

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:

DEBORAH MONTOYA,

Respondent,

and

PASADENA UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. 2013-0160

OAH No. 2014050162

PROPOSED DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), on September 25, 2014, in Los Angeles.

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

Deborah Montoya (Respondent) was present and represented herself.

No appearance was made by or on behalf of Pasadena Unified School District (School District).

Oral and documentary evidence was received, and argument was heard. The record was closed and the matter was submitted for decision on September 25, 2014.

ISSUE

Whether Respondent is permanently disabled or incapacitated from performance of her duties as a cook/baker for the School District on the basis of lower back and right upper thigh conditions.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Anthony Suine made and filed the Statement of Issues in his official capacity as the Chief of the Benefit Services Division of CalPERS.
2. On May 18, 2012, Respondent signed an application for disability retirement. In filing the application, Respondent claimed disability on the basis of lower back and right upper thigh conditions.
3. At the time Respondent filed her application for retirement, she was employed as a cook/baker for the School District. By virtue of her employment, Respondent is a miscellaneous member of CalPERS subject to Government Code section 21150. Respondent has the minimum service credit necessary to qualify for retirement.
4. CalPERS obtained medical reports concerning Respondent's lower back and right upper thigh conditions from competent medical professionals. After review of the reports, CalPERS determined that Respondent was not permanently disabled or incapacitated from performance of her duties as a cook/baker at the time the application for disability retirement was filed.
5. By letter dated December 3, 2012, CalPERS notified Respondent that her application for disability retirement was denied and advised her of her appeal rights. A copy of the denial letter was also sent to the School District.
6. By letter dated December 31, 2012, Respondent filed a timely appeal and requested a hearing. The Statement of Issues was filed on April 3, 2014.

Job Duties and Work Injury

7. According to the School District's Essential Functions Job Analysis for the position of cook/baker (Exh. 9), a cook/baker for the School District works in secondary schools or in base/central kitchens preparing large quantities of food to be served at secondary schools and/or elementary schools. The essential functions include securing and calculating recipes; gathering ingredients for daily cooking and baking; preparing entrees, vegetables and other side dishes; receiving and storing foodstuff and supplies; loading food into containers for transport; operating kitchen equipment such as electric mixers, slicers, choppers, dishwashing machines, stoves, ovens, kettles, skillets, and other commercial kitchen equipment; portioning and serving food; and washing, sanitizing, and storing pots, pans, tableware and other kitchen utensils. The physical demands for the position of cook/baker include "continuous" standing and reaching at or below shoulder level; "frequent" walking and bending and twisting at the neck; and "occasional" walking on uneven terrain, bending and twisting at the waist, squatting, climbing, and reaching above shoulder level.

The lifting demands include "continuous" lifting up to 10 pounds (e.g., food items, supplies, kitchen items, and food trays), with "occasional" lifting of 11 to 25 pounds (e.g., boxes of condiments, canned foods, and frozen foods) and 26 to 40 pounds (e.g., cases of canned and frozen items, boxes of fruit or supplies). The carrying demands include "frequent" carrying of up to 10 pounds, and "infrequent" carrying of 11 to 25 pounds and 26 to 40 pounds. The Essential Functions Job Analysis indicates that assistance is available only for carrying 11 pounds or more.

8. Respondent worked as a cook/baker for the School District for 16 years until March 21, 2011. She worked in a base kitchen, where she prepared food that was sent to six satellite schools. She also prepared food for the students and staff at the middle school where she was assigned.

9. On March 17, 2011, Respondent reported to her manager that she experienced pain in her lower back and numbness in her right upper thigh while performing her duties as a cook/baker. She reported that this condition started on February 28, 2011. Respondent was referred to a physician for treatment of an occupational injury. On March 21, 2011, Respondent was seen by a physician, given medication and home exercises, and referred to physical therapy. Her diagnosis was chronic lumbar strain, rule out lumbar radiculopathy. She was released to return to work with restrictions including no lifting over 15 pounds and no repetitive bending. Respondent did not return to work.

10. For the period March 2011 through February 13, 2012, Respondent was seen and treated by physicians in connection with her workers' compensation claim. She was given medication, referred to physical therapy, and given exercises to perform at home. Throughout this period, the physicians released Respondent to return to work under restrictions that included no lifting over 15 pounds (later raised to 20 pounds in August 2011) and no repetitive bending. In June 2011, she was found capable of performing half-time work. Respondent, however, did not return to work. She was recovering from hand and wrist surgery in June and July, and she normally did not work in the summer. In September, she still had not returned to work due to her carpal tunnel surgery. Respondent also reported to her physician in May 2011 that she did not return to work because her employer would not take her back to work with limitations. In October 2011, Respondent reported to her physician that she attempted to return to work with restrictions but was not permitted to return. As of February 13, 2012, Respondent was found by her physician to be eligible to work with no lifting over 15 pounds, and she was recommended to continue her program to lose weight and perform home exercises.

Medical Examination by Dr. Filler

11. At the request of CalPERS, Blair C. Filler, M.D., performed a medical examination of Respondent on September 10, 2012. Dr. Filler has been licensed as a physician in California since 1957. He is board certified in orthopedic surgery. *He has practiced orthopedic medicine for over 40 years. Dr. Filler testified at this hearing.*

12. In a report dated September 10, 2012, Dr. Filler memorialized his findings and conclusions regarding his examination of Respondent. He had Respondent complete a written questionnaire, he interviewed Respondent to obtain an oral history, and he performed a full-body orthopedic examination. Dr. Filler also reviewed medical records, the Essential Functions Job Analysis, x-rays and an MRI provided by Respondent, and x-rays that Dr. Filler arranged to have taken.

13. At the time of the examination, Respondent complained of pain in her lower back when standing in one spot for 30 to 45 minutes, and after sitting for one hour or walking for 30 to 45 minutes. Respondent also reported having a small area of increased sensation along the interior of her right thigh, which she occasionally noted with her lower back pain. She reported that had been given exercises but was not doing them, as she felt that her weight prevented her from doing them. Respondent reported that she drives her daughter to and from school, performs some light housework, and is able to shop. She indicated to Dr. Filler that she engaged in no sports or recreational activities.

14. Dr. Filler examined Respondent's cervical spine and found that she demonstrated a full range of painless cervical motion. There was no spasm or tenderness and no pain with cervical traction or contraction. His examination of the lumbar spine found no spasm or sciatic tenderness. She demonstrated full extension, lateral bend and rotation without reported discomfort. Dr. Filler found that Respondent demonstrated a full range of painless motions of her upper extremities. Regarding her lower extremities, Dr. Filler found that Respondent walked with a normal gait, readily climbed on the examination table, and had full painless motion of her hips, ankles, knees, and feet. From his review of the x-rays and MRI of Respondent's lumbosacral spine, Dr. Filler found there were normal bones, joints, alignments and disc spaces.

15. Based on his examination of Respondent, and review of records, documents, x-rays and an MRI, Dr. Filler opined that Respondent is not substantially incapacitated in the performance of her usual duties as a cook/baker for the School District. Dr. Filler's opinion is based on his examination of Respondent which resulted in no objective findings to substantiate her subjective complaints. For example, when Respondent performed the straight leg raising test in a standing position, she reported no pain; but when performing the same test supine (lying on her back), she reported pain in her lower back. According to Dr. Filler, the results should have been the same regardless of whether Respondent was standing or supine. Similarly, when Respondent was asked to touch her toes while seated and then while standing, she reported pain when standing but not when sitting. Again, according to Dr. Filler, the results should have been the same regardless of whether Respondent was standing or seated. Dr. Filler's opinion that Respondent is not "substantially incapacitated" is also based the fact that her back condition improved after she received physical therapy. Dr. Filler believes that Respondent's obesity and physical conditioning require allowance for momentary rest periods and in lifting over 25 pounds, and that the previously outlined exercise program for her back and weight loss should entirely alleviate this requirement. According to Dr. Filler, there is no specific job duty that Respondent is unable to perform, and that she is capable of full, unrestricted work.

16. On September 27, 2012, Dr. Filler prepared a Supplemental Report, after he was provided additional medical records related to Respondent's workers compensation claim. Based on his review of those additional records, Dr. Filler found that those records confirmed that Respondent has pre-existing degenerative changes of the lumbosacral spine, and that she continued to complain of anterior right thigh numbness that was not confirmed by physical examination or by tests. The records disclosed that, except for one of her doctors, Respondent's treating physicians felt that her symptoms were related to her exogenous obesity. Dr. Filler's review of the additional medical records did not alter his conclusions set forth in his September 10, 2012 report.

Respondent's Testimony

17. Respondent testified that she has had accommodation meetings with her employer where she requested an assistant to help her with lifting over 11 pounds. Respondent testified that she was told that the School District will not hire a second person to assist her, and that a cook/baker must be able to lift 30 to 50 pounds. Respondent offered no documentation or other evidence to corroborate this testimony. Respondent testified that standing for long periods of time aggravates her back. Respondent admitted that her physician, Dr. Moscarello, did not give her any work restrictions regarding standing for long periods. Respondent testified that she has not performed the home exercises because of her carpal tunnel, and not because she is unwilling to perform the exercises. Respondent testified that the numbness in her thigh has subsided and she no longer has that condition. Respondent is presently taking a class in medical terminology at the East Los Angeles Skill Center. She hopes to get a job in medical billing.

LEGAL CONCLUSIONS

1. Government Code section 21150, subdivision (a) provides:

"Any 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, unless the person has elected to become subject to Section 21076 or Section 21077."

2. Government Code section 20026 states, 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. Government Code section 21154 provides, in pertinent part:

"On receipt of an application for disability retirement of a member, . . . the board shall, or of its own motion may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty."

4. Government Code section 21156 states, 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"

5. Respondent has the burden of proving entitlement to disability retirement. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.3d 234, 238.) In state administrative hearings, unless indicated otherwise, the standard of proof is "persuasion by a preponderance of the evidence." (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

6. To establish entitlement to disability retirement, an employee must show that he or she is "incapacitated for the performance of duty," which courts have interpreted as the "substantial inability of the applicant to perform his usual duties," as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) An increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of present disability. (*Hosford, supra*, 77 Cal.App.3d at pp. 862-863.)

7. In this case, the preponderance of the evidence established that Respondent is not substantially incapacitated to perform the usual duties of a cook/baker at the time she applied for disability retirement. Dr. Filler's opinion was persuasive and supported by the evidence. His findings were consistent with the findings of the physicians who treated Respondent as part of her workers' compensation claim. Respondent was found eligible to return to her job as a cook/baker with the School District under work restrictions including no lifting over 15 pounds and no repetitive bending. As of February 13, 2012, she was deemed capable of doing modified work. Respondent's testimony that her employer has refused to provide her with accommodations, such as a hiring a second person to assist her with lifting, was uncorroborated. In any event, the focus in this case is not whether Respondent's employer could provide accommodation but, rather, whether Respondent is

substantially incapacitated in the performance of her duties. The preponderance of the evidence established that she is not. Her application for disability retirement shall be denied. (Factual Findings 1-16.)

ORDER

The application for disability retirement of Respondent Deborah Montoya is denied.

Dated: October 23, 2014



ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings