent reported that her headaches were more severe after her January 2003 work injury. The progress notes indicate that respondent was told that there was no evidence that a neck injury causes migraine headaches.

On July 19, 2006, respondent saw Dr. Rutchik, a Qualified Medical Evaluator (QME) assigned to evaluate respondent's worker's compensation claim. Respondent reported to Dr. Rutchik that she had headaches two to 12 days per month, and that she could not work when she had the headaches. Two times in the prior eight months she had to go home from work due to a headache. In July 2006, she missed five days of work because of her headaches.

In June 2007, a computerized tomography (CT) of respondent's sinuses was performed. There was no nasal passage obstruction. Respondent's headaches were not found to be related to any underlying sinus pathology.

Respondent continued to report recurrent headaches through 2007 and 2008. The medical records indicate that in February 2008, respondent was notified that she would benefit from fewer medications. In June 2008, Dr. Rutchik noted that respondent's medications were Topamax, Tenormin, and Lyrica. Respondent also estimated that she took Phenergan five to eight times per month. She also used two bottles of Stadol nasal spray per month. Dr. Rutchik noted that respondent had a history of migraine headaches and also diagnosed her with tension headaches from spasms of the trapezius and paraspinal muscles. Dr. Rutchik performed an electrodiagnostic study of respondent, which was normal.

On July 22, 2008, Dr. Han noted that respondent was prescribed Oxycontin and used Vicodin "almost every other day." She was prescribed approximately six tablets of Vicodin per day. Dr. Han suggested to respondent that she be admitted to the hospital to help her to stop taking narcotic medication, as he was concerned that she was experiencing "overuse" headaches. Respondent told Dr. Han that her home situation would not allow her to be in the hospital. She was a single mother. Respondent continued to take narcotic medication.

In May 2009, a second MRI of respondent's cervical spine was performed. There was no significant large disc herniation or spinal cord compression.

¹ The Merriam-Webster online medical dictionary defines "radiculopathy" as any pathological condition of the nerve roots.

In July 2009, Dr. Han again suggested respondent attend an inpatient detoxification program. He also asked her to consider gradually tapering off the narcotic medication. Respondent continued to use narcotic medication through May 2010.

11. Dr. McIntire diagnosed respondent with a "history consistent with migraine headaches and a component of tension headaches." He determined that respondent's primary issue was medication overuse or "rebound headaches." Dr. McIntire explained that there are certain medications that if used in high frequency will eliminate headache pain, but will cause another headache. The body becomes dependent on the medication being present, and when the medication wears off, it triggers a migraine headache. Some of the narcotic medications that respondent was taking were "notorious" of causing rebound headaches. Dr. McIntire determined that "with appropriate tapering and highly restricted use of narcotic medications" respondent would be "expected to have substantially fewer headaches."

12. Dr. McIntire found no objective neurological deficits of significance. In response to the question posed by CalPERS concerning whether there were specific job duties that respondent was unable to perform because of a physical or mental condition, Dr. McIntire answered: "No, from a neurological perspective, it is expected that the [respondent] would be able to perform her job duties." Dr. McIntire also answered "No" to the question of whether respondent was "substantially incapacitated for the performance of her usual duties."

AMIR JAMALI, M.D.

13. Dr. Jamali obtained his medical degree 1995 from Medical College of Virginia. He is board certified in Orthopedics. He currently runs his own medical clinic.

14. On May 18, 2010, Dr. Jamali conducted an IME of respondent. Dr. Jamali reviewed respondent's duty statement and the physical requirements of her position. He also interviewed respondent, obtained a personal and medical history, conducted a physical examination, and reviewed respondent's medical records related to her orthopedic conditions.

15. Respondent provided Dr. Jamali information about her January 21, 2003, work injury to her neck and her history of migraines, similar to the information she provided to Dr. McIntire. Respondent described her migraine pain levels as between six and 10 out of 10. She described her neck pain levels as between five and 10 out of 10. She reported that she had occasional numbness on her left side. She reported that she felt weaker on her left side and that she was not able to grip as strongly as she did before her injury.

16. Dr. Jamali conducted a physical examination of respondent. Dr. Jamali noted that her neck was without deformity. There was a slight degree of increased spasm in the left trapezius region compared to the right side. The range of motion for her neck was "80 percent of normal flexion, approximately 50 percent of normal extension, with limitation of

pain...” Neck rotation was “80 percent on the right and 100 percent on the left.” The neck tilt was 80 percent on the right and 100 percent on the left.”

The grip strength measurement test showed that respondent’s left side was weaker than her right side by approximately 33 percent. Dr. Jamali testified that he typically expects a 10 to 15 percent difference in grip strength from a normal side compared to the effected side. Dr. Jamali found no muscle atrophy in respondent’s arms.

Respondent’s shoulder examination revealed that the left and right side were not tender. Respondent had full range of motion and there was no evidence of impingement signs.

17. Dr. Jamali reviewed respondent’s medical records related to her work injury from Anthony Tseng, M.D., Sierra Sports Rehabilitation, Sherry Taylor, M.D., Michael Levin, M.D., Jonathan Rutchik, M.D., Wenchiang Han, M.D., Ramila R. Gupta, M.D., Sutter Medical Group, and emergency room records from Rideout Memorial Hospital.

On April 11, 2003, Dr. Tseng noted that “...two months post injury, she is showing some improvement with therapy, but continues to have neck and shoulder pain. She has had approximately 20 sessions of therapy.” Dr. Tseng recommended modified duty and authorization for an MRI of respondent’s cervical spine, which occurred in May 2003.

In May 2003, respondent met with Dr. Taylor to discuss the results of her MRI, which showed loss of cervical lordosis. Dr. Taylor noted that she did not see “...distinct neural foraminal narrowing at the level and the nerve root appears to exit without difficulty.” Dr. Taylor recommended that respondent proceed with “conservative treatment” for the muscle spasm and recommended an electromyogram/nerve conduction study to “... rule out C7 radiculopathy.” The nerve conduction study was performed by Dr. Han on July 10, 2003. The findings were normal.

On January 28, 2004, respondent had a MRI of her cervical spine. Mild disc bulges were seen at C3-4 through C6-7, without significant stenosis. Dr. Taylor described the MRI as showing “...very mild degenerative changes...”

On March 17, 2009, respondent had another MRI of the cervical spine. The findings were not “...significantly changed, compared to the prior MRI of 2004.”

18. Dr. Jamali’s impressions were that respondent had “chronic left trapezius/paraspinal muscle strain” and “mild cervical degenerative disc disease.” He determined that respondent’s “...neurologic complaints were not related to her cervical spine or any evidence of radiculopathy.”

19. In response to the question posed by CalPERS concerning whether there were specific job duties that respondent was unable to perform because of a physical or mental condition, Dr. Jamali answered that respondent:

...is able to perform her specific job duties related to her physical impairment on an orthopedic basis. She has very good strength and range of motion of the cervical spine, which would allow her to do the very limited physical demands of the job, as detailed in her job description.

Dr. Jamali also determined that respondent was "not substantially incapacitated for the performance of her usual duties based on neck and shoulder issues."

Respondent's Evidence and Worker's Compensation Records

20. Respondent testified that in the months after her injury, she started to get migraines. She testified that she has "tried everything." In September 2013, based on the advice of Dr. Rutchik, she entered a five-day "detox" program and was taken off all narcotic medication. She has not taken narcotic medication for nine months. She still gets migraine headaches every day. The pain makes her nauseous and light and sound make the migraines worse. When respondent has a migraine, she must lie down in a dark room. Respondent testified that as a result of her headaches, she is not the same person she was 11 years ago. She does not attend church, or listen to music. She rarely leaves the house.

21. Respondent does not believe she can work because she cannot concentrate or focus when she has headaches. The duties of a Personnel Specialist require her to concentrate and she is concerned that she will make a mistake. Respondent testified that her worker's compensation doctor told her that she could not return to work because of her headaches. Respondent has not seen her primary treating physician, David Miller, M.D., since November 2013, because she no longer has health insurance.

22. At hearing, respondent's sister Donna McAvoy testified that respondent was active prior to her work injury. Now, respondent sits in a dark house. She often misses family events because of her pain.

23. At the hearing, the Department submitted some of respondent's worker's compensation records and reports. Neither respondent nor the Department called any doctors to testify at the hearing. All of respondent's worker's compensation reports and records were admitted as administrative hearsay, and have been considered to the extent permitted under Government Code section 11513, subdivision (d).²

² Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Discussion

24. When all the evidence is considered, Dr. McIntire's and Dr. Jamali's opinions that respondent is not permanently disabled or substantially incapacitated from performance of the duties of a Personnel Specialist were persuasive. Respondent did not present competent medical evidence to support her disability retirement application. In the absence of supporting medical evidence, respondent's application for disability retirement must be denied.

LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21150, subdivision (a), which provides in pertinent part, that "[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..."

2. To qualify for disability retirement, respondent must prove that, at the time she applied, she was "incapacitated physically or mentally for the performance of his or her duties..." (Gov. Code, § 21156, subd. (a)(1).) As defined in Government Code section 20026,

"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. (Bolding added.)

3. "Incapacity for the performance of duty" under 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, 876.) Substantial inability to perform usual duties must be measured by considering applicant's abilities. Discomfort, which makes it difficult to perform ones duties, is insufficient to establish permanent incapacity from performance of one's position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) A condition or injury that may increase the likelihood of further injury, as well as a fear of future injury, do not establish a present "substantial inability" for the purpose of receiving disability retirement. (*Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal. App. 3d 854, 863-864.) As the court explained in *Hosford*, prophylactic restrictions imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature.

4. An applicant for disability retirement must submit competent, objective medical evidence to establish that at the time of application, she was permanently disabled or incapacitated from performing the usual duties of her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.) In *Harmon v. Board of Retirement*, the court found that a deputy sheriff was not permanently incapacitated from the performance of his

duties, because “aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for [the sheriff’s] condition are dependent on his subjective symptoms.”

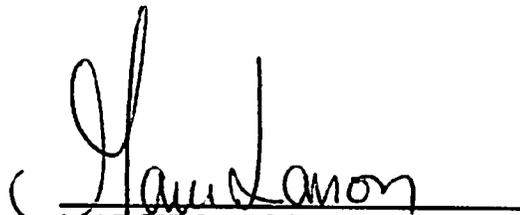
5. Findings issued for the purposes of worker’s compensation are not evidence that respondent’s injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at 207; *English v. Board of Administration of the Los Angeles City Employees’ Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego*, (1989) 214 Cal.App.3d 563.)

6. The burden of proof is on respondent to demonstrate that she is permanently and substantially unable to perform her usual duties such that she is permanently disabled. (*Harmon v. Board of Retirement of San Mateo County, supra*, 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) Although respondent asserted subjective complaints of disability, she did not present competent, objective medical evidence to establish that she was permanently disabled or incapacitated from performance of her duties as a Personnel Specialist for the Department at the time the disability retirement application was filed on her behalf. Therefore, based on the Factual Findings and Legal Conclusions, respondent’s disability retirement application must be denied.

ORDER

The application of Karen L. Hodges for disability retirement is DENIED.

DATED: July 9, 2014


MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings