ATTACHMENT E

THE PROPOSED DECISION

BEFORE THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Of: SUSAN HALE, Respondent, and CALIFORNIA DEPARTMENT OF MOTOR VEHICLES, Respondent.	Case No. 2010-0621 OAH No. 2013080915

PROPOSED DECISION

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in San Luis Obispo, California, on May 22, 2014.

Renee Salazar, Senior Staff Counsel, represented Petitioner Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Susan Hale (Respondent) represented herself.

Respondent Department of Motor Vehicles (DMV) did not appear at the hearing.

Petitioner seeks to deny Respondent's disability retirement application on grounds that the medical evidence does not support her claim of disability based on her orthopedic condition (bilateral hands, wrists, elbows, with numbness, pain and swelling). Respondent asserts that she is disabled for the performance of her duties.

Oral and documentary evidence and argument was received at the hearing and the matter was submitted for decision.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in his official capacity.

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2. At the time Respondent filed her application for retirement, she worked as a DMV field representative. By virtue of her employment, Respondent is a state miscellaneous member of CalPERS.

3. Respondent is 56 years old. She received a service retirement, effective March 1, 2008. On February 7, 2009, she filed an application for disability retirement, describing her disability as "Both right and left hands, wrists [and] elbows are affected, numbness, pain and swelling all the time." (Exh. 4, at p. 2.)

4. Respondent started working for DMV in May 1981, and her last day of work was in August 2003. She started as a receptionist before becoming a field representative. As a field representative, her responsibility increased over time and she performed numerous functions and did what was needed. Respondent worked at the counter attending to customers. She performed clerical functions, as needed. She entered data into the computer. She answered phones.

5. a. As set forth in the field representative Position Duty Statement, Respondent was responsible for interacting with members of the public, processing registration and license applications, collecting and processing payments, and preparing reports and other documents. The duties of the position are grouped into three categories. The "Registration Rating and Driver License Processing" duties were expected to consume approximately 75 percent of her time, the "Cashier and Auditing" functions about 23 percent of her time, and "Other Duties as Required" about two percent of her time.

b. The Physical Requirements Form submitted to CalPERS shows that Respondent was expected to use a computer keyboard or mouse occasionally, or up to three hours during any given day. Respondent was required to use her hands frequently, or between three and six hours each day. Lifting of up to 25 pounds was an occasional duty.

c. Respondent agreed that the Position Duty Statement and the Physical Requirements Form were those applicable to her position.

6. In September 2001, Respondent started having problems with her hands at work and sought treatment. In November 2002, she was evaluated by Michael Behrman, M.D. (Behrman), a board-certified orthopedic surgeon and hand specialist, who has remained her treating physician. She underwent right carpal tunnel release on August 27, 2003 and left carpal tunnel release on March 3, 2004. She underwent right ulnar nerve transposition at the elbow on October 27, 2004. In 2005, she was diagnosed with left ulnar compression at the elbow, and required surgery on August 16, 2006. In September 2008, Dr. Behrman treated Respondent for right thumb pain and bilateral medial elbow pain. In August 2009, Respondent required tenosynovectomy of the right small finger, from which she recovered.

7. In a statement dated May 12, 2014, submitted at the hearing, Dr. Behrman reported that he has treated Respondent since 2002 and that he has performed multiple upper extremity surgeries. Her condition has progressed to the point where she has complete ulnar

nerve dysfunction in the left arm. This is complicated by chronic problems in the right arm. In his opinion, the combination of conditions on the right side combined with the nerve dysfunction on the left side make it essentially impossible for Respondent to do repetitive activities such as using a keyboard or writing. Her pain is controlled by narcotics, which further limits her ability to function. Dr. Behrman noted that Respondent is capable of writing for no more than an hour with breaks every 15 minutes; she is currently able to do no more than a minimal amount of "keyboarding" with the left side; she is not able to do any lifting or carrying with the left arm. In Dr. Behrman's opinion, Respondent cannot perform the duties of her DMV job.

8. In a report dated October 8, 2005 and prepared in connection with pending workers compensation claims, Dr. Behrman described Respondent's work restrictions as follows: "[Respondent] should have permanent work restrictions which preclude repetitive or heavy gripping or squeezing with either hand[.] She should be limited to rapid repetitive activity such as keyboard activity and writing for no more than 4 hours a day with breaks every 30 minutes[.] She should be precluded from repetitive elbow flexion activities[.] Lastly, [Respondent] cannot return to her pre-injury job unless permanent job modifications are made, otherwise she is a Qualified Injured Worker[.]" (Exh. B, at p. 15.)

9. At the request of CalPERS, Respondent was examined by two independent physicians, Hans Barthel, M.D. (Barthel) and Alice Martinson, M.D. (Martinson). Dr. Barthel is board-certified in Internal Medicine and Rheumatology in Germany. Dr. Martinson is certified by the American Board of Orthopaedic Surgery. Both physicians examined Respondent and reviewed records from Respondent's workers compensation claims, including reports from Dr. Behrman. Drs. Behrman and Martinson did not testify at the hearing, but their reports were received as administrative hearsay pursuant to Government Code section 11513, subdivision (d), to explain or supplement other, direct, evidence. Dr. Barthel testified at the hearing and thus provided the only opinion evidence sufficient to support a finding. The opinions of Drs. Behrman and Martinson have been relied upon to the extent they support Dr. Barthel's opinions, but when in conflict with those of Dr. Barthel's, the opinions of Drs. Behrman and Martinson have not been relied upon.

10. a. Dr. Martinson examined Respondent on January 22, 2010. Respondent complained of intermittent swelling in both hands when she used them. Her fingers tingled when her hands became swollen. Respondent reported marked discomfort and tingling in the hands with forceful gripping of large and small objects, such as pens. She was able to tolerate about half-an-hour on the computer keyboard and mouse. She could write with her dominant right hand for about 10 minutes at a time. She had frequent nocturnal numbness and tingling. In the past few months, she had developed some pain with the active use of her left shoulder, which responded to a corticosteroid injection.

b. On physical examination, Dr. Martinson was able to see Respondent's well-healed surgical scars. Respondent had full range of motion on both shoulders, both elbows, both wrists, and all the small joints of the digits of both hands. There was no synovial thickening or increase in local heat in any of the accessible small joints in her upper extremities.

Sensation was normal throughout the fingers of both hands. There was no atrophy of the intrinsic muscles in either hand and no qualitative weakness of pinch, grip or opposition. There was no residual triggering of the right ring finger or any of the other digits. Respondent had no localized tenderness along the course of the first dorsal compartments on either side. Phalen's Test, a test involving flexing of the wrist, was positive in both hands at less than 10 seconds with numbness and paresthesias, or tingling, into the index and long fingers. Tinel's Test, a test involving tapping of the wrist, was mildly positive over both median nerves at the wrists with paresthesias into the palms. Pressure on the mid portion of both forearms produced paresthesias into the ring and little finger.

c. Dr. Martinson concluded that Respondent's ongoing complaints of intermittent hand swelling were suggestive of some sort of systemic condition beyond carpal tunnel. However, after review of Respondent's job duty statement and the physical requirements form, Dr. Martinson concluded that there was no specific job duty that Respondent was unable to perform because of a physical or mental condition.

11. a. Dr. Barthel examined Respondent on April 13, 2010. Respondent reported having hand pain since 2002. She reported pain after using her hands for a short period, which limited her activities around the house. On physical examination, Dr. Barthel noted that the musculoskeletal exam was normal for all large joints. There was no notable synovitis at any joints. Both shoulders had normal range of motion with normal internal and external rotation. Examination of the hands showed well-healed scars of the carpal tunnel and release operations. Phalen's Test was positive after 15 seconds with atypical numbness distribution to the fourth and fifth fingers. Tinel's Test was positive with mild shooting pain in index and third finger. Bilateral grip strength was normal and there was no sign of atrophy or weakness.

b. Dr. Barthel concluded that despite bilateral hand limitations, Respondent's was able to perform the duties of her position. Her job only required typing up to a total of three hours, and had minimal and intermittent hand and upper extremity demands. In Dr. Barthel's opinion, Dr. Behrman's work limitation of keyboard activity and writing of no more than four hours with small pauses was consistent with the job requirements and with his (Dr. Barthel's) opinion.

12. Respondent testified consistently with the symptoms she reported to Dr. Martinson. Her condition has continued to worsen and she can no longer perform most household chores. She requires assistance with many daily living activities, including dressing. She cannot write for more than a few minutes at a time.

13. The credible medical evidence and opinion establishes that Respondent is not incapacitated for the performance of duty by reason of her orthopedic condition. As established by the testimony of Dr. Barthel, which is fully corroborated by that of Dr. Martinson, at the time Respondent filed her disability retirement application, she was able to perform all the duties of her position. Dr. Barthel's testimony is also partially corroborated by that of Dr. Behrman, who opined that Respondent could perform repetitive keyboard activity and writing for up to four hours, with 30-minute breaks.

LEGAL CONCLUSIONS

1. Government Code section 20026 defines the following relevant terms: "'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."

2. Government Code section 21156 provides, in pertinent part: "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. . . ."

3. As set forth in factual finding numbers 1 through 13, Respondent has not established that she is incapacitated for the performance of duty within the meaning of Government Code sections 20026 and 21156. On the contrary, the competent medical evidence received at the hearing shows that, at the time she filed her disability application, Respondent was not incapacitated for the performance of her duties by reason of an orthopedic condition related to her upper extremities. Therefore, the application must be denied.

ORDER

The application for disability retirement of Susan Hale is denied.

DATED: 6/23/04

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings