

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
(Application For Industrial Disability
Retirement) Of:

ALLISON V. JOHNSON,

Respondent,

and

CALIFORNIA DEPARTMENT OF
TRANSPORTATION,

Respondent.

Case No. 2013-0353

OAH No. 2014050850

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on December 12, 2014, and August 21, 2015.

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

Respondent Allison V. Johnson appeared and represented herself.

Respondent California Department of Transportation was not represented.

The matter was submitted on August 21, 2015.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED September 11, 2015

CR. GAO

ISSUE PRESENTED

Whether respondent Johnson was substantially incapacitated for the performance of her usual duties as an Accounting Officer (Specialist), California Department of Transportation, at the time she applied for an industrial disability retirement.

FACTUAL FINDINGS

1. Petitioner/complainant Anthony Suine filed the Statement of Issues solely in his official capacity as Chief of the CalPERS Benefits Services Division.

2. Respondent Johnson was employed by respondent California Department of Transportation. At the time respondent Johnson filed her application for retirement, she was employed as an Accounting Officer (Specialist). By virtue of her employment, respondent Johnson is a state miscellaneous member of CalPERS subject to Government Code section 21150.

3. On or about October 27, 2011, respondent Johnson signed an application for industrial disability retirement. In filing the application, disability was claimed on the basis of a rheumatologic condition (fibromyalgia and arthritis) and a psychological condition (anxiety disorder).

4. CalPERS obtained medical reports concerning respondent Johnson's claimed areas of injury from medical professionals. After review of the reports, CalPERS determined that respondent Johnson was not permanently disabled or incapacitated for performance of the usual duties of an accounting officer at the time her application for industrial disability retirement was filed.

5. Respondent Johnson was notified of CalPERS' determination and was advised of her appeal rights by letters dated November 1, 2012, and March 19, 2014.

6. Respondent Johnson filed a timely appeal by letter dated November 23, 2012, and requested a hearing.

7. At the conclusion of the hearing on December 12, 2014, the parties agreed that an additional basis for respondent Johnson's claim that she was substantially incapacitated were orthopedic injuries to her low back, neck, hips, and extremities. The parties further agreed that respondent Johnson should be evaluated for her orthopedic conditions and, if necessary, the record would be reopened for the presentation of additional evidence relating to the evaluation. The orthopedic evaluation was performed on May 12, 2015, and after considering the orthopedic evaluation, CalPERS remained of the opinion that respondent Johnson was not substantially incapacitated for the performance of her usual duties as an accounting officer. The August 21, 2015 hearing date was selected by the parties to receive additional evidence relating to the orthopedic evaluation discussed below.

Usual Duties for an Accounting Officer (Specialist) Employed by Respondent California Department of Transportation

8. Two Duty Statements for Accounting Officer, Specialist, California Department of Transportation, were received in evidence. They were endorsed by respondent Johnson on January 8, 2008, and December 1, 2009. Each is also endorsed by a supervisor for respondent California Department of Transportation. The physical requirements that are relevant to respondent Johnson's disability claim include sitting for long periods of time using a keyboard and video display, the ability to concentrate and meet strict deadlines, interaction and the ability to work cooperatively with others including situations involving emotionally charged issues, and the ability to handle stress during peak seasons when the job is particularly demanding.

Competent Medical Opinion

Complainant's Medical Opinion Evidence

Douglas Haselwood, M.D.

9. Respondent Johnson was examined by independent medical examiner Douglas Haselwood, M.D., a board-certified rheumatologist, at the request of CalPERS. Dr. Haselwood examined respondent Johnson on August 7, 2012, and prepared a report the same day that was received in evidence. Dr. Haselwood testified at the administrative hearing and explained the contents of his report.

10. Dr. Haselwood focused his evaluation on respondent Johnson's potential for fibromyalgia syndrome or any other objectively identifiable rheumatologic syndrome. Dr. Haselwood took a history from respondent Johnson, discussed her complaints, conducted a physical examination, and reviewed her past medical records. He formulated his diagnoses and answered the questions posed by CalPERS relating to respondent Johnson's incapacity for her usual duties as defined by the duty statements described above.

11. Respondent Johnson was 40 years old when she was evaluated by Dr. Haselwood. Her then-current complaints were constant moderate to severe widespread musculoskeletal pain that was somewhat more problematic in the lumbosacral region. Other compounding symptomatology included cognitive dysfunction, poor memory, blurred or double vision, tremors, insomnia, balance issues, panic attacks and depression, and transient atrial fibrillation. Respondent Johnson told Dr. Haselwood that her problems and functional impairments caused by them had not significantly improved over the past two years despite treatment by physicians and medications prescribed for her. She described her very sedentary lifestyle in which she spends most of her time resting, with her husband performing most of the homemaking activities.

12. Respondent Johnson related to Dr. Haselwood that her symptoms began five years earlier when she was recuperating from gastric bypass surgery for obesity. Since then,

there had been an increase in widespread musculoskeletal pain and dysfunction. She had failed to respond to several epidural injections in the lumbosacral region and was awaiting nerve ablation in the same area. Respondent Johnson described an adversarial relationship with her supervisor, unreasonable demands on her time and a long commute to work. These all produced extreme stress. She opted to stop working in November of 2011 at the urging of her treating physicians.

13. Dr. Haselwood performed a physical examination of respondent Johnson's areas of complaint. He noted minor age appropriate osteoarthritic changes in her appendicular joints which were otherwise normal without evidence of a chronic reactive arthropathy or synovitis. Respondent Johnson declined any palpation, manipulation or range of motion testing of her low back. She described tenderness and limited range of motion in her neck. She complained of soft tissue tenderness diffusely over her upper extremities, trunk, sacral region and distal lower extremities. In Dr. Haselwood's estimation, the described tissue tenderness was much too inconsistent and poorly localized to allow credible mapping of "tender points." Her withdrawal and guarding were quite inconsistent and nonphysiologic. Respondent Johnson walked slowly with a cane in the examining room in contrast with more fluid movement in the waiting room.

14. As noted above, Dr. Haselwood reviewed