

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Involuntary
Reinstatement from Disability Retirement of:

Case No. 2013-0573

OAH No. 2013090356

LESLIE GRAHAM,

Respondent,

and

DEPARTMENT OF CORRECTIONS AND
REHABILITATION, CALIFORNIA
STATE PRISON – LOS ANGELES
COUNTY,

Respondent.

PROPOSED DECISION

Michael A. Scarlett, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 30, 2014, in Los Angeles, California.

Cynthia A. Rodriguez, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Leslie Graham (respondent Graham), nor any representative on her behalf, did not appear at the hearing. Consequently, this matter proceeded as a default hearing under Government Code section 11520.

Patricia Castillo, Employer Relations Officer, appeared on behalf of the Department of Corrections and Rehabilitation, State of California (respondent CDCR).

Oral and documentary evidence was received and the matter was submitted for decision July 30, 2014.

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CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Aug. 26, 2014

C. Bodily

FACTUAL FINDINGS

1. Respondent Graham was employed by respondent CDCR as an office assistant typist at the California State Prison – Los Angeles County in Lancaster, California. By virtue of her employment, respondent Graham was a member of CalPERS and subject to Government Code section 21151.¹

2. On July 12, 2005, respondent Graham submitted an application for industrial disability retirement. Disability retirement was approved by CalPERS for respondent Graham, and her disability retirement became effective January 7, 2005, on the basis of orthopedic conditions (bilateral shoulders, bilateral upper extremities, cervical spine).

3. Respondent Graham was born on July 30, 1976. Under Government Code section 21060, she was under the minimum age for voluntary retirement for service applicable to members of her classification when she underwent a medical examination pursuant to the terms of Government Code section 21192, described below.

4. CalPERS may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service to undergo a subsequent medical examination. (Gov. Code, § 21192.) CalPERS requested respondent to undergo such examination, which she did on August 12, 2012. CalPERS obtained or received medical reports concerning respondent Graham's orthopedic conditions (bilateral shoulders, bilateral upper extremities, cervical spine) from competent medical personnel. Based on said medical reports, including an Independent Medical Examination (IME) and report prepared by orthopedic surgeon Dr. Edward Green III, M.D. dated August 29, 2012, CalPERS determined that respondent Graham was no longer permanently disabled or incapacitated from performance of her duties as an office assistant typist.

5. By letter dated May 6, 2013, CalPERS notified respondent Graham and respondent CDCR of its determination that respondent Graham was no longer disabled or incapacitated from performance of her job duties and informed both parties of their right to appeal the determination. On June 5, 2013, respondent Graham filed a timely appeal and request for hearing. On August 30, 2013, CalPERS filed an Accusation in its official capacity. Per the Accusation, respondent Graham's appeal is limited to the issue of whether she is disabled or incapacitated from performance of her usual job duties. If respondent Graham's orthopedic conditions no longer exist, CalPERS requests that she be reinstated to her former usual job duties with respondent CDCR as an office assistant typist.

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¹ Government Code section 21151, subdivision (a), provides: "Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service."

6. On February 24, 2014, CalPERS served respondent Graham with a Notice of Hearing for the July 30, 2014 hearing date. The notice was served on respondent Graham at her current address in Chesterfield, Virginia, the same address she provided CalPERS in her June 5, 2013 appeal and request for hearing. CalPERS served respondent Graham with proper notice of this hearing date. Respondent Graham failed to appear at hearing. Consequently, this hearing proceeded as a default under Government Code section 11520.

7. Respondent Graham began working as an office assistant typist with respondent CDCR in July 1997. In approximately May 1999, she began experiencing pain and swelling in her right wrist and forearm which she attributed to excessive typing. She was diagnosed with right carpal tunnel syndrome and underwent physical therapy for her symptoms in 1999. Shortly thereafter respondent Graham began experiencing pain in her left wrist, neck, upper back, and bilateral shoulders which she again attributed to excessive typing. In October 1999, she was seen for an initial orthopedic consultation. She was prescribed typing splints and medication to address her pain symptoms. On February 8, 2000, respondent Graham was walking into work and slipped on wet ground and fell landing on her back. She complained of immediate pain in her lower back as well as increased pain in her neck and bilateral shoulders. In March 2000, respondent Graham was diagnosed with acute lumbar sprain, and was prescribed medication, and was returned to work with restrictions.

8. Thereafter respondent Graham continued to experience bilateral wrists and hand pain, bilateral shoulder pain, and lower back pain from 2001 through 2004. She was taken off of work intermittently between 2001 and 2004 because of this pain. In July 2003, she was determined to be temporarily totally disabled and was taken off work with respondent CDCR. In July 2004 respondent Graham underwent right shoulder surgery followed by two months of physical therapy. In December 2004, she was declared "permanent and stationary" and she continued to complain of pain in the right shoulder, bilateral wrists, neck and back. Respondent Graham last worked for respondent CDCR in July 2003 and her last day on their payroll was December 31, 2004.

9. Respondent Graham's general duties as an office assistant typist were to provide clerical support to professional staff within respondent CDCR's Education Department. The office assistant typist performed routine tracking, filing, and maintenance of various education reports and assessment data and had to be able to type 45 words per minute, and read, interpret and process various assessment document scores, high school transcripts, General Education Development Certificates, and Permanent Class Records. The office assistant typist prepared correspondence, reports, charts, and graphs, and independently prepared non-routine typing assignments. The office assistant typist duties also included the following: typing memo, answering correspondence, taking messages, completing forms and purchase orders (30 percent); typing statistical reports for review (25 percent); maintaining educational logs (20 percent); answering office telephones, ordering supplies, problem solving, and processing mail (20 percent); and attending in/out service training (5 percent).

10. The physical requirements of the office assistant position, as reported by Patricia Castillo, the Employee Relations Officer for respondent CDCR, in pertinent part, are as follows: sitting and standing: occasionally up to 3 hours/frequently 3 to 6 hours; walking: occasionally up to 3 hours/frequently 3 to 6 hours; kneeling: rarely to occasionally up to 3 hours; climbing: occasionally up to 3 hours; squatting: occasionally up to 3 hours; bending (neck): frequently 3 to 6 hours; bending (waist): occasionally up to 3 hours; twisting (neck): occasionally up to 3 hours; twisting (waist): occasionally up to 3 hours; reaching (above shoulder): occasionally up to 3 hours; reaching (below shoulder): occasionally up to 3 hours; pushing and pulling: occasionally up to 3 hours; fine manipulation: frequently 3 to 6 hours; power grasping: occasionally up to 3 hours; simple grasping: frequently 3 to 6 hours; repetitive use of hand(s): frequently 3 to 6 hours; keyboard use: frequently 3 to 6 hours; mouse use: frequently 3 to 6 hours; lifting/carrying: occasionally up to 3 hours (0 to 10 lbs: frequently 3 to 6 hours), (11 to 25 lbs: occasionally up to 3 hours), (26 lbs and above: never); walking on uneven ground: occasionally up to 3 hours; exposure to extreme temperature, humidity, wetness: occasionally up to 3 hours; and exposure to dust, gas, fumes, or chemicals: occasionally up to 3 hours.

Evaluation by Dr. Edward Green III, M.D.

11. Respondent Graham was seen for an IME by orthopedic surgeon Edward Green III, M.D. on August 12, 2012, in Long Beach, California. Dr. Green is Board Certified in orthopedic surgery by the American Board of Orthopedic Surgeons, a Diplomate with the American Academy of Orthopedic Surgeons, and a Fellow with American Academy of Orthopedic Surgeons.

12. Dr. Green indicated in his August 29, 2012 IME report that respondent Graham complained of constant neck pain (aching) which varied with activity. She stated that she had radiation of pain to both shoulders, but there was no numbness or tingling. Respondent Graham told Dr. Green that her pain was aggravated by “keyboarding and writing” and that she used topical cream and heat applications to ease her pain. Respondent Graham also complained of constant right and left shoulder pain described as “aching, which varied with activity. She stated that she had radiation of pain down her right and left arms to the area of the wrists, that there was numbness and tingling in the right and left hands and fingers with locking of the right and left thumb. She noted “heaviness” of both arms. Respondent Graham stated that this pain was aggravated by keyboarding, reaching, mopping, sweeping, combing her daughter’s hair, and ironing and that topical cream and heat application improved the pain in both shoulders. She complained of constant bilateral wrist pain which varied with activity and she described the pain as “sharp and shooting.” There is radiation of pain to both forearms and numbness and tingling in both hands and fingers. Respondent Graham stated the bilateral wrist pain was aggravated with writing, typing, cooking, and any movement of the bilateral wrists. The pain was improved with braces and changes in activities. Finally, respondent Graham complained of constant lower back pain, described as “aching and pressure-type” pain, which varied with activity. She noted radiation of pain down the right leg to the knee area, but there was no numbness or tingling.

The lower back pain was aggravated with sitting, walking, bending, twisting, lifting and vacuuming. The pain was improved with changed positions, topical creams and heat applications.

13. Dr. Green's physical examination of respondent Graham, in pertinent part, revealed that she had good posture, her gait was normal, and that she could squat with difficulty because of low back pain. The physical examination also revealed the following:

Her range of motion for the cervical spine was flexion 50°, extension 60°, lateral bend 20° bilaterally, and rotation 85° bilaterally. There was some tenderness in the cervical spine region.

Her upper extremities examination revealed no heat, ecchymosis, erythema or swelling in the bilateral shoulders, bilateral elbows or bilateral wrists.

Her shoulder motion was as follows: active abduction 170° bilaterally, external rotation 60° bilaterally, internal rotation 70° bilaterally, forward flexion 170° bilaterally, extension 40° bilaterally, adduction 45° bilaterally.

Her elbow motion was as follows: extension 0° bilaterally, flexion 150° bilaterally, pronation 90° bilaterally, and supination 90° bilaterally.

Her wrist motion was as follows: palmar flexion 75° bilaterally, dorsiflexion 75° bilaterally, radial deviation 20° bilaterally, and ulnar deviation 30° bilaterally.

There was some tenderness bilaterally in respondent Graham's upper extremities, including tenderness of the trapezius, subacromioclavicular and acromioclavicular, and carpal tunnel, all bilaterally.

14. The x-rays taken by Dr. Green of respondent Graham's cervical spine showed normal lordosis, no disc space narrowing, no foraminal narrowing, no facet joint narrowing, and no spondylolysis. The x-rays of the right shoulder showed acromioclavicular joint narrowing, type I acromion and os acromiale. X-rays of the left shoulder showed minimal acromioclavicular narrowing, type I acromion, and os acromiale. X-rays of the bilateral wrists were normal.

15. After reviewing respondent Graham's medical history and records and performing an orthopedic physical examination, Dr. Green diagnosed respondent Graham with the following conditions: (1) cervical spine degenerative disc disease; (2) cervical spine degenerative osteoarthritis; (3) cervical spine myofascial strain; (4) bilateral shoulder impingement, post-operative pain right shoulder; (5) bilateral acromioclavicular degenerative osteoarthritis; (6) bilateral carpal tunnel syndrome; (7) lumbar spine degenerative disc disease; (8) lumbar spine degenerative osteoarthritis; and (9) lumbar spine myofascial strain.

16. Dr. Green indicated that there were specific job duties respondent Green was unable to perform such as prolonged sitting and posturing of the lumbar spine, cervical spine and upper extremities for prolonged typing, mousing, and data entry because of her continued pain residuals from cervical and lumbar myofascial sprains and strains as well as the bilateral shoulder impingement and bilateral carpal tunnel syndromes. He concluded that respondent Graham was not substantially incapacitated for performance her usual job duties. Although Dr. Green acknowledged that respondent Graham's "usual duties provide some soreness and stiffness and difficulty performing certain tasks," he nevertheless concluded that she was "not essentially incapable of performing the duties and not incapable of performing the essential job duties" of an office assistant typist. (Exh. 20, p. 14.) He noted that respondent's Graham's medical condition was "permanent" and that she had improved and responded to medical treatment, including injections and right shoulder surgery, and physical therapy. (*Id.*)

17. Dr. Green noted that his physical examination of respondent Graham did not support many of her subjective complaints throughout the examination. He stated that "[q]uite often her ranges of motion and provocative testing was negative compared to her description of symptomatology," and that her posture, demeanor, stance, and gait "did not indicate that there were limitations of range of motion in the cervical spine or lumbar spine or restrictions in motion in the upper extremities." (Exh. 20, p. 14.) Dr. Green noted that respondent Graham's neurodiagnostic testing of the upper extremities was negative, and that the MRI findings of the cervical spine and right shoulder "were also not consistent with a traumatic injury or specific injury that correlated with her subjective complaints or history of industrial injury or exposure." (Exh. 20, pp. 14-15.) Finally, Dr. Green indicated that the shoulder x-rays and MRIs revealed a congenital anomaly consistent with a nonunited growth plate which predisposed respondent Graham to impingement syndromes because of the mobility of the nonunited segment.

18. Based on his examination of respondent Graham and her documented medical history, Dr. Green opined that respondent Graham is not substantially incapacitated for the performance of her duties as an office assistant technician and that her incapacity was temporary.

19. Dr. Green noted in his IME report that respondent Graham had informed him that from 2005 to 2007, she worked for multiple staffing agencies at different construction sites performing such duties as ordering supplies, interviewing workers, filing, inserting blueprints, receiving orders, answering phones, checking on the status of permits, driving and handwriting reports. She was required to perform these tasks while sitting, standing, walking, driving, writing, and keyboarding. Respondent Graham worked an eight-hour shift, five days per week on these jobs, which were temporary positions. In 2009, respondent Graham moved from California to Virginia. From June 2010 to the time of the August 2012 IME examination and report by Dr. Green, she has continued to work for multiple temporary employment agencies performing general office work which required filing, ordering

supplies, writing reports, keyboarding, answering telephones, driving, sitting, standing, and walking. Respondent Graham has typically worked eight hours per day, five days per week on these temporary jobs.

20. Respondent Graham provided no evidence to contradict Dr. Green's IME and report and his opinion that she was no longer substantially incapacitated from performing her usual duties. CalPERS has demonstrated through competent medical evidence that respondent Graham is not permanently disabled or incapacitated from performance of her duties as an office assistant typist with respondent CDCR. There was no competent medical evidence to the contrary in the record that could be considered as direct evidence in this case. After consideration of the medical evidence relating to respondent Graham's orthopedic bilateral shoulders, bilateral upper extremities, and cervical spine conditions, CalPERS' request that respondent Graham be reinstated to her former usual duties as an office assistant typist should be granted.

LEGAL CONCLUSIONS

1. CalPERS has the burden to establish by a preponderance of the evidence that respondent Graham is no longer permanently disabled or incapacitated from performance of her duties as an office assistant typist.

2. Government Code section 20026² provides in pertinent 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. Section 21156, subdivision (a)(1), provides in pertinent part:

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. . . .

4. Section 21192 provides in pertinent part:

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary

² All further statutory references shall be to the Government Code unless otherwise specified.

retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her. The board, or in the case of a local safety member, other than a school safety member, the governing body of the employer from whose employment the person was retired, shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. The examination shall be made by a physician or surgeon, appointed by the board or the governing body of the employer, at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, the university, or contracting agency, where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

5. Section 21060 provides in pertinent part

A member shall be retired for service upon his or her written application to the board if he or she has attained age 50 and is credited with five years of state service. . . .

6. Section 21193 provides in pertinent part:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the

same class, he or she shall be reinstated, at his or her option, to that position. However, in that case, acceptance of any other position shall immediately terminate any right to reinstatement. A recipient who is found to continue to be incapacitated for duty in his or her former position and class, but not incapacitated for duty in another position for which he or she has applied for reinstatement and who accepts employment in the other position, shall upon subsequent discontinuance of incapacity for service in his or her former position or a position in the same class, as determined by the board under Section 21192, be reinstated at his or her option to that position. . . .

7. Being “incapacitated for the performance of duty” means the “*substantial* inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 875, italics original; *Curtis v. Board of Retirement of Los Angeles County Employees Retirement Association* (1986) 177 Cal.App.3d 293, 297-298 [applying the *Mansperger* standard for “incapacitated for the performance of duty” to the County Employees Retirement Law of 1937].) The inability to perform some of the duties of a position does not render one disabled. (*Mansperger v. Public Employees Retirement System, supra*, at pp. 876-877 [fish and game warden’s inability to carry heavy items did not render him substantially incapacitated because the need to perform such task without help from others was a remote occurrence].)

In *Mansperger*, the court explained that the term “incapacitated for the performance of duties” meant a substantial inability to perform the employee’s usual duties. (*Id.* at p. 876.) The applicant in *Mansperger* was a warden with the Department of Fish and Game whose physician opined that he could no longer perform heavy lifting and carrying. The evidence established that such tasks were an infrequent occurrence, and the applicant’s customary activities were the supervision of hunting and fishing. The *Mansperger* court found that the applicant was not entitled to disability retirement because, although he suffered some physical impairment, he could perform most of his usual job duties.

8. Cause exists under section 21192 to affirm the determination of CalPERS that respondent Graham is no longer permanently disabled or incapacitated from the performance of her duties as an office assistant typist.

9. Cause exists under sections 21192 and 21193 to cancel the disability retirement allowance previously approved for respondent Graham and to reinstate her to her former position with respondent CDCR.

10. The documentary, testimonial, and medical evidence contained in Factual Finding 1 through 20 have been considered. CalPERS established through competent medical evidence that respondent Graham’s orthopedic bilateral shoulders, bilateral upper extremities, and cervical spine conditions no longer substantially incapacitates her from the performance of her usual job duties as an office assistant typist with respondent CDCR. Dr.

Green's IME report and testimony were the only competent medical evidence offered into evidence in the case. He opined that respondent Graham was not substantially incapacitated for the performance of her usual job duties, although performance of some of those duties would cause some pain. He reasoned that respondent Graham's condition was permanent and that she had improved and responded to reasonable medical treatment and physical therapy. Dr. Green also believed that respondent Graham's reports of pain were exaggerated and did not comport with the findings of his physical examination of respondent Graham. Respondent Graham presented no competent medical evidence to the contrary.

ORDER

1. The determination by CalPERS that respondent Leslie Graham is no longer permanently disabled or incapacitated from performing her duties as an office assistant typist is affirmed, and the appeal filed by respondent Leslie Graham is denied.

2. The disability retirement allowance previously approved by CalPERS is cancelled. Respondent Leslie Graham shall be reinstated to her former position as an office assistance typist.

DATED: August 22, 2014


MICHAEL A. SCARLETT
Administrative Law Judge
Office of Administrative Hearings