

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues  
Against:

ROSEMARY KROLL,

Respondent.

and

SOLANO COMMUNITY COLLEGE  
DISTRICT,

Respondent.

Case No. 2013-1118

OAH No. 2014040367

**PROPOSED DECISION**

Administrative Law Judge Regina J. Brown, State of California, Office of Administrative Hearings, heard this matter on August 20, 2014, in Oakland, California.

Christopher C. Phillips, Staff Attorney, represented California Public Employees' Retirement System (CalPERS).

Respondent Rosemary Kroll was present and represented herself.

Respondent Solano Community College District was neither present nor represented.

The matter was submitted on August 20, 2014.

**FACTUAL FINDINGS**

1. Respondent began working for the Solano County Community College District in 2005. In 2007, she assumed the position of courier. On April 26, 2012, respondent filed a CalPERS disability retirement application on the basis of an orthopedic (thoracic and lumbar spine) condition. CalPERS denied respondent's application on the basis that respondent was not permanently disabled or incapacitated from her duties as a courier. Respondent filed a timely appeal.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

September 23, 2014

*[Handwritten Signature]*

2. Anthony Suine filed the Statement of Issues in his official capacity as Chief of the Benefit Services Division, CalPERS.

3. As a courier, respondent worked in an indoor and outdoor environment. While performing her duties, she regularly operated a motor vehicle in areas of traffic, and travelled from site to site. Her job description states the following: "Under direction of the Director of Facilities, provide District-wide mail services including pickup, sorting, delivery, and determining class and amount of postage; prepare and process mail for zip sort, bulk mailings, registered, certified, and special delivery items. Provide assistance to warehouse operations and provide receptionist duties for Maintenance Department." The physical demands of the job required respondent to sit, stand and walk for long periods of time, use hands and fingers to operate a computerized postal machine, electronic scales, and other office machines, reach with her hands and arms, and operate an electric cart for mail pickup and delivery. She also regularly transported mail bags, packages, and trays weighing up to 75 pounds.

4. Respondent suffered an industrial injury on June 28, 2011, when she slipped and fell, landing on her right side sustaining pain to her right side, right hip, and back. Respondent went to physical therapy and chiropractic treatments. She was found to have acute and chronic low back pain and mild lumbar spondylosis. Initially, she was able to work her usual duty, but at some point, she was placed on modified duty and eventually taken off work completely. According to respondent, human resources at Solano Community College forced her to file for early CalPERS service retirement on May 2, 2012, because there was no position that would accommodate her physical limitations.

5. Andrew Brooks, M.D., a board-certified orthopedic surgeon, conducted an independent medical examination on respondent on April 11, 2013, at the request of CalPERS, and submitted a report. According to Dr. Brooks, at the time of his examination, respondent complained of mid-line low back pain. The pain was constant but varied in intensity. The pain would occasionally radiate down her lower extremities down into her feet. She did not experience numbness or weakness. Respondent told Dr. Brooks that the low back pain was aggravated by sitting for over an hour, any repetitive bending at the waist, and squatting. The pain was alleviated by resting in bed, elevating her legs, using ice, and taking Ibuprofen. She did not take any narcotics.

6. Dr. Brooks reviewed the following medical records:

a. Gary Hollinger, Physician's Assistant, was respondent's medical provider when she was initially injured. Hollinger recommended physical therapy and placed her on modified duty.

b. Radiologist David Ehrenfeld, M.D., took an MRI of respondent on October 27, 2011. The MRI showed degenerative changes at multiple levels, and a disc bulge at L5-S1 level that was producing some narrowing of the bilateral neural foramen which could possibly be causing some radicular-type pain.

c. Charles M. Sonu, M.D., conducted an evaluation of respondent on November 8, 2011. He reviewed her MRI and determined that respondent did not need surgery and recommended physical therapy and epidural steroid injections.

d. William T. O'Connor, M.D., respondent's primary physician, opined in a Physician's Report on Disability report, dated April 23, 2012, that respondent suffered from a lumbar disc herniation and thoracic spine disc herniation. Dr. O'Connor found that respondent was unable to lift, carry, bend forward, stand, walk or sit for prolonged periods. He considered her to be permanently incapacitated from the performance of the usual duties of her job.

e. Robert S. Blum, M.D., performed an Agreed Medical Examination (AME) on respondent pursuant to her workers' compensation claim. In his AME report, Dr. Blum diagnosed respondent with a lumbar strain/sprain. At the time, respondent's injury was too painful for her to return to work. Dr. Blum considered her to be temporarily totally disabled. He concluded that it was likely that with time and appropriate treatment respondent could improve to the point that she would be able to return to work. Dr. Blum disagreed with O'Connor's opinion that respondent would never be able to return to work because there was "no objective reason for her not to be able to flex her spine repeatedly."

7. Dr. Brooks reviewed respondent's MRI and agreed with Dr. Ehrenfeld's findings. Dr. Brooks performed a physical examination of respondent and found that her complaints suggested radiculopathy. However, he found no deformities or specific neurologic abnormalities. He noted that her range of motion had improved. He concluded that her condition was not of the type that usually became permanent and, with proper treatment (physical therapy, rest, anti-inflammatories), should gradually resolve.

8. Dr. Brooks also reviewed additional information that respondent provided with her request for appeal, including a report, dated May 14, 2013, entitled "Medical Assessment of Ability to do Work-Related Activities." The diagnosis in this report was based on respondent's X-ray findings and CT scans results. However, Dr. Brooks had not been provided any additional testing since the MRI performed in October 2011. In his supplemental report, Dr. Brooks stated that the additional information did not change his opinion.

9. Dr. Brooks was the only medical professional to testify at hearing. He reiterated his findings as detailed in his report. Dr. Brooks was unable to identify any specific job duty that respondent is unable to perform because of a physical or mental condition. Dr. Brooks concluded that, based upon his professional opinion, respondent was not incapacitated for the performance of her usual duties.

#### *Respondent's evidence*

10. Respondent feels that she was forced to retire and she wanted to continue to work. This entire proceeding has been "hard on [her]," and she is confused about why she

has to go through this proceeding. She feels that her employer “left her out in the cold.” Respondent continues to experience pain, and states that, “some days are good and some are really bad.” She was seen by Dr. Margaret Portwood, her primary care physician, on May 14, 2013. Dr. Portwood concluded that respondent’s ability to lift, carry, stand, walk, and sit are impaired.

11. Respondent’s workers’ compensation matter is still pending. Dr. Blum examined respondent and determined, in an AME report dated October 31, 2013, that respondent’s condition was permanent and stationary. He concluded that respondent’s permanent disability rating is 5%, and she is in need of continuing medical care.

12. Respondent has been found eligible to receive Social Security Disability.

### LEGAL CONCLUSIONS

1. A CalPERS member who becomes “incapacitated for the performance of duty” shall be retired if she possesses the required credited service. (Gov. Code, § 21150.) The term “incapacitated for performance of duty” is defined by the Public Employees’ Retirement Law (PERL) to mean “disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion.” (Gov. Code, § 20026.) To determine whether an applicant is “incapacitated for performance of duty,” the courts look to whether the applicant is disabled from performing the substantial range of her usual duties. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.) A finding of incapacity for duty must be made “on the basis of competent medical opinion.” (Gov. Code, § 21026.) The member has the burden of proving incapacity.

2. It is undisputed that respondent sustained an injury to her back while working as a courier. It is undisputed that she suffered and continues to suffer from lower back pain as a result of her injury. However, an orthopedic surgeon reported and testified that there is no objective support for the severity of the symptoms reported by respondent.

3. Respondent has failed to carry her burden to prove that her back injury has disabled her sufficiently to entitle her to disability retirement from CalPERS. The only nonhearsay medical evidence offered at hearing is the testimony of Dr. Brooks, who concluded that respondent is not disabled. It is acknowledged that respondent feels that she cannot return to work due to her pain. The question of disability, however, is a matter for expert opinion. On that issue, the only evidence presented is the hearsay reports of various doctors which are not sufficient to support a finding of disability. (Gov. Code, § 11513, subd. (d).)

4. The evidence did not establish that Respondent had a disability that substantially incapacitated her from performing her job duties. Other than her testimony, respondent provided no direct evidence establishing her case. Respondent relied on the hearsay evidence of Dr. O'Connor and Dr. Blum. Neither doctor testified on respondent's behalf.

Even if Dr. O'Connor had testified to the matters set forth in his report, his opinion would be insufficient to carry respondent's burden, particularly in light of the persuasive medical opinions, proffered through testimony and written reports, to the contrary. Most importantly, there was no explanation of the discrepancies between respondent's objective condition and her subjective complaints. Also, an employee's permanent disability rating under the workers' compensation system is a different issue than whether the employee is capable of performing her usual duties. (*Winn v. Bd. of Pension Commissioners* (1983) 149 Cal.App.3d 532, 539-540.)

5. Cause exists to sustain CalPERS's denial of respondent's disability retirement application, as set forth in Factual Findings 3 through 9, and Legal Conclusions 2 through 4.

ORDER

The application of Rosemary Kroll for CalPERS disability retirement is denied.

DATED: September 19, 2014

  
REGINA J. BROWN  
Administrative Law Judge  
Office of Administrative Hearings