

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for Disability
Retirement of:

MARY E. GILBERT,

Respondent,

and

COUNTY OF BUTTE,

Respondent.

Case No. 2014-0440

OAH No. 2014080373

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 17, 2015, in Sacramento, California.

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

Mary E. Gilbert (respondent) represented herself.

There was no appearance by or on behalf of the County of Butte (County).

Evidence was received, the record was closed, and the matter was submitted for decision on June 17, 2015.

ISSUE

On the basis of orthopedic (osteoarthritis) and psychological (ADHD,¹ anxiety, depression, possible bi-polar) conditions, is respondent permanently and substantially

¹ "ADHD" stands for Attention Deficit Hyperactivity Disorder.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
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incapacitated from performing her usual duties as an Employment and Eligibility Specialist for the County?²

FACTUAL FINDINGS

Respondent's Disability Retirement Application

1. Respondent was born in 1958. She was employed by the County as an Employment and Eligibility Specialist. The County submitted a disability retirement application on behalf of respondent dated March 15, 2013. Respondent submitted her own application for disability retirement dated April 24, 2013. Respondent service retired effective May 14, 2013.

2. In her disability retirement application, respondent listed her disabilities as "ADHD, Anxiety, Depression, (possible) Bi-Polar II, Sleep Disorder, Osteo-Arthritis." In response to the question asking when her disabilities had occurred, respondent wrote:

Sleep Disorder all my life. Born with ADHD. Diagnosed with Depression, Anxiety & Bi Polar approx 8/12 through 10/12

In response to the question asking how her disability occurred, respondent stated that:

Wasn't aware of it until doctors diagnosed me.

Respondent described her limitations and preclusions as:

Memory loss, poor focus, poor interpersonal skills, mobility issues.

Respondent stated that her illnesses had affected her ability to perform her job "for many years."

3. Louella Regis, M.D., submitted a Physician's Report of Disability dated June 3, 2013, with regard to respondent's disability retirement application. In her report, Dr. Regis addressed only respondent's right hip and left knee pain. She did not address any of respondent's psychological conditions. In response to the question asking whether respondent was substantially incapacitated from performing her usual job duties, Dr. Regis checked the "No" box.

² The Accusation originally listed "anxiety, depression and possible bi-polar" as respondent's claimed psychological conditions. At hearing, the Accusation was amended to add ADHD to this list.

Physical Requirements of an Employment and Eligibility Specialist

4. The class specification for a County Employment and Eligibility Specialist was not offered into evidence. At hearing, respondent described her duties in this position as monitoring case loads and administering benefits for several programs, including Medi-Cal and food stamps.

5. CalPERS submitted a completed Physical Requirements of Position/Occupational Title form that was signed by respondent and a Human Resources Analyst, Principal in April 2013. According to this form, an Employment and Eligibility Specialist: (1) never runs, crawls, climbs, lifts more than 10 pounds, walks on uneven ground, drives, works with heavy equipment, is exposed to excessive noise, extreme temperatures, humidity, wetness, dust, gas fumes, or chemicals, works at heights, operates foot controls, engages in repetitive movement, uses special visual or auditory protective equipment, or works with bio-hazards; (2) occasionally (up to three hours a day) stands, walks, kneels, squats, bends at the neck and waist, twists at the neck and waist, reaches above the shoulder, and engages in simple and power grasping; (3) frequently (three to six hours a day) reaches below the shoulder, pushes and pulls, engages in fine manipulation, and lifts up to 10 pounds; and (4) constantly (over six hours a day) sits, repetitively uses her hands, and uses a keyboard and mouse.

6. Although respondent's signature is on the completed Physical Requirements of Position/Occupational Title form, she believed she may have signed the form before it was completed. She disagreed with some of the information included on the completed form. She testified that, as an Employment and Eligibility Specialist, she occasionally (up to three hours a day) lifted and carried 11 to 25 pound, and frequently (three to six hours a day) sat and walked.

Reports of CalPERS' Experts

7. CalPERS retained two experts to conduct independent medical examinations of respondent: Arthur M. Auerbach, M.D., and Andrea R. Bates, M.D.

8. Arthur M. Auerbach, M.D. Dr. Auerbach is board-certified in orthopedic surgery. He examined respondent on January 9, 2014, reviewed her medical records, and issued an Independent Medical Evaluation report dated January 9, 2014. Respondent complained mostly of pain in her right hip, and "some popping" in her left knee. At the time of the evaluation, respondent was five feet four inches tall and weighed 195 pounds. She was not then getting any treatment for either her right hip or left knee. Respondent told Dr. Auerbach that she began working for the County in July 2002, and stopped working in or about December 2011.

9. Dr. Auerbach diagnosed respondent with:

1. Mild right hip osteoarthritis.
2. Mild chronic left knee strain with intermittent popping.

10. Dr. Auerbach opined that there were “no specific job duties” that respondent was “unable to perform because of an orthopedic physical condition.” Dr. Auerbach opined further that, “If the right hip and the knees were her only problem, she could do the regular workload, but with a degree of pain when doing repetitive walking or heavier lifting at work.” In Dr. Auerbach’s professional opinion, respondent was “not substantially incapacitated for the performance of her usual duties” based upon her orthopedic conditions.

11. Andrea Bates, M.D. Dr. Bates is a board-certified psychiatrist. She is the Director of the Acute Unit at BHC Sierra Vista Hospital and an Assistant Clinical Professor in the Department of Psychiatry at U.C. Davis. Dr. Bates examined respondent on September 30, 2013, reviewed her medical records, and issued an Independent Medical Evaluation report dated October 13, 2013.

12. During the examination, respondent told Dr. Bates about her difficulties at work. She stated that the County placed her on a performance plan, which she “failed,” and that her doctor had opined that she was not fit for duty. At the time of the examination, respondent was taking Adderall for ADHD, Zoloft as an antidepressant, Trazodone for sleep and possible antidepressant, Temazepam for sleep, and Guaficine for hypertension, ADHD, and sleep.

13. Dr. Bates diagnosed respondent as follows:

- | | |
|---------|---|
| Axis I | Attention Deficit Hyperactivity Disorder (ADHD),
Dysthymic Disorder, Alcohol Abuse in Sustained
Remission, Major Depressive Disorder in Full
Remission |
| Axis II | Deferred, History of Depressive and
Negativistic Personality Traits |
| Axis II | Hypertension |
| Axis IV | Primary Support Stressors, Occupational
Stressors |
| Axis V | 70 |

14. In her October 13, 2013 report, Dr. Bates stated that respondent performed in her County job for 10 years, “apparently at a marginal capacity.” She felt “devastated and

'shocked' when told she was unfit for her job, and that has caused her motivation to decline." She had "some family stressors and difficulties," which "made performance more difficult for a while." Dr. Bates noted that respondent has "had treatment in recent years." Dr. Bates stated that the "mental health treatment" respondent received "probably came too late at the job in terms of the job performance plan that she was under at the time." Dr. Bates also stated that it was "likely" that the "scrutiny" respondent was under made it "too difficult" for her to "perform optimally at that time." Dr. Bates noted that respondent had quit drinking alcohol, which Dr. Bates described as a "subtle change," that, when "taken together with other mental health treatment benefits," made it "more than likely" that respondent "would be able to perform successfully at the job tasks, given intact motivation, and in a reasonable normal work environment without the intensity of the job performance plan and the artificial pressure that can cause..." Dr. Bates opined that, although respondent:

... may not have had specific "counseling" for her Major Depressive Disorder, and Adjustment Disorder, I think the mental health treatment she did receive, including psychiatric medication treatment and brief counseling in that context, given the longer period of time that would have been advised for a faster rate of improvement, she was able to substantially improve and recover from when previously evaluated for the Fitness for Duty Evaluation. The Fitness for Duty did not indicate that ADHD, in and of itself, was the disabling factor.

15. Dr. Bates opined that respondent was able to substantially perform her job duties. Dr. Bates explained that the reasons that she found respondent was not substantially incapacitated was "because any impairment was not to the degree that [respondent] had a substantial inability to perform the usual and customary duties of" her position.

16. At hearing, Dr. Bates testified that, given the treatment respondent has received and the fact that she has stopped drinking, Dr. Bates believed that respondent was functioning well enough to perform her usual job duties. Although Dr. Bates did not specifically mention bipolar disorder in her report, she evaluated respondent for that disorder and found that respondent did not have it. Dr. Bates used the term "dysthymic disorder" to note that respondent was depressed at least a few days a week for at least a couple of years, but her level of depression was not as serious or disabling as major depressive disorder. Dr. Bates believed that the medications respondent is taking are "working." Dr. Bates gave respondent a GAF³ score of 70, which is at the bottom of normal functioning, because respondent had some mild psychiatric symptoms that were sometimes bothersome and interfered with her life and her functioning, but were not so severe as to overwhelm or debilitate her. Dr. Bates reviewed the Fitness for Duty and other medical reports that found that respondent was not fit for duty, but did not find the level of impairment that those other health care providers found.

