

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:

TONI REYNOLDS,

Respondent,

and

MURRIETA VALLEY UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. 2013-0273

OAH No. 2014110517

PROPOSED DECISION

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Riverside, California, on July 1, 2015.

JeanLaurie Ainsworth, Senior Staff Attorney, represented the petitioner, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California (CalPERS).

Toni Reynolds (respondent) represented herself.

No appearance was made by or on behalf of respondent Murrieta Valley Unified School District.

The matter was submitted on July 1, 2015.

FACTUAL FINDINGS

1. On February 2, 2012, respondent signed a Disability Retirement Election Application and submitted it to CalPERS. Respondent sought a disability retirement with a retirement date of June 7, 2012. Before filing her application, she was employed by the district as a child care worker. By virtue of her employment, respondent is a local miscellaneous member of CalPERS subject to Government Code section 21150. Ms.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

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Reynolds also had the minimum service credit necessary to qualify for retirement. In her application, respondent claimed a disability on the basis of paraplegia and associated conditions of decubitus ulcers¹ and back pain.

2. On April 19, 2012, respondent signed an application for service retirement. CalPERS granted respondent's service retirement. Her service retirement was effective June 9, 2012, and she has received a service retirement allowance from CalPERS since that date.

3. By letter dated February 7, 2013, CalPERS informed respondent that she was not substantially incapacitated for the performance of her job and denied her application for disability retirement. The denial of the disability retirement did not impact respondent's service retirement.

4. Respondent appealed CalPERS' decision On February 27, 2013.

5. Petitioner filed Statement of Issues No. 2013-0273 in his official capacity on July 14, 2014. In a document dated November 13, 2014, the parties requested the hearing take place in July 2015.

Basis for Respondent's Claim for Disability Retirement

6. Respondent was injured in a motor vehicle accident in 1978 when she was 18 years old. The accident caused a spinal cord injury that resulted in paraplegia.

7. For the 15 years prior to her retirement, respondent worked in a before-and-after school child daycare and enrichment program run by the district. The child daycare program operated from 6 a.m. to 6:30 p.m. Respondent worked various shifts during the daycare programs hours of operations.

8. In addition to having knowledge relating to child care, growth and development, the district's job description for child care worker requires that the employee be able to sit, stand, stoop, kneel, bend, walk, and climb slopes, stairs, ramps, and ladders. With the exception of these physical requirements, respondent was fully capable of fulfilling the essential functions of the job when she was hired. The district accommodated her disability and waived several of the physical requirements in the job description.

9. From 1978 to 2006, respondent suffered six or seven decubitus ulcers. In 1980, respondent underwent surgery for one of the ulcers. The surgery involved removing some bone. After the surgery, respondent tended to lean more towards her right side.

10. Beginning in 2007, respondent's ulcers increased in frequency and severity. She is at risk for the development of ulcers if she sits in her wheelchair for extended periods

¹ A decubitus ulcer, commonly called a bed sore, is an open wound on the skin caused by prolonged pressure.

of time. Additionally, transferring into and out of an automobile requires respondent to slide on her buttocks which can irritate her skin. In an attempt to avoid decubitus ulcers, respondent shifts her weight or gets out of her wheelchair and lies down. She also uses a gel pad in her wheelchair.

11. On one occasion she was out of work for a month because of the ulcers; on another occasion she was out of work for several months. Respondent stated that once an ulcer occurs, scar tissue forms. She stated the scar tissue breaks down more often and the decubitus ulcer worsens.

12. Respondent can remain in her wheelchair for a maximum of six hours at a time; however, if the pressure becomes too great when she is at home, she can get out of the chair and into bed right away. Respondent has not had a problem with decubitus ulcers since she retired.

13. Respondent worked eight and one-half hours per day from 6:30 a.m. to 3:00 p.m., with a small break during the day. If a parent was late to pick up his or her child, respondent was required to stay until the parent arrived. These hours did not include the time it took for respondent to get to the school or to travel home.

Respondent voluntarily reduced the number of hours she worked by working a split shift so that she would not have to sit in her wheelchair for over six hours at a time. Split shifts did not solve the problem because it required respondent to get in and out of her car twice as often as if she worked a straight shift. Respondent felt she was putting herself at risk by continuing to work. She also felt she was doing a disservice to the children because they required consistency that she could not provide when she had to take a leave because of the ulcers. The children became attached to her and expected her to be at the school. She would also have to re-build relationships with the children when she returned from leave. Respondent testified that she loved her job and the children, and she is very disappointed that she can no longer work with them.

Testimony of School Personnel

PAMELA BLOOD

14. Pamela Blood was respondent's supervisor in the Family Services Child Care program at the district. Ms. Blood has known respondent for almost 18 years. When Ms. Blood supervised respondent, respondent worked a full eight hour schedule and moved between several schools in the district depending upon need.

Ms. Blood confirmed that, when she was hired, and for the majority of her employment with the district, respondent performed all of the essential functions of the job. If children fell, she picked them up. Respondent was expected to pull chairs from the tops of tables and set them out; get activities for students from cubby holes; participate in art activities; help students get breakfast; and all other tasks required of a child care worker. Respondent accompanied afternoon kindergarten children from the child care program to

their kindergarten and morning kindergarten children from the kindergarten to the child care program.

Ms. Blood stated that respondent did an “awesome” job with the children and often spent her own money on crafts and other items for the students. Ms. Blood said that respondent was a familiar person on the school campus; she interacted with the students and the students loved her. Ms. Blood also felt the children learned valuable lessons in diversity by interacting with respondent. Ms. Blood stated that most often the children forgot respondent was in a wheelchair. Ms. Blood said that some parents initially expressed a concern whether respondent could effectively work with their children. Ms. Blood talked to them and asked them to give it a chance. Ms. Blood later followed up with the parents. On each occasion, the parents expressed their appreciation for respondent’s dedication, and said they could see that respondent was very capable.

Ms. Blood noticed a change in respondent in approximately 2010. Respondent was less able to be available for the children as she had been, and she had more health-related absences.

Prior to retiring, respondent telephoned Ms. Blood crying and told Ms. Blood that she could not be with the children and needed to stay home. She stated that her doctor told her she could not safely return to work as it would be dangerous to her health and he was not confident she could do the job without harming herself or the children. Respondent felt she could not concentrate 100 percent on the job physically or emotionally.

Ms. Blood confirmed that consistency was important for the district’s students. The extended school program was like a “home away from home” and inconsistency was not conducive to the student’s development, especially in the morning when the tone of the remainder of the students’ day was set.

In 2010, the Family Services Child Care program staff was reduced. Although respondent had seniority and was not subject to a reduction in hours, respondent voluntarily took a cut because of her medical concerns. Ms. Blood testified that, despite the reduction in hours, respondent was not able to overcome her medical issues.

SUSAN CARLSON

15. Susan Carlson works in the district’s Human Resources Department. She has known respondent for 26 years; first when respondent was a parent of a student and then as a child care worker. Ms. Carlson described respondent as a “very able-minded person with a disability.” Ms. Carlson stated that, when she was hired, respondent was fully capable of performing the great majority of the child care worker duties and of fulfilling the district’s expectations. Ms. Carlson testified that respondent’s ability to remain in her chair for extended periods of time changed between when respondent was hired and when she retired.

Testimony of Tony Cue

16. Tony Cue is respondent's husband. He testified that respondent did not want to give up her job. He said she hated to call in sick. He saw her medical condition worsen and her ability to stay on the job decrease. He felt that by working so hard and not giving up, respondent sustained additional injury.

Independent Medical Evaluation

17. Neil Thomas Katz, M.D., is a board certified orthopedic surgeon and a qualified medical examiner. He performed an independent medical evaluation of respondent for CalPERS on November 28, 2012, and wrote a report. Dr. Katz evaluated respondent to determine her current status and whether she was able to perform the essential functions of her job. He interviewed respondent, conducted a physical examination, and reviewed medical records.

Medical records included in Dr. Katz's report confirm a history of chronic decubitus ulcers that increased in frequency in 2010. The medical records also indicated a history of recurring back pain. The back pain was reported to be aggravated by prolonged sitting.

The records reviewed by Dr. Katz contained a report dated January 25, 2012, by Dr. Richard Ellis, D.O. CalPERS Benefit Services Division, who found that respondent was incapacitated to perform her usual duties due to "limitations with prolonged sitting," and "worsening back pain and decubitus ulcers" which required respondent to "take increased time off." Dr. Ellis placed respondent on work restrictions until January 2015.

Dr. Katz testified that decubitus ulcers could not be prevented, but attempts could be made to minimize them. He stated that individuals with paraplegia frequently develop decubitus ulcers. They are treated by traditional wound care. He stated that decubitus ulcers could become lethal if not properly treated.

Respondent reported to Dr. Katz that she worked five hours per day, five days per week.² Respondent also told Dr. Katz that, since she retired, she stayed in her wheelchair for approximately six hours at a time.

Based upon Dr. Katz's understanding that respondent worked for five hours per day and that she was able to remain in her wheelchair for up to six hours,³ Dr. Katz opined that respondent was not substantially incapacitated from doing her job duties. He further opined

² These hours would correspond to respondent's voluntarily decreased work schedule. Respondent reduced her hours in an unsuccessful attempt to stave off the ulcers and continue working.

³ This does not account for the time respondent would be confined to her wheelchair preparing to go to work and travel to and from work.

that he would be concerned if respondent was required to sit in her wheelchair for six hours or more a day.

LEGAL CONCLUSIONS

1. Government Code section 20026 provides in 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.
2. Government Code section 21152, subdivision (d), provides that an application for disability retirement can be filed by a CalPERS member.
3. Government Code section 21153 provides:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.
4. Government Code section 21154 provides in part:

The application shall be made only (a) while the member is in state service, . . . On receipt of an application for disability retirement of a member . . . the board shall, or of its own motion it 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. . . .
5. Government Code section 21156 provides in part:

(a)(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, . . .
6. For respondent to receive a disability retirement, she must establish she is disabled and incapacitated for the performance of duty as Child Care Worker for the district.

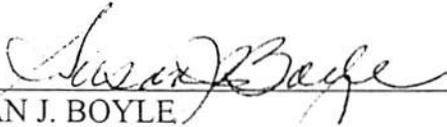
The phrase "incapacitated for the performance of duty" means "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Further, respondent must establish that her disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863.)

7. Based upon Dr. Katz's opinion that respondent could sit in her wheelchair for up to six hours, but he would be concerned if she had to sit for more than six hours, as supported by the medical evidence submitted by respondent and attached to Dr. Katz's report, and the testimony of Ms. Blood, Ms. Carlson and respondent, it was established that respondent's customary work hours required her to remain in her wheelchair for eight hours or more a day, and she is, therefore, substantially incapacitated for the performance of her job as a child care worker and is entitled to disability benefits.

ORDER

The application for disability retirement of Toni Reynolds is granted.

DATED: July 31, 2015



SUSAN J. BOYLE
Administrative Law Judge
Office of Administrative Hearings