

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Disability
Retirement of:

MICHELLE BOYER,

Respondent

and

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Respondent.

Case No. 2014-0668

OAH No. 2014110061

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings (OAH), State of California, heard this matter on July 8 and 9, 2015, in Sacramento, California.

Melinda Vaughn, Deputy Attorney General, represented the California Public Employees' Retirement System (CalPERS).

Respondent Michelle Boyer represented herself.

No one appeared on behalf of respondent California Public Employees' Retirement System in its capacity as respondent's former employer and a default was taken against this respondent, pursuant to Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for written decision on July 9, 2015.

On July 13, 2015, complainant submitted redacted copies of the documents admitted as Exhibits 15 and 16 and requested that the redacted copies be substituted in place of the unredacted copies. Respondent did not object to that request, and the redacted copies of Exhibits 15 and 16 were substituted in place of the unredacted copies.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 17 Jul 20 15

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SUMMARY

This appeal is limited to determining whether Ms. Boyer is permanently and substantially incapacitated for the performance of her usual job duties as an Associate Government Program Analyst with the California Public Employees' Retirement System due to an orthopedic (lower back pain) condition. Ms. Boyer did not present persuasive medical evidence demonstrating her substantial incapacity. Therefore, her application for disability retirement benefits should be denied.

FACTUAL FINDINGS

Procedural History

1. On July 22, 2013, Ms. Boyer signed, and CalPERS received, an Application for Service Pending Disability Retirement (Application). She claimed disability based on chronic back pain, and identified the limitations caused by her disability as the inability to: 1) work more than a six-hour day, 2) stand for more than 25 percent of her shift; 3) walk for more than 25 percent of her shift, 4) bend at the waist for more than 25 percent of her shift, and 5) twist at the waist at all.¹ She was retired for service, effective October 8, 2013.

2. At the time of hearing, Ms. Boyer was 52 years old. She had worked for the State of California for a total of 22 1/2 years, most recently as an Associate Government Program Analyst for the California Public Employees' Retirement System. By virtue of such employment, she was a state miscellaneous member of CalPERS subject to Government Code section 21150, subdivision (a).²

3. CalPERS obtained or received medical reports concerning Ms. Boyer's claimed disability from competent medical professionals. After review of those documents, CalPERS determined that Ms. Boyer was not permanently disabled or incapacitated for performance of her duties as an Associate Government Program Analyst at the time she filed the Application.

4. Ms. Boyer was notified of CalPERS's determination and advised of her appeal rights by letter dated January 2, 2014.

¹ She identified other disabling conditions in her Application, but introduced no evidence in support of them. Therefore, any disability caused by chronic asthma, anxiety, GERD, and/or hiatal hernia was not considered.

² Government Code section 21150, subdivision (a), states: "A 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, 21076.5, or 21077."

5. Ms. Boyer filed a timely appeal from the denial of her Application by letter dated January 27, 2014. She included with her notice of appeal medical records she had recently obtained.

6. CalPERS acknowledged receipt of Ms. Boyer's notice of appeal and additional medical records by letter dated December 4, 2014. The letter advised that CalPERS considered her additional medical records, but its decision to deny her Application remained unchanged.

7. Anthony Suine, Chief of the Benefit Services Division of CalPERS, signed the Statement of Issues on October 14, 2014, solely in his official capacity.

Job Duties of an Associate Government Program Analyst

8. Ms. Boyer's former position as an Associate Government Program Analyst included the following duties:

- Provides leadership for staff in the mapping of processes, writing procedures and validation of those procedures for all processes related to the functions of the Disability Retirement Section. Will work with subject matter experts to develop and revise written procedures as part of implementing system-wide changes, or as a result of legislation implementation. Maintains the tracking of procedure development, ensures that updates are scheduled for existing procedures, and monitors procedures for consistent, uniform formatting. Ensures that current procedures are distributed to staff. Organizes and maintains documentation and statistical data.
- Serves as a contact for Section in the development and revision of publications. Provides leadership for staff in reviewing and revising program information within publications. Ensures that Section is aware of deadlines for various publications. Works with subject matter experts to provide correct and accurate language and forms. Maintains good working relationship with managers and staff responsible for publications. Organizes and maintains documentation and statistical data regarding publications.
- Maintains and compiles statistical data on training conducted and procedures developed and published for Section Managers. Communicates to staff and management regarding procedural updates or where workarounds are needed until systems/formal procedures are in place.

- Assist primary Training Analyst/Coordinator with development of training plans, maintenance of training matrix, and coordination of new hire set-ups. Provides monthly feedback to Section Managers on trainee statuses. Consult with the managers, supervisors and staff within the Disability Retirement Section to resolve training issues.
- Provides technical support to staff and management to Disability Retirement related issues.
- Occasional travel and instances of overnight stays may be required, as well as after normal working hours.

A Physical Requirements of Position/Occupational Title for the position of Associate Government Program Analyst prepared by CalPERS and approved by Ms. Boyer identifies the following relevant physical requirements of her former position and the frequency with which the particular requirement is performed:

- Sitting, Constantly³
- Standing, Never
- Running, Never
- Walking, Occasionally
- Climbing, Never
- Bending (waist), Occasionally
- Twisting (waist), Occasionally
- Lifting/Carrying: 0-10 lbs., Occasionally; 11-25 lbs., Never; 26-50 lbs., Never; 51-75 lbs., Never; 76-100 lbs., Never; 100+ lbs., never
- Working at heights, Never

History of Ms. Boyer's Injury

9. Ms. Boyer was involved in a car accident in approximately 1983 when the car she was driving was rear-ended. No specific medical treatment was provided and no x-rays were taken at the time because she was pregnant. She has suffered intermittent low back

³ "Constantly" is "Over 6 hours," and "Occasionally" is "Up to 3 hours."

pain since the accident, but it had not interfered with her work performance until 2009. In approximately October 2009, Ms. Boyer's low back pain became severe enough that she began having trouble sleeping.

10. No evidence of the medical treatment, if any, Ms. Boyer received for her low back pain prior to 2011 was introduced. However, the evidence established that her primary care physician, Ralph Herrera, M.D., a board-certified internist at Kaiser South Sacramento, was providing conservative treatment for low back pain at the beginning of 2011. Such treatment consisted of physical therapy and prescriptions for hydrocodone.

11. Eventually, Ms. Boyer was referred to Thomas Voegeli, M.D., a board-certified orthopedic surgeon with Kaiser Roseville. On October 2, 2011, Dr. Voegeli reviewed MRI and CT scans of Ms. Boyer's lumbar spine and diagnosed her with "degenerative spondylosis and disc disease, L4-5, L5-S1." He recommended surgery.

12. In May 2012, Dr. Voegeli performed surgery on Ms. Boyer's lumbar spine. Specifically, he performed a posterior lumbar interbody fusion at L5-S1 and a posterolateral fusion at L4-S1.⁴ He also performed a laminectomy at L4-5, a discectomy at L5-S1, and lateral recess decompression and foraminotomies at both surgical sites.⁵

13. X-rays taken of Ms. Boyer's lumbar spine three and six months after her operation revealed that Dr. Voegeli's spinal fusion was successful, vertebral body height and alignment were maintained, and all hardware was still intact. Furthermore, Ms. Boyer reported on November 6, 2012, that her back pain and leg pain were "completely gone." Eventually, Dr. Voegeli concluded he had done all he could for Ms. Boyer's low back pain from an orthopedic surgery standpoint, and released her back to her primary care physician, Dr. Herrera.

14. Ms. Boyer did not return to work after surgery until January 15 or 18, 2013, when she was released to full duty. In approximately March 2013, her work hours were limited to six hours per day because of low back pain and her pain medication was causing her to "zone out." Her hours were further reduced to five hours per day in May 2013, and she continued to work intermittently until October 5 or 6, 2013, when she retired for service.

⁴ The former procedure is a surgical procedure by which the surgeon enters through the patient's back, removes the vertebral discs between the vertebral bodies to be fused and replaces them with disc spacers, and then fuses the vertebral bodies together using a bone graft attached with rods and screws. The latter procedure is a similar procedure that instead fuses the vertebral bodies by placing the bone graft along the side of those bodies.

⁵ Laminectomies, discectomies, and foraminotomies are different types of spinal decompression surgeries whereby the surgeon seeks to relieve the patient's pain caused by the narrowing of a spinal canal. A laminectomy removes the lamina portion of the vertebral body involved, a discectomy removes the entire vertebral disc, and a foraminotomy removes bone spurs near the area where the nerve comes through the vertebral body.

15. On June 5, 2013, Dr. Voegeli signed a Physician's Report on Disability, wherein he opined that Ms. Boyer is permanently and substantially incapacitated as a result of "severe low back pain and bilateral leg pain, trochanteric hip pain." He wrote the following regarding the specific job duties/work activities she was unable to perform due to her incapacity:

Patient on modified activity at work and at home from 05/18/2013 through 05/31/2013
Stand: Occasionally (up to 25% of shift). Walk: Occasionally (up to 25% of shift). Bend at the waist: Occasionally (up to 25% of shift). Torso/spine twist: Not at all. Climb ladders: Not at all. Use of scaffolds/work at height: Not at all.
Lift/carry/push/pull no more than 10 pounds. Work no more than 6 hour(s) per work day.

16. Ms. Boyer did not describe any of her usual job duties as an Associate Government Program Analyst in her Application or at hearing. And while she identified limitations on her ability to perform her usual duties purportedly caused by her disability in her Application as discussed above, she did not discuss any limitations at hearing, other than that her pain medication would sometimes cause her to be "out of it" and she did not believe her employer would have allowed her to leave work to rest whenever that occurred.

17. Ms. Boyer did explain, however, that her alleged disability has severely impaired her activities of daily living. She is no longer able to vacuum, wash a car, or garden. She is capable of doing "light" grocery shopping, which she defined as shopping for 30 minutes or less. She is also able to do "light sweeping" and "some" laundry because the washer and dryer have been raised up off the ground. Ms. Boyer is no longer able to bowl or golf, two activities she participated in often prior to her back problems. She is currently taking the following prescription medications for pain: morphine, 15 mg; lidocaine, 700 mg/patch; gabapentin, 300 mg; and sulindac, 200 mg.

18. Ms. Boyer's testimony was corroborated by her husband, who also explained that their family has always been "really tight." However, there are "a lot of" family activities Ms. Boyer is no longer able to participate in. This year alone, the Boyers had to miss a relative's wedding and their granddaughter's birthday party because of the pain Ms. Boyer was experiencing at the time. Additionally, her husband made four trips to see their son without her. He estimated that she has six or seven "good days" during an average month, but it is never more than two days in a row. And when she does have a good day and participates in activities she enjoys, she "pays for it" either later that day or the following day.

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Medical Evidence

Ms. Boyer's evidence

19. Ms. Boyer did not call any medical experts to testify at hearing, but produced a copy of Akshat Shah, M.D.'s, progress notes from Ms. Boyer's November 6, 2014 office visit. Those notes were admitted, without objection, as Exhibit 15.

20. Dr. Shah is a physician who is board-certified in physical medicine and rehabilitation and works at Kaiser South Sacramento. Ms. Boyer sought treatment for low back pain on November 6, 2014.

21. Dr. Shah's physical examination of Ms. Boyer revealed that she walked with a normal reciprocal gait, had normal muscle tone in her lower extremities, and had a normal range of motion in her lower extremities. He diagnosed her with "Chronic Failed Back Syndrome" and "chronic neuropathic pain." However, Dr. Shah's progress notes showed that he did not recommend any further treatment, prescribe any medication, or refer Ms. Boyer to another specialist for treatment.

22. No evidence of whether Dr. Shaw believes Ms. Boyer is permanently and substantially incapacitated for the performance of her usual job duties was introduced.

CalPERS's evidence

23. CalPERS called Dr. Joseph Serra as its medical expert at hearing. He is a board-certified orthopedic surgeon who was retained by CalPERS to perform an independent medical evaluation (IME) of Ms. Boyer on December 3, 2013. Dr. Serra prepared a report documenting his IME, and that report was introduced into evidence.

24. Upon physical examination, the range of motion of Ms. Boyer's lumbar spine upon flexion (bending forward at the waist) was only 50 percent of normal, extension (leaning backward at the waist) was only 25 percent of normal, and rotation (rotating from left to right at the waist) was only 25 percent of normal. She failed to touch her toes by 18 inches when asked to bend at the waist and touch her toes.

At hearing, Dr. Serra stated "so there definitely was a decrease in range of motion in lumbrosacral spine," but explained that a decrease is not unusual in patients who have undergone spinal fusion of a portion of their lumbar spine. He further explained that there are "a lot of reasons" why a patient may have a reduced range of motion of the lumbar spine, many of which have to do with a lack of a regular exercise routine.

25. Dr. Serra's neurological exam of Ms. Boyer's lower extremities was also unremarkable. As he explained at hearing, the "common culprit" of lower back pain is the sciatic nerve. However, several tests to determine whether Ms. Boyer's sciatic nerve in either leg was damaged were negative. She was able to raise both feet at the ankle with

resistance and without pain, there was no complaint of pain when her sciatic notch on either side was depressed, and she was able to raise either leg 90 degrees while sitting on an examination table with her legs dangling over the edge. She was also able to move from a standing position to a squatting position and then return to a standing position “100 percent.”

While Ms. Boyer experienced pain when lifting either leg while lying on an examination table on her back, a result commonly found in patients experiencing problems with their sciatic nerve, her complaints of low back pain radiating to her groin and posterior thigh when lifting her left leg and pain radiating to her right buttock and hip when she lifted her right leg, were inconsistent with such a finding. As Dr. Serra explained, a patient experiencing problems with her sciatic nerve will either not want to lift the leg on that side or will do so guardedly because such movement stretches the nerve and causes pain. Additionally, sciatic nerve pain is not felt in the groin because the sciatic nerve does not extend to that area of the body.