³ "GAF" stands for Global Assessment of Functioning.

Respondent's Testimony and Evidence

17. Respondent and her mother, Agnes Catherine Kate Owings, testified at hearing. Respondent did not call any health care providers to testify. Instead, she offered various reports, which were admitted as administrative hearsay, and have been considered to the extent permitted under Government Code section 11513, subdivision (d).⁴

18. At hearing, respondent testified that she has had issues all her life getting along with others and fitting in. She reacts and speaks without first thinking. She was diagnosed with ADHD as a child. She did not realize how much her ADHD affected her at work until she received her diagnosis of adult ADHD. She takes medications for her ADHD, which help her to be a "little more alert" in the morning, but will not cure her. She asserted that she has memory difficulties and was unable to remember how to perform her job. She also asserted that her adult ADHD made her unable to prioritize, organize, and multi-task, all important skills for her work. Her impulsivity and speaking and acting without thinking caused friction with her co-workers and clients. Respondent considers herself to be disabled based upon her own life experiences and the medical opinions she has received.

19. Ms. Owings, respondent's mother, testified that respondent was deaf as a child. Ms. Owings did not realize this until respondent was tested at school. Respondent received an operation that restored her hearing. Respondent was an intelligent student, but had memory and behavioral issues. She was diagnosed with ADHD as a child.

20. The employment and medical records that respondent submitted indicate the following: In August 2011, respondent received a performance evaluation that rated her as "not satisfactory" on "public contacts" and as "requires improvement" on the following performance factors: observance of work hours, attendance, compliance with rules, employee contacts, knowledge of work, work judgments, planning and organizing, job skill level, quality of work, meeting deadlines, accepts responsibility, accepts direction, effectiveness under stress, work coordination, initiative, and professionalism.

21. In a letter dated January 5, 2012, Mark Streets, Ph.D., a Clinical Psychologist, stated that respondent was seen for an initial evaluation for ADHD on December 20, 2011, and January 3, 2012, and for an initial TOVA⁵ test and review of results on January 4, 2012. According to Dr. Streets, the results from the initial testing "were strongly suggestive of

⁴ Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

⁵ "TOVA" stands for Test of Variables of Attention.

ADHD patterns and warranted further evaluation...” The results also warranted “consideration of a trial on ADHD medication.” By letter dated April 26, 2012, Dr. Streets set forth the accommodations that he recommended that the County offer to respondent to address her ADHD and anxiety.

22. The County sent respondent for a fitness for duty psychological evaluation with Eugene P. Roeder, Ph.D. Dr. Roeder evaluated respondent on August 20, 2012, and issued an evaluation report on September 7, 2012. Dr. Roeder opined that the objective psychological testing that was conducted confirmed that respondent was “experiencing the symptoms of a severe mental disorder, at a level which would render her incapable of fulfilling employment responsibilities.” But Dr. Roeder also opined that respondent was not:

... currently receiving any mental health treatment, although she is being prescribed a regimen of psychotropic medication by her primary care physician, including several antidepressant medications, one of which she indicated is prescribed for anxiety, and a paradoxical stimulant medication prescribed to treat her Attention Deficit Hyperactively Disorder.

Dr. Roeder concluded that:

While the prognosis for [respondent] to overcome these difficulties without treatment and become fit for duty for any position is guarded, it would be recommended she be referred for outpatient counseling to address her significant and disabling levels of depression, anxiety and negativity. If and when her treating therapist came to the conclusion [respondent] had improved sufficiently in her functioning to be capable of returning to work, she could then be referred back for an updated psychological evaluation, at which time her fitness for duty could be reassessed. Based on the psychological evaluation results, it is expected maximum therapeutic progress would be achieved in somewhere between 90 and 180 days.

23. Respondent was again seen by Dr. Roeder for an updated evaluation on March 28, 2013. In a letter dated March 29, 2013, Dr. Roeder opined that respondent’s functioning had not improved since August 2012, and was “in fact worse.” But Dr. Roeder stated that, although, in August 2012, he recommended that respondent:

... participate in outpatient mental health counseling and be referred for an updated evaluation if and when her treating therapist came to the conclusion she had improved sufficiently in her functioning to be capable of returning to work, [respondent] indicated she had not participated in any such intervention. She is, however, continuing to be prescribed

psychotropic medication, including Adderall and Zoloft, a stimulating/paradoxical medication for ADHD and antidepressant, and she indicated she had just started a new antidepressant, Trazadone, to help her sleep. In my opinion, [respondent] remains not fit for duty because of the intensity and severity of her psychological difficulties, and she is unlikely to become fit for duty unless and until she participates in treatment.

24. On May 23, 2013, Lori Mason, a Nurse Practitioner who works in Behavior Health at the Feather River Health Clinic, completed a Reasonable Accommodation Questionnaire. In the questionnaire, Ms. Mason opined that respondent was permanently impaired due to her ADHD and anxiety, and there were no accommodations that would assist her in performing her job functions. Ms. Mason stated that respondent was taking medications which were "partially helpful," but that she was not participating in regularly scheduled outpatient mental health counseling.

25. On June 17, 2013, the County sent a letter to respondent, which informed her that:

Given the restrictions noted by your Ms. Mason on the completed Reasonable Accommodation Questionnaire, the County has determined that you are unable to perform the essential functions of your position on a permanent basis. In addition, it does to appear that there is a reasonable accommodation available that will permit you to perform the functions.

26. Respondent submitted a Notice of Award dated August 25, 2013, from the Social Security Administration (SSA), which indicated that she was deemed eligible for disability insurance (SSI). There is nothing in the Notice of Award to indicate how or on what basis the SSA determined that respondent was eligible for SSI.

Discussion

27. Respondent sought disability retirement on the basis of orthopedic (osteoarthritis) and psychological (ADHD, anxiety, depression, possible bi-polar) conditions. There was no competent medical opinion presented at hearing to establish that respondent is substantially incapacitated due to osteoarthritis. Dr. Auerbach persuasively testified that respondent's right hip and left knee conditions are not substantially disabling. Dr. Regis, respondent's treating physician, on her June 3, 2013 Physician's Report of Disability opined that respondent was not substantially disabled by her hip and knee conditions. Consequently, respondent's application for disability retirement on the basis of osteoarthritis must be denied.

28. Dr. Bates persuasively testified that respondent's psychological conditions did not substantially incapacitate her from performing the usual duties of her job. Although Dr. Bates recognized that respondent's psychological conditions, particularly her ADHD, were "real," Dr. Bates found that respondent was responding well enough to her medications such that she was capable of functioning adequately at work.

29. Although respondent submitted psychological reports and correspondence from the County that indicated that she was not fit for duty, these reports and correspondence were not persuasive. Because the authors of these reports and correspondence were not available at hearing for cross-examination, their opinions were admitted only as administrative hearsay and cannot be relied upon, standing alone, to support any findings as to respondent's psychological conditions. (Gov. Code, § 11513, subd. (d).)

30. In addition, the reports themselves cast doubt on whether respondent was substantially incapacitated by her psychological conditions. Respondent told Dr. Auerbach that she stopped working in or about December 2011. As set forth in the reports and correspondence she submitted, she was first diagnosed with adult ADHD by Dr. Streets in January 2012, after she had stopped working. Although respondent received various medications for her psychological conditions, as stated by both Ms. Mason and Dr. Roeder, respondent did not receive any counseling treatment before the County pronounced her unfit for duty. As Dr. Roeder opined, without such treatment, respondent had not reached her "expected maximum therapeutic progress." Because respondent had not received sufficient treatment for her psychological conditions before she ceased working for the County, the determinations of the County, Ms. Mason and Dr. Roeder that respondent was not fit for duty can be given little weight. In addition, because respondent did not provide any evidence to establish the basis on which the SSA determined her to be eligible for SSI, the SSA's determination can be given no weight in determining whether respondent's application for disability retirement should be granted.

31. The burden was on respondent to present competent medical evidence to establish that she is permanently and substantially incapacitated for the performance of her usual job duties. When all the evidence is considered, respondent did not submit sufficient evidence to meet her burden. Consequently, her disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of her employment as an Employment and Eligibility Specialist for the County, respondent is a local miscellaneous member of CalPERS and subject to Government Code section 21150. Respondent has the minimum service credit necessary to qualify for 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 she is permanently and substantially incapacitated for the performance of her usual duties as an Employment and Eligibility Specialist for the County. Respondent failed to offer sufficient evidence. Consequently, her disability retirement application must be denied.

ORDER

The application of Mary E. Gilbert for disability retirement is DENIED.

DATED: June 25, 2015



KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings