

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for
Service-Connected Disability Retirement of:

Case No. 2012-0958

RONDA S. CRAIG,

OAH No. 2013040737

Respondent,

and,

DEPARTMENT OF CONSUMER
AFFAIRS,

Respondent.

PROPOSED DECISION

This matter was heard before Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 14, 2015, in Fresno, California.

Preet Kaur, Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Ronda S. Craig (respondent) appeared and represented herself.

No appearance was made by or on behalf of the Department of Consumer Affairs.

Evidence was received, the record was closed, and the matter was submitted for decision on May 14, 2015.

ISSUE

Based upon respondent's heart disease and multi-level disc disease, is respondent permanently and substantially incapacitated from performing the usual and customary duties of a Program Representative II for the Department of Consumer Affairs?

FACTUAL FINDINGS

Respondent's Disability Retirement Application

1. February 4, 2011, CalPERS received respondent's Disability Retirement Election Application (application). In response to the application's question about her specific disability, and when and how it occurred, respondent wrote:

Heart Disease

Multi-Level disk [sic] disease

Respondent did not provide an explanation for when and how her specific disability occurred.

2. Respondent separated from state service on February 19, 2011 and has been receiving her retirement allowance from that date.

3. On December 1, 2011, Mary Lynn Fisher, Chief of the Benefit Services Division, notified respondent that her application had been denied based upon a determination that respondent's cardiovascular (heart) and orthopedic (neck and back) conditions were not disabling. CalPERS concluded that respondent was not substantially incapacitated from the performance of her job duties as a Program Representative II with the Department of Consumer Affairs. Respondent timely appealed the denial.

Job Duties of a Program Representative II

4. The Department of Consumer Affairs Bureau of Automotive Repair (BAR) Position Duty Statement (duty statement) describes the essential duties and responsibilities of Program Representative II, in part, as follows:

SPECIFIC ASSIGNMENTS [Essential (E)/Marginal (M) Functions]

40% [E] Conduct the more complex investigations

10% Examines a variety of records and vehicles to secure or verify information concerning suspected violations and violators. Documents confirmed violations for resolution of complaints

10% Identifies, gathers, assembles and preserves statements, affidavits and other evidence for use in legal action

10% Communicates with consumers and repair facilities in writing, by telephone, or in person to develop facts. Takes statements and interviews witnesses

5% Prepares detailed investigative reports to recommend appropriate disciplinary actions

5% Conducts covert undercover vehicle/surveillance operations to ensure compliance with laws pertaining to the Auto Repair Act

35% [E] Lead to Program Representative I's

30% Provides technical information and guidance relating to formal investigations and consumer complaint investigations

5% Assists PR I in prioritizing workload and obtaining equipment necessary to conduct proper investigations

(Bold in original.)

The remainder of respondent's duties are public outreach and assisting management.

5. The functional and physical requirements of the job include sitting and standing in an office environment, with 50% of the time spent in the field, which includes sitting while driving, and walking. The physical demands include frequent driving, while occasionally: walking; standing; bending; squatting; crawling; reaching; balancing; pushing; pulling; carrying; lifting; kneeling; twisting; and performing foot movements and hand manipulation.

In addition to the duty statement, a CalPERS form entitled "Physical Requirements of Position/Occupational Title," set forth the physical requirements of respondent's job. The form indicated that there would "NEVER" be any running, climbing, fine manipulation, power grasping, lifting and carrying over 50 pounds, and carrying heavy equipment. Respondent signed the form on February 10, 2011. Beneath her signature, respondent wrote the following:

Note: It is my opinion that this document is misleading. It leads you to believe that on any given day, one would not be required to perform any of the above physical requirements longer than 3 hours. When in fact I have personally been required to stand in 110° weather [sic] for hours, days on end or climbed all over motor homes for hours on-end or crawled under cars for hour [sic] day after day. Ronda S. Craig

6. Joel Bilotta, a Program Representative III, was respondent's supervisor from 2000 to the end of 2008, except for a short period when respondent took a promotion as Program Representative II in the BAR's Valencia office in 2005. Respondent later returned back to the BAR's Bakersfield office to again work under Mr. Bilotta.

Mr. Bilotta testified that respondent worked in the field to inspect consumer cars and parts, and she also made contact with auto shops that were subjects of consumer complaints. Program Representative II's conduct vehicle inspections of the body or under the hood. Inspections underneath a vehicle are done with a lift, not by crawling underneath the vehicle. However, Mr. Bilotta indicated that it was possible that a Program Representative II would have to crawl underneath a larger vehicle, like a motor home. However such under-vehicle inspections are not done very often, even though they are within his office's jurisdiction. In addition, Program Representative II's do not climb on motor homes because there are no ladders in the field. Ladders are assigned to the BAR's documentation lab, and if a program representative needed one, the documentation lab would have to get involved. Mr. Bilotta stated that BAR does not have jurisdiction over the upper part of motor homes.

Respondent was not reasonably expected to run or climb. Running would only be required as a means to escape to safety in the field. Climbing is only performed in the documentation lab. If respondent was required to drive for three or more hours, she had the opportunity to stop her vehicle and stretch. Mr. Bilotta did not recall any occasions where respondent had to stand in 110 degrees for hours. In addition, the "field reps" are dressed in business attire, and would not be assigned to climb on motor homes or to crawl under vehicles. These activities were performed only on an occasional basis.

Mr. Bilotta's credible testimony indicated that although he did not recall respondent having to stand in 110 degree temperatures for hours, or that she had to crawl underneath or climb on top of motor homes, it was possible that respondent performed such activities on an occasional basis, not for "hours on end," or "days on end," as respondent claimed.

7. Mr. Bilotta's testimony was corroborated by the testimony of James Atkinson, given by affidavit. Mr. Atkinson supervised respondent for approximately two to three months in June or July 2009, when Mr. Bilotta transferred to another unit. Mr. Atkinson stated that he was familiar with respondent's specific job duties. He stated that respondent was not required to run, climb, power grasp, carry more than 50 pounds, or work at heights or with hazardous waste. While supervising respondent, she complained to Mr. Atkinson of leg pain and circulation problems. Mr. Atkinson unofficially accommodated respondent by not asking her to do work that he felt would be physically difficult, such as walking a long distance or standing in one place for a long time. Mr. Atkinson did not recall requiring respondent to crawl on the ground under a vehicle or to stand out in the heat for any length of time.

Independent Medical Examination by Mohinder Nijjar, M.D.

8. On October 11, 2011, Dr. Nijjar conducted an independent medical examination of respondent at the request of CalPERS due to her claimed multi-level disc disease. Dr. Nijjar is a board-certified orthopedic surgeon, and recently retired. He testified at hearing. Dr. Nijjar reviewed respondent's medical, social, occupational and treatment history, performed a physical examination, and prepared a report dated October 11, 2011. Dr. Nijjar described respondent's history of injury and treatment as follows:

Somewhere in June 2010, she started experiencing pain in the neck and back, which was going on for a period of time. This became much more significant. She went ahead and reported this as an injury. She was taken off work on June 26, 2010.

However, she indicated that working over a period of time, she started having pain in the neck. The pain was radiating to the shoulder area. She also started having pain in her lower back and she started getting numbness and tingling in the upper extremities as well. She was treated with medications and physical therapy. She was referred first to the chiropractor and then she went to be evaluated by a psychiatrist. She was recommended branch blocks for the cervical spine and she had two sets of those blocks and she indicated it was at six levels [.]

Dr. Nijjar noted that respondent's magnetic resonance image (MRI) of the cervical spine revealed herniation of discs at the C3-4 level, and mild disc osteophytes, or bone spurs at the C4-5, C5-6 and C6-7 levels. He did not find acute foraminal stenosis¹ or excessive compression of the cervical spinal cord at any of the levels.

Respondent's lower back MRI showed mild disc protrusion at the right L5-S1 level and mild spondylosis² at the C4-5 level.

9. Respondent's current complaints were noted as pain in her neck, which she rated as a six to eight on a scale of ten. The pain radiated to her scapular area bilaterally. The pain worsened when respondent sat for a prolonged period, repetitively turned her neck, and when she had been lying down for a long period of time. Respondent's pain was relieved with rest and medications. Respondent also complained of pain in her lower back,

¹ Foraminal stenosis is the narrowing of the cervical disc space caused by enlargement of a joint in the spinal canal.

² Spondylosis is a degenerative osteoarthritis of the joints between the center of the spinal vertebrae and/or neural foramina.

rated as a four to eight on a scale of ten. Her pain increased with walking and standing over 15 to 20 minutes at a time. Her pain also increased with prolonged sitting and repetitive bending.

10. On physical examination, Dr. Nijjar noted no deformities of the cervical spine. She had slight tenderness along the medial border of her scapula. Her bilateral shoulder examination showed no deformities or localized tenderness. She had no signs of impingement, rotator cuff tear or SLAP lesion³ in her shoulders. Her range of motion in her shoulders was normal. Examination of her thoracic spine showed no deformity or localized tenderness. She had full range of motion in her thoracic spine.

11. Dr. Nijjar provided the following diagnoses after his independent medical examination:

- (a) Cervical spine sprain/strain with cervical disc protrusion at C3-4.
- (b) Degenerative disc disease at L4-5 level.
- (c) Mild right paracentral disc protrusion at L5-S1 without encroachment of the foramen.

12. Dr. Nijjar concluded that from an orthopedic point of view, there are no specific job duties or job functions that respondent cannot perform. He further concluded that respondent is not substantially incapacitated from the performance of her usual duties.

Independent Medical Examination by Harcharn Chann, M.D.

13. On July 27, 2011, Dr. Chann conducted an independent medical examination of respondent at the request of CalPERS due to her claimed heart disease. Dr. Chann is board-certified in internal medicine, with a subspecialty of cardiovascular disease. He did not testify at hearing, but his July 27, 2011 and August 31, 2011 reports were admitted as administrative hearsay and considered. Dr. Chann reviewed respondent's medical, social, occupational and treatment history and performed a physical examination on respondent.

14. Respondent smokes half a pack of cigarettes per day. She has smoked for 30 years. Respondent complained that her blood pressure would fluctuate from very high to very low, causing her to pass out. She told Dr. Chann that she had gone to the Mayo Clinic where she was hospitalized for several days, and was told that she would have to "live with it." Respondent was given three different kinds of medications to adjust her blood pressure.

³ A SLAP lesion is an injury to the circumferential rim of fibrocartilage of the shoulder joint. SLAP is an acronym for "superior labral tear from anterior to posterior."

15. Dr. Chann's examination of respondent's heart showed no heart enlargement, or cardiomegaly. He did not find "murmurs, gallops, thrills or clicks." Respondent's electrocardiogram (EKG) was normal.

16. Dr. Chann provided the following diagnoses after his independent medical examination:

- (a) Atypical chest pain with angiographically normal coronaries.
- (b) Lightheadedness and dizziness, etiology undetermined.
- (c) Degenerative disc disease involving the cervical vertebra.

Dr. Chan noted that respondent had a history of passing out which would make her unable to drive for work. Interestingly, he noted that respondent's "physical job requirements required her to be running, climbing, power grasping, lifting, carrying weight, working with heavy equipment, working at heights, and working with biohazards." However, these functions were "never" a part of respondent's job functions, as set forth in Finding 5.

17. Dr. Chann indicated that respondent was substantially incapacitated for the performance of her usual duties since June 28, 2010, due to the unpredictability of her "blackouts." He considered respondent's disability permanent. However, in his August follow-up report, he indicated that respondent had "no documented cardiac problems related to her limitations." He did not indicate what those limitations were. He wrote that respondent "has a history suggestive of difficulty to control blood pressure and postural hypotension,⁴ however there is no documentation in the medical record." It is unclear in his follow-up report whether he reversed his finding that respondent was substantially incapacitated due to her heart condition due to lack of medical documentation. Dr. Chann did not identify any specific job duty that respondent was unable to perform. Given that Dr. Chann's reports were not corroborated by any other direct evidence, they were given little weight.

Respondent's Testimony

18. Respondent asserted that her medications make her unsafe to drive. In 2009, she testified that she almost hit a car head on when she "blacked out." At the time, she suffered from anxiety, and was afraid that one of the people she put in prison was "out to get [her]." She could not drive on long trips without a large dose of Lorazepam, a benzodiazepine used to treat anxiety, depression and insomnia.

⁴ A drop in blood pressure due to a change in posture or body position, causing dizziness.

19. Respondent claimed that she worked in the field in 110 degree conditions, approximately six times per month. She asserted that Mr. Bilotta lied during his testimony regarding underneath inspection of vehicles using lifts. However, Mr. Bilotta's testimony was credible and persuasive in this regard.

20. Respondent's driving required her to sit for long periods of time. She would have to take three to four breaks while driving. In the summertime, her mitral valve would swell, and she would get shortness of breath, creating the potential for her to black out.

21. Respondent asserted that she could not work while on medications, and that she was violating her office's drug free workplace policy by taking her medications.

Discussion

22. Dr. Nijjar persuasively concluded that respondent was not substantially incapacitated from performing her usual job duties. Dr. Nijjar did not find evidence of multi-level disc disease other than degenerative back conditions due to aging. Respondent did not present any documentary evidence or expert witness testimony to the contrary. Similarly, with regard to her heart condition, respondent failed to present any direct evidence, particularly from an expert witness, to establish that she was diagnosed with heart disease, such that she was substantially incapacitated from performing her usual job duties. The above matters having been considered, respondent has not established through competent medical evidence that, at the time of application, she was permanently disabled or incapacitated from performing the usual duties of her position as a Program Representative II for the Department of Consumer Affairs, due to heart disease or multi-level disc disease.

LEGAL CONCLUSIONS

1. Respondent has the burden of proof to establish by a preponderance of evidence that she is "incapacitated for the performance of duty,"⁵ which courts have

⁵ Although no court construing CalPERS law has ruled on this issue, courts applying the County Employees' Retirement Law have held that the applicant has the burden of proof. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691.) CalPERS may rely on decisions affecting other pension plans when the laws are similar. (*Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal.App.3d 937, 947.) In this case, Government Code section 31724 (County Employees' Retirement Law) is similar to Government Code section 21151 (California Public Employees' Retirement Law), and the rule concerning the burden of proof is therefore applicable. Furthermore, Evidence Code section 664 creates the general presumption that a public agency has performed its official duty. Here, CalPERS has fulfilled its duty to determine respondent's eligibility for disability retirement, and the burden falls on respondent to rebut the presumption of Evidence Code section 664 by proving incapacitating disability.

interpreted to mean “the substantial inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.) Discomfort, which may make it difficult to perform one’s duties, is insufficient to establish permanent incapacity from performance of one’s position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (*Hosford, supra*, 77 Cal.App.3d at p. 863.)

2. Pursuant to Government Code section 21150, members incapacitated for the performance of duty shall be retired for disability. Government Code section 20026 provides that “‘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.”

In *Mansperger, supra*, 6 Cal.App.3d at p. 873, the court construed the term “incapacitated for the performance of duties” to mean a substantial inability to perform the employee’s usual duties. (*Id.* at p. 876.) As the court explained in *Hosford*, prophylactic restrictions imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Hosford, supra*, 77 Cal.App.3d at p. 863.) An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697 [finding that a deputy sheriff was not permanently incapacitated from the performance of his duties, because “aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the [the sheriff’s] condition are dependent on his subjective symptoms.”].)

3. *Mansperger, Hosford* and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date she applied for disability retirement, she was substantially unable to perform the usual duties of a Program Representative II due to her heart disease and multi-level disc disease conditions. Respondent did not present sufficient evidence to meet this burden.

4. In sum, respondent failed to show that, when she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual and customary duties of a Program Representative II for the Department of Consumer Affairs. Her application for disability retirement must, therefore, be denied.

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ORDER

The application for disability retirement filed by respondent Ronda S. Craig is DENIED.

DATED: June 15, 2015



DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings