

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues
Against:

BARBARA ADAMS,

and

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondents.

Case No. 2014-0183

OAH No. 2015020303

PROPOSED DECISION

This matter was heard by Laurie R. Pearlman, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 25, 2015, in Los Angeles.

Oral and documentary evidence was received. The record was left open for the California Public Employees' Retirement System (PERS) to submit a closing brief by July 24, 2015; for Respondent Barbara Adams to submit a response by July 31, 2015; and for PERS to submit a reply brief by August 7, 2015. Each of these documents was timely filed. PERS closing brief and reply were marked as Exhibits 19 and 20 for identification, respectively, but were not admitted into evidence. Respondent's response, which contained evidentiary material, was marked as Exhibit L for identification, and was admitted into evidence as administrative hearsay.¹ On August 7, 2015, the record was closed and the matter was submitted for decision.

Preet Kaur, Staff Attorney, represented PERS. Barbara Adams (Respondent) was present and represented herself. No appearance was made by or on behalf of Respondent

¹ The term "administrative hearsay" is a shorthand reference to the provisions of Government Code section 11513, subdivision (d), to the effect that hearsay evidence that is objected to, and is not otherwise admissible, may be used to supplement or explain other evidence but may not, by itself, support a finding. It may be combined with other evidence to provide substantial evidence sufficient to support a finding. (*Komizu v. Gourley* (2002) 103 Cal.App.4th 1001.)

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED September 9, 2015

Reay

Los Angeles Unified School District (the District). The District was properly served with notice of the hearing.

FACTUAL FINDINGS

1. On October 21, 2014, Anthony Suine signed the Statement of Issues in his official capacity as Chief of PERS' Benefit Services Division.
2. Respondent was employed by the District as an Office Technician, beginning in November 1993. She worked at Shenandoah Street Elementary School (Shenandoah) from September 2011 until June 11, 2012. Prior to that, Respondent worked as an Office Technician at Glenfeliz Boulevard Early Education Center and Grant Early Education Center. By virtue of her employment, Respondent is a local miscellaneous member of PERS subject to Government Code section 21150, and has the minimum service credit necessary to qualify for retirement.
3. The physical requirements of the Office Technician job title include frequent (for three to six hours) reaching above and below the shoulder; lifting/carrying up to ten pounds; bending and twisting the neck; sitting; fine manipulation; simple grasping; repetitive use of hands; and use of keyboard and mouse. It requires occasional (up to three hours) standing; walking; bending and twisting the waist; pushing; pulling; and power grasping. (Exhibit 17.)
4. As a result of staff reductions, Respondent was transferred to Shenandoah in Culver City, effective September 26, 2011. The transfer to Shenandoah resulted in a considerable increase in Respondent's driving distance to work. Because she is legally blind in her left eye, she does not drive on freeways. Respondent requested re-assignment to a school within 5 miles of her home, as a reasonable accommodation. The District granted this request on September 13, 2011, with the caveat that due to reductions in force, it could take some time before a transfer could be arranged. Respondent continued to drive to Shenandoah using side streets, but found that her long commute strained her eyes. As a result, her vision was blurred during the work day, making data entry very difficult for Respondent.
5. In a letter to Respondent dated December 12, 2011, Elisa M. Gonzalez, School Administrative Assistant at Shenandoah, noted that data entry and transfer is "ninety percent" of Respondent's position. She stated, "Due to that you are [sic] visually impaired it is affecting your work and the safety of our school." Gonzalez had requested that Respondent move her computer to the side, rather than directly in front of her, so that she would "have a better view of the door for safety reasons." However, Respondent was unable to do so, since she needed to have the computer monitor directly in front of her, since she is legally blind in her left eye. (Exhibit E, page 2.)

6. Respondent was out of the office due to illness from February 6 -10, 2012. She returned to work on February 13, 2012, with a note from her primary care physician, Santos Uy, Jr., M.D., requesting a reasonable accommodation to “light duty” because Respondent was unable to get up and down from her seat. Gonzalez sent an email to the District dated February 13, 2012, stating that Shenandoah could not accommodate the requested work modification because “[o]ne of her most important job description details that she is to perform customer service to parents, staff and students in which it is required to physically get up and move to the counter and around the main office. . . . I will . . . send her home until she is released to full duty. . . . My school is very much being impacted with the . . . accommodation for her present permanent conditions.” (Exhibit E, page 3.) Respondent objected to being sent home, and requested that she be permitted to remain at work with reasonable accommodation. The District’s Disability Coordinator stated in an email to Gonzalez, dated February 13, 2012, “I understand that you are not able to accommodate the current restrictions.” (Exhibit E, p. 5.)

7. In a memorandum dated February 14, 2012, Gonzalez informed Respondent that Shenandoah’s “concern [is] that you are unable to carry out the core duties pertaining to your job description: [h]elp parents at the counter, help student’s [sic] in the health office, make copies, distribute U.S. mail. . . . Your restrictions are an impact to your core duties and therefore they cannot be accommodated.” (Exhibit G.) Respondent never returned to Shenandoah after being sent home on February 13, 2012.

8. On May 18, 2012, Respondent signed and submitted an application for service retirement pending disability retirement. She claimed to be disabled on the basis of orthopedic conditions of her back, left lower extremity, neck and left shoulder. Respondent also noted on her application that she is “legally blind” and was unable to read the computer screen clearly. (Exhibit 3, p. 2).

9. Respondent retired for service effective June 11, 2012, and has been receiving her retirement allowance from that date.

Orthopedic Issues

10. In February 2012, a lumbar spine x-ray revealed multi-level degenerative disc disease and facet joint disease. On April 27, 2012, a lumbar spine MRI showed degenerative changes primarily at L4-L5, with a disc bulge and a large superimposed central and left paracentral disc protrusion, resulting in mild to moderate spinal stenosis, and effacement of the left lateral recess, and compression of the descending left L5 nerve root.

11. Jason Rhee, M.D., a pain management specialist, diagnosed Respondent with lumbar degenerative disc disease, lumbar disc herniation, lumbar radiculopathy, and lumbar spinal stenosis. On June 22, 2012, Dr. Rhee performed a nerve block to alleviate Respondent’s lower back pain. Respondent described her pain as constant, throbbing, shooting, and numbing. (Exhibit L.)

Kevin J. Pelton, M.D., Independent Medical Examiner

September 2012

12. PERS sent Respondent to Kevin J. Pelton, M.D., an Independent Medical Examiner (IME), to evaluate her orthopedic conditions. Dr. Pelton is a Board Certified Orthopedic Surgeon, who has practiced in California since 2008. On September 28, 2012, Dr. Pelton examined Respondent. He also reviewed her medical records and diagnostic studies, including x-rays and MRI's.

13. In his report dated September 28, 2012, Dr. Pelton noted that Respondent has significant subjective complaints and objective findings related to her lumbar spine, cervical spine, and shoulder (subacromial impingement and rotator cuff tendonitis.) Respondent told Dr. Pelton that she had continuous lumbar spine pain, which radiated to her left hip and down her left leg, extending to the calf. She stated that her pain level is at nine on a ten point scale and increased with prolonged sitting (more than five minutes), standing, or walking. She also had difficulty with forward flexion, lifting, or rising from a sitting position. She complained of neck pain, which radiated to both shoulders but was worse on the left side. She had numbness and tingling in the left hand. Her neck was stiff and was aggravated by rotation. Respondent complained of intermittent localized left shoulder pain, which increased with reaching.

14. On examination on September 28, 2012, Respondent had tenderness and a limited range of motion in her cervical spine, lumbar spine, and left shoulder. Dr. Pelton noted that Respondent was pleasant and cooperative during the physical examination, and showed no signs of exaggeration of complaints or lack of effort during testing.

15. Dr. Pelton concluded that Respondent has work preclusions and must refrain from repetitive bending, twisting, stooping, or doing overhead work with the left upper extremity. He also stated that Respondent should not lift over ten pounds and must have a five to ten minute break for every hour of office work. Dr. Pelton concluded that she is not substantially incapacitated based on an orthopedic condition. However, if she could not be provided a five to ten minute break hourly, he would consider Respondent to be unable to return to her position as an Office Technician. (Exhibit 10.)

16. Dr. Pelton concluded in his report that he did not believe Respondent was exaggerating her problems to improve her disability request. During the hearing, Respondent appeared to be in pain and sincere about her request for a disability retirement, at times tearing up when testifying about her pain and inability to return to the District.

17. By letter dated February 8, 2013, PERS asked Dr. Pelton to clarify the work restriction recommendations made in his September 28, 2012 IME report. PERS noted that the physical requirements of an Office Technician require an employee to occasionally bend,

twist, and reach above shoulder-level. PERS also pointed out that the need for a ten minute break each hour “appears to be a significant restriction.” (Exhibit 11.)

April 2013

18. By letter dated April 17, 2013, Dr. Pelton stated that Respondent was precluded from frequent bending, twisting, or reaching above shoulder level, but could do so up to three to six hours per day. Based upon his diagnostic findings of left shoulder impingement, mild left lower extremity radiculopathy and cervical spinal functional losses, Dr. Pelton also stated that he would “amend [his] previous recommendation” to require a 5 minute break each hour “to provide a lessening of continued physical strain to an already compromised body region.” (Exhibit 12.)

October 2013

19. On October 16, 2013, PERS forwarded additional medical records to Dr. Pelton for his review. (Exhibit 13.) This information did not change his medical opinion that Respondent is partially, permanently disabled and may return to her job as an office technician, with restrictions. In reaching this opinion in his October 28, 2013 IME Report, Dr. Pelton reviewed a job description for office technicians within the District. Dr. Pelton’s conclusions were based upon a job description for an office technician whose “[j]ob duties were mainly clerical with no significant physical exertion required. . . . There is no description of any lifting activities required.” Dr. Pelton also assumed that Respondent “is required to lift occasionally” and does “not perform strenuous work at or above shoulder level.” (Exhibit 14, pages 4 and 6.) In fact, the physical requirements for Respondent’s job as an office technician include frequent lifting/carrying of up to ten pounds, for three to six hours per day, as well as frequent reaching above shoulder level. Frequent is defined as three to six hours per day. (Exhibit 17.)

May 2015

20. On May 26, 2015, Dr. Pelton prepared a supplemental IME report, following his review of additional medical records forwarded to him by PERS. In his supplemental report, he noted that he had requested an updated MRI study of the lumbar spine and electrodiagnostic testing of the lower extremities to confirm the extent of the residual disc protrusion or radiculopathy, but “unfortunately [my] request was denied.” Once again, his review of these medical records and evidence did not alter his previous opinion that Respondent was capable of returning to work with the limitations he had previously noted. (Exhibit 15.)

Dr. Pelton’s testimony

21. At hearing, Dr. Pelton affirmed the findings in his reports. He did concede that Respondent should only be occasionally reaching above shoulder level, not frequently.

Frequent reaching above shoulder level is a physical requirement of her job title, according to the form completed by the District regarding physical requirements of the office technician job title. (Exhibit 17.)

Vision Issues

22. Respondent had cataract surgery of the left eye when she was age 27 or 28. She underwent surgeries in 2006 and 2009, to repair ruptured scar tissue in her left eye. She has mild cataracts in her right eye. In her left eye, Respondent has an irregular iris with left esotropia (turned inward toward the nose) and a constricted visual field. She cannot perform work requiring near or far acuity or field of vision using her left eye, and cannot perform work requiring depth perception using both eyes.

23. On August 18, 2011, Respondent's treating doctor Michael R. Rose, M.D., of Rose Eye Medical Group, observed that Respondent is legally blind in her left eye and cannot drive more than ten miles roundtrip, since her vision is very poor. (Exhibit L.)

24. To establish disability based upon vision loss, Respondent submitted a report to PERS from Dr. Uy dated June 28, 2012. She also submitted a letter from her optometrist, Michel N. Kahwaji, O.D., of Silverlake Optometry, dated August 8, 2013. (Exhibit 4.) Dr. Kahwaji reported that Respondent's corrected visual acuity is 20/40-1 in her right eye, with normal visual fields. In her left eye, Respondent is only able to see hand motion no greater than one foot away from her eye, and her visual fields are constricted in that eye. (Exhibit D.)

25. On October 16, 2013, PERS sent Respondent a letter informing her that PERS had received insufficient medical information to review her vision condition. The letter explained that PERS did not have a medical opinion to support substantial incapacity, nor did it have sufficient medical records to support continuous disability for a vision condition. The letter stated that if Respondent wished to have PERS consider whether she is incapacitated for the performance of her job duties due to her vision condition, she would need to have her physician complete an enclosed Physician's Report on Disability. Respondent was informed that she would need to provide medical records to PERS to support the contention that she was unable to work or had been taken off work, due to her vision problem, on or before her June 11, 2012 date of separation, and continuing. The letter had an attachment, which provided the treating specialist with information regarding PERS' disability standards. (Exhibit 5, pages 1-2).

26. Respondent failed to submit any additional evidence to PERS regarding her vision condition. As a result, her vision condition was not reviewed by PERS. PERS asserts that Respondent failed to establish that she is substantially incapacitated based on vision loss for purposes of obtaining a PERS disability retirement. PERS asserts that Dr. Uy's report does not contain subjective complaints, objective findings, or job duties Respondent is unable to perform due to a vision condition and Dr. Kahwaji's letter does not address PERS' criteria regarding substantial incapacity.

Jurisdiction

27. PERS concluded that Respondent was not permanently disabled or incapacitated for performance of her duties as an Office Technician with the District.

28. By letter dated May 24, 2013, PERS notified Respondent that her application for a disability retirement had been denied. Based upon PERS' determination that her orthopedic conditions of the back, left lower extremity, neck and left shoulder) are not disabling, PERS concluded that Respondent was not substantially incapacitated from performing her job as an Office Technician with the District. (Exhibit 6.)

29. On June 17, 2013, Respondent timely filed an appeal, in which she requested an administrative hearing. She contends in her letter that her orthopedic and vision problems have incapacitated her. Respondent asserts that due to her back problems, she cannot bend; has trouble rising up and down from a low position; and is unable to do heavy lifting, or stand for long periods of time. If she does so, her leg becomes numb. If she sits too long, it strains her lower back. Tension in her neck and shoulders prevents her from doing any lifting, and causes daily headaches. (Exhibit 7.)

Respondent's Evidence

30. Respondent is a 56-year-old married woman with an adult daughter.

31. At age four, Respondent was burned in the left eye with a cigarette, at which time she lost the sight in that eye. She was struck by a car in 1968 or 1969, sustaining injuries to her left hip. In 2002, Respondent developed neck and low back pain, which was diagnosed as arthritis. It was helped with a course of physical therapy.

32. Respondent had been working as an Office Technician with the District at Grant and Glenfeliz Early Childhood Education Centers, near her home. She was transferred to Shenandoah on September 26, 2011, which resulted in a considerable increase in Respondent's driving distance to work. The District agreed to reasonably accommodate her vision issues by placing her in a job within five miles of her home when that became available, but that did not transpire.

33. At Shenandoah, Respondent was required to be "up and down all day long" and was constantly walking ten feet from her desk to the counter to assist people. She was also required to do a great deal of data entry. This work aggravated her eyes, which were blurry and painfully dry, due to her long commute and existing vision problems. Respondent was also required to stand at a copy machine for one hour to ninety minutes each day, non-stop.

34. In December 2011, Respondent began to develop pain in her lower back as a result of the physical demands of her job. She suddenly found that she was unable to get out

of her chair due to sciatica, and was in excruciating pain. On December 10, 2011, she had difficulty getting out of bed, due to low back pain which radiated down her left leg, extending to her foot. Dr. Uy took her off work for one month and placed her on bed rest. During that time she also developed left shoulder pain.

35. Returning to work on full duty on January 14, 2012 greatly aggravated her symptoms. She had limitations standing more than ten minutes, was unable to sit or stand for long periods of time, and experienced pain throughout her lower back and left leg, down to her left foot.

36. Dr. Uy took her off work again from February 6 -10, 2012. She returned to work on February 13, 2012, with a doctor's note requesting a reasonable accommodation to "light duty," which Shenandoah stated it was unable to accommodate. She did not return to work after that date.

37. The District did not make an appearance in this case or otherwise present evidence rebutting Respondent's contention on this topic or any other. Respondent established by a preponderance of the evidence that the District did not allow her to return to work under the work restrictions imposed by Dr. Uy, her treating physician.

Award of Social Security Disability Benefits

38. On June 28, 2013, Respondent filed an application for Social Security Disability (SSD) benefits alleging disability since June 10, 2012. After a hearing was held on October 21, 2014, she was awarded SSD benefits. The federal Administrative Law Judge (FALJ) found that the evidence supported restricting Respondent to less than the full range of light exertional work, based upon her severe impairments, including degenerative disc disease of the lumbar spine with stenosis and radiculopathy; left eye blindness with aphakia (absence of the lens of the eye, due to trauma).

39. The FALJ found that: Respondent was able to lift and carry 20 pounds occasionally and 10 pounds frequently; could stand and walk for two hours in an eight-hour workday; could occasionally balance, stoop, kneel, crouch and crawl; must be allowed to change positions every 10 to 15 minutes; and could not perform work requiring depth perception using both eyes. Relying on much of the same medical evidence considered by Dr. Pelton, the FALJ concluded that Respondent had been disabled from June 10, 2012, in that she was unable to engage in any substantial gainful activity by reason of a medically determinable physical impairment that had lasted for a continuous period of twelve months or more.

///
///
///
///

LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.)

2. The statutory scheme for disability retirement requires a “disability of permanent or extended and uncertain duration, as determined . . . on the basis of competent medical opinion.” (Gov. Code, § 20026.) “If the medical examination and other available information show to the satisfaction of the board that the member . . . 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.” (Gov. Code, § 21156.) The term “incapacitated for performance of duty” has been defined 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, 876–877.)

3. A. An applicant does not qualify for a disability retirement when she can perform customary duties, even though doing so may sometimes be difficult or painful. (*Mansperger, supra*, 6 Cal.App.3d 873; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) However, a closer review of those cases is warranted because they involved situations different from Respondent’s case.

B. The applicant in *Mansperger* was a fish and game warden who had suffered work-related injuries to his right arm that prevented him from lifting and carrying heavy loads. (*Mansperger, supra*, 6 Cal.App.3d at p. 875.) He remained able to perform most of his usual duties, including apprehending a prisoner, but could not lift heavy weights or carry the prisoner away. (*Id.*) PERS concluded he was not physically incapacitated from performing his duties as a fish and game warden. The trial court denied his petition for writ of mandate, and the Court of Appeal affirmed. (*Id.* at pp. 874, 877.) The *Mansperger* court held that although the applicant was not able to lift or carry heavy objects, the evidence showed he “could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence.” (*Id.* at pp. 876–877.) Because the applicant could carry out most of his duties, PERS and the trial court properly found he was not incapacitated for the performance of duty and he was therefore not entitled to disability retirement. (*Id.* at p. 877.)

C. The court in *Hosford* reached a similar result. The applicant there was a California Highway Patrol sergeant who had sustained injuries, including to his back, in three separate incidents. (*Hosford, supra*, 77 Cal.App.3d at pp. 856–857.) As a result, he experienced continuing pain, and believed he was in danger of further injury when he had to overpower people who resisted arrest. (*Id.* at p. 857.) PERS determined he was not incapacitated for his duties as a traffic officer. The applicant petitioned for a writ of mandate, and the trial court, exercising its independent judgment, found he was “substantially able to perform the normal duties of a sergeant in the California Highway

Patrol,” and denied the petition. (*Id.* at p. 859.) The Court of Appeal concluded that substantial evidence supported the trial court's determination. (*Id.* at pp. 859, 865.) The *Hosford* court noted that a CHP sergeant's supervisory role meant both that he might need to make arrests and subdue prisoners and that he would be subjected to such physical demands less frequently than would traffic officers. (*Id.* at pp. 860–861.) In concluding the evidence supported the trial court's finding, the *Hosford* court noted that sitting for long periods of time would probably bother the applicant's back, but that did not mean he was unable to do so, particularly since he could stop and exercise as needed. (*Id.* at p. 862.) As to more strenuous activities, such as running and apprehending a fleeing suspect, the court relied on “[t]he rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function.” (*Id.*)

4. This case presents an entirely different situation. In *Mansperger* and *Hosford*, the applicants were unable to perform functions they would only rarely encounter in their respective positions. The physical requirements of the Office Technician job title include frequent (for three to six hours) reaching above and below the shoulder and frequent lifting. The testimony of Dr. Pelton established that Respondent is restricted from frequent lifting and from frequently reaching above shoulder level, due to her orthopedic issues. Moreover, the fact that Shenandoah prohibited Respondent from returning to her Office Technician position with the “light duty” work restrictions imposed by Dr. Uy, and stated that her visual problems impact Respondent's ability to perform her assigned duties, establishes that she is substantially unable to perform her usual duties, as a result of her limited vision and orthopedic conditions.

5. Respondent presented admissible medical evidence demonstrating she is substantially incapacitated from performing her usual job duties and cannot perform the essential functions of her job due to visual and orthopedic conditions. (Factual Findings 10-24.)

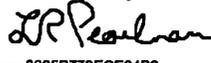
6. Cause exists to grant Respondent's application for a disability retirement, in that Respondent met her burden of establishing by a preponderance of the evidence that she is permanently disabled or incapacitated for performance of her duties as an Office Technician for the District. (Factual Findings 1-39; Legal Conclusions 1-5.)

///
///
///
///
///
///
///
///
///
///
///

ORDER

Respondent Barbara Adams' appeal is granted. Respondent established that, at the time of her disability retirement application, and thereafter, she was and is permanently disabled or incapacitated for performance of her duties as an Office Technician for the Los Angeles Unified School District.

DATED: September 4, 2015

DocuSigned by:

3695B779ECE34B2...

LAURIE R. PEARLMAN
Administrative Law Judge
Office of Administrative Hearings