26. Based on the totality of his findings during a physical examination of Ms. Boyer and a review of the medical records provided, Dr. Serra opined that she is not substantially incapacitated for the performance of her usual duties as an Associate Government Program Analyst for the California Public Employees’ Retirement System. While he did not doubt the sincerity of her complaints of pain, he was unable to correlate her pain with any objective findings that she suffers from an orthopedic condition.

27. Ms. Boyer provided additional medical records with her appeal of CalPERS’s decision to deny her Application as discussed above. Those records were provided to Dr. Serra for his review, and he prepared a supplemental IME report. However, none of those records were relevant to Ms. Boyer’s claim that she is permanently and substantially incapacitated as a result of chronic low back pain. Therefore, a discussion of those records is not necessary.

Discussion

28. The uncontroverted medical evidence established that Ms. Boyer is not permanently and substantially incapacitated for the performance of her usual duties as an Associate Government Program Analyst as a result of chronic low back pain. Her ability to raise either leg to 90 degrees while sitting on an examination table was persuasive evidence of a lack of damage to her sciatic nerve. While she was unable to do the same while lying on her back, Dr. Serra explained that those two tests are designed to test for the same problem – a problem with the patient’s sciatic nerve – and the results should be consistent, i.e., Ms. Boyer should have been able to raise either leg 90 degrees during the latter test. The fact that the results of the two tests were inconsistent, when considered in conjunction with her inconsistent reports of pain during the latter test and her performance on other tests of the sciatic nerve, raised concerns about the efforts put forth by Ms. Boyer during the latter test.

29. Dr. Voegeli's identification of the specific job duties/work activities Ms. Boyer is supposedly unable to perform due to incapacity is inconsistent with the legal definition of "incapacitated for the performance of duty" because he did not conclude that she was *unable to perform* any of her usual duties. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877 ["incapacitated for the performance of duty" means "the substantial inability of the applicant to perform [her] usual duties."]) In particular, he did not conclude that she *could not* stand, walk, bend at the waist, or lift, carry, push, or pull items, but rather her performance of those tasks during any given shift *should be limited*. He further concluded that her work shifts *should be limited* to six hours per day. But such prophylactic restrictions on work duties cannot form the basis of a disability determination. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863.) And while Dr. Voegeli concluded Ms. Boyer could not twist at her waist, climb ladders, or use scaffolds/work at height, none of her usual duties as an Associate Government Program Analysts required her to perform such tasks.

30. While Ms. Boyer presented evidence that she is currently taking several prescription medications for low back pain, there was no medical evidence that such medication prevented her from performing their usual duties. Her speculation that her employer would not allow her to leave to rest whenever her medication caused her to be "out of it" did not constitute admissible evidence, let alone admissible medical evidence. (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 454. ["[S]peculation is not evidence."])

Summary

31. When all the evidence discussed above is considered, the persuasive medical evidence did not establish that Ms. Boyer is permanently and substantially incapacitated for the performance of her usual duties as an Associate Government Program Analyst with the California Public Employees' Retirement System as a result of chronic low back pain. Therefore, her application for disability retirement should be denied.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Ms. Boyer has the burden of proving her eligibility for disability retirement benefits by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

Applicable Statutes

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

“Disability” and “incapacity for performance of duty” as the 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 21150, subdivision (a), provides: “A 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, 21076.5, or 21077.”
4. Government Code section 21156, subdivision (a), provides, in pertinent part:
 - (1) 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
 - (2) In determining whether a member is eligible to retire for disability, the board ... shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.
5. The courts have interpreted the phrase “incapacitated for the performance of duty” to mean “the substantial inability of the applicant to perform [her] 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 for the performance of her 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 determination. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

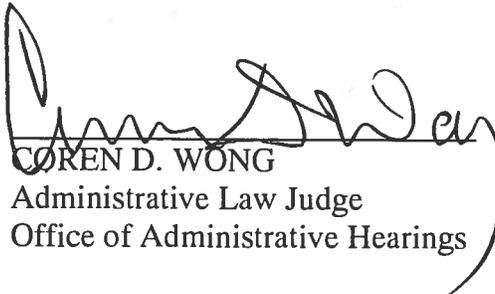
Conclusion

6. As set forth in Factual Findings 28 through 31, Ms. Boyer did not meet her burden of proving that she is permanently and substantially incapacitated for the performance of her usual duties as an Associate Government Program Analyst with the California Public Employees’ Retirement System due to chronic low back pain. Therefore, Ms. Boyer’s application for disability retirement should be denied.

ORDER

Respondent Michelle Boyer's application for disability retirement is DENIED.

DATED: July 15, 2015



COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings