

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:

THERESA RUSHTON OFFICE,
Respondent,
and

DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL,
Respondent.

Case No. 2012-0954

OAH No. 2014050260

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on January 21, 2015, in Sacramento, California.

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

Theresa Rushton Office (respondent) represented herself.¹

There was no appearance by or on behalf of the Department of Justice, Office of the Attorney General (DOJ).

Evidence was received, the record was closed, and the matter was submitted for decision on January 21, 2015.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED Feb. 6, 2015
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¹ Respondent was referred to as Theresa A. Rushton in the caption of the Statement of Issues. At the hearing, she requested to be referred to as Theresa Rushton Office.

ISSUE

Is respondent permanently and substantially incapacitated from the performance of her usual duties as an Office Technician for the DOJ on the basis of a cardiovascular (congestive heart failure) condition?

FACTUAL FINDINGS

1. Respondent service retired as of March 2, 2011. On April 19, 2011, CalPERS received a Disability Retirement Election Application (application) from respondent. As set forth in her application, respondent filed for service retirement pending disability retirement. On June 28, 2011, CalPERS sought additional information from respondent about her claimed disability. On July 12, 2011, respondent replied to CalPERS's June 28, 2011 letter. By letter dated March 19, 2012, CalPERS notified respondent that, based upon the medical information it had received, it had determined that her cardiovascular condition was not disabling, and that she was not substantially incapacitated from the performance of her usual job duties as an Office Technician. Consequently, CalPERS denied respondent's disability retirement application. Respondent appealed from CalPERS's denial.

Respondent's Disability Retirement Application

2. Respondent was born in 1959. In her application, she described her disability as follows:

Congestive Heart Failure: On 11/20/10, while at work I became very ill. Shortness of breathe [*sic*], bodily functions were failing and very heavy sweating. Paramedics were called (911).

Respondent described her limitations and preclusions as:

Avoid overexertion – walk at a moderate rate. No lifting heavy objects – Nothing over 10 lbs. Follow low sodium diet.

Respondent stated that her illness has affected her ability to perform her job in the following ways:

Unable to lift boxes for office supplies (over 10 lbs). Continue to have diareah [*sic*] (6-7) times daily.

3. In her July 12, 2011 letter to CalPERS, respondent provided the following additional information about her congestive heart failure:

On November 10, 2010, I suffered congestive heart failure on the job. I deficated [*sic*] on myself, I was sweating profusely

and my skin was cold and clammy [*sic*]. I couldn't catch my breath. The paramedics were called and I was rushed to the hospital where I was unconcious [*sic*]. While in the emergency room I was placed on a life support ventilator, fluid was drained from my heart and lungs and was on several IV's and other medicines administered through IV's. The doctor told my family that I might not make it. Til this day I still don't remember the emergency room episode. I was in Intensive Care Unit for 2 days. I was in a very critical state. I was dead and brought back to life. Thanks to immediate attention from Kaiser's Medical staff and paramedics I am alive today. In December 2010, I was placed on a "heart monitor machine." I was monitored for 6 months. My vitals were not good and to this day my vitals are still not up to par. For example, on July 5, 2011, I had a doctor's appointment because I haven't been feeling well. My doctor increased my heart medicine and advised me not to do any traveling out of state for a while. This is a life & death situation. I am trying to prevent another heart failure by living a stress-free life. This is why I decided to retire from my job on March 2011. A lot of people have died from Congestive Heart Failure, but I'm a survivor.... (Underlining in original.)

Duties of an Office Technician

4. As set forth in the DOJ's job description, an Office Technician (Typing) in the Criminal Law Division of the Bureau of Medi-Cal Fraud and Elder Abuse works with Headquarters staff and provides support to the Case Intake and Development Unit. The job duties of an Office Technician (Typing) include reviewing complaints and inquiries, inputting voluminous complaint information into ProLaw, routing complaints to the appropriate office, providing assistance in maintaining and updating complaint files, preparing complaint referral letters, scanning and photocopying documents, answering telephones, preparing reports, and providing general clerical support. The job description states that Office Technicians must be able to lift up to 25 pounds.

5. As set forth in a Physical Requirements of Position/Occupational Title (Physical Requirements) signed by an Investigative Auditor Supervisor and respondent in March 2011, an Office Technician (Typing): (1) constantly (over six hours a day) sits, uses her hands repetitively, and uses a keyboard and mouse; (2) frequently (three to six hours a day) engages in simple grasping; (3) occasionally (up to three hours a day) stands, walks, bends at the neck and waist, twists at the neck and waist, reaches above and below the shoulder, pushes and pulls, engages in fine manipulation, and lifts and carries up to 25 pounds; (4) never runs, crawls, kneels, climbs, squats, engages in power grasping, lifts more than 25 pounds, walks on uneven ground, drives, works with heavy equipment, is exposed to

excessive noise, extreme temperature, humidity or wetness, or dust, gas, fumes or chemicals, works at heights, operates foot controls, uses special visual or auditory protective equipment, or works with bio-hazards.

Report and Testimony of CalPERS's Expert

6. CalPERS retained Raye L. Bellinger, M.D., to conduct an Independent Medical Evaluation (IME) of respondent and issue an IME report. Dr. Bellinger is board-certified in Internal Medicine and Internal Medicine – Cardiovascular Disease. Dr. Bellinger examined respondent on January 24, 2012, reviewed her medical records and the Physical Requirements, and issued an IME report. In his IME report, Dr. Bellinger described respondent's hospitalization in November 2010 for congestive heart failure. The hospital records that Dr. Bellinger reviewed indicated that on November 11, 2010, a chest x-ray showed that respondent had a "large left pleural effusion and underlying consolidation or atelectasis." An echocardiogram on February 28, 2011, showed "normal left ventricular function, moderate aortic insufficiency, small circumferential pericardial effusion, and left ventricular cavity size moderate to severely enlarged." Dr. Bellinger noted that respondent had "mild to moderate concentric left ventricular hypertrophy." Dr. Bellinger summarized a physician's report on disability authored by a Dr. Rose, which documented that respondent had "left-sided heart failure, shortness of breath, palpitations, and chest discomfort." But Dr. Rose opined that respondent could return to performing "deskwork," so long as she did not lift more than 25 pounds. Dr. Bellinger did not note the date of Dr. Rose's report.

7. After examining respondent, Dr. Bellinger diagnosed her with:
1. Hypertensive heart disease with episode of congestive heart failure
 2. Poorly controlled hypertension
 3. Obesity
 4. Diabetes mellitus – diet-controlled
 5. ? depression/anxiety²

8. In his IME report, Dr. Bellinger opined that respondent was not substantially incapacitated from the performance of her duties as an Office Technician as a result of her cardiovascular condition. He described her job duties as "predominantly sedentary," and found that there were no job duties that respondent was unable to perform. He concluded that respondent was able to "return to her predominantly sedentary level of employment."

² The question mark was included in Dr. Bellinger's report.

9. At the hearing, Dr. Bellinger recognized that respondent had "cardiac issues" including "hypertensive heart disease." But, he agreed with respondent's physician, Dr. Rose, that respondent was capable of returning to her predominantly sedentary job. He reviewed the list of medications that respondent is currently taking to address her high blood pressure, heart disease, and fluid retention. He testified that these medications are appropriate to treat her heart condition and should not interfere with her ability to perform her usual job duties as an Office Technician. He explained that respondent's heart condition can be well-controlled if she continues to take these medications, maintains a healthy diet, exercises and loses weight. In sum, Dr. Bellinger opined that respondent was not permanently and substantially incapacitated from the performance of her usual duties as an Office Technician for the DOJ on the basis of a cardiovascular (congestive heart failure) condition.

Respondent's Testimony and Evidence

10. At the hearing, respondent described the congestive heart failure she experienced in November 2010. She was hospitalized for four days. She now has a "hard time breathing" and "shortness of breath." She can no longer walk long distances or dance as she used to.

11. After her November 2010 hospital stay, respondent returned to her job as an Office Technician in January 2011. She worked full-time for two months. She decided to service retire at the beginning of March 2011 because she found that her job was "overwhelming." She was unable to concentrate on her work, had to use the restroom frequently due to the medications she was taking, and was fearful that she would have another episode like the one she experienced in November 2010.

12. Respondent's brother died of a heart attack in 2010. Respondent is afraid that she might die like him. She has been seeing a therapist for her anxiety and stress for about two years, but she confirmed that she is not seeking disability retirement on these bases.

13. Terry Lee Office has been respondent's husband for about one year, although they have been together for many years. He described how sick respondent was in November 2010 when she was hospitalized. He confirmed that respondent has difficulty breathing and must often go to the bathroom due to the fluid pills she is taking.

14. Respondent did not call a physician to opine about her ability to return to work. She did not offer any reports from physicians who have opined that she is substantially incapacitated from the performance of her usual job duties as an Office Technician. Respondent submitted letters from her primary care physician and the physician currently treating her for stress and anxiety. These letters confirm that respondent is under the care of these physicians, but do not otherwise opine about respondent's medical condition.

15. Respondent submitted a single page of a letter dated May 9, 2012, from the Office of Disability Adjudication and Review relating to her application for disability benefits under the Social Security Act, and the first page of a letter dated June 20, 2014, from the Social Security Administration, stating that she was entitled to monthly disability benefits beginning January 2012. Because these documents are incomplete, and because the standards applied by the Social Security Administration when determining whether an applicant is eligible for Social Security disability benefits are different from the standards applicable to this proceeding, these documents have been given little weight.

Discussion

16. Respondent suffered a frightening and life-threatening medical event in November 2010. But she did not provide competent medical evidence to establish that her heart condition that was diagnosed at that time causes her to be permanently and substantially incapacitated from performing the usual duties of an Office Technician. Dr. Bellinger's testimony that respondent's heart condition can be well-regulated so long as she takes her medications, maintains a healthy diet, exercises, and loses weight was convincing. Thus, Dr. Bellinger's opinion that respondent is not permanently and substantially incapacitated from performing the usual duties of an Office Technician was persuasive.

17. In sum, the burden was on respondent to present competent medical evidence to establish that she is permanently and substantially incapacitated from performing the usual duties of an Office Technician. Because respondent failed to offer such evidence, her disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of her employment as an Office Technician for the DOJ, respondent is a state miscellaneous member of CalPERS and subject to Government Code section 21150. Respondent has the minimum service credit necessary to qualify for disability retirement.

2. Government Code section 20026, in relevant part, provides:

"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. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.)

4. To qualify for disability retirement, respondent had to offer sufficient evidence, based upon competent medical opinion, to establish that, at the time she applied for disability retirement, she was permanently and substantially incapacitated from the performance of her usual duties as an Office Technician for the DOJ. Respondent failed to offer such evidence. Consequently, her disability retirement application must be denied.

ORDER

The application of Theresa Rushton Office for disability retirement is DENIED.

DATED: February 4, 2015



KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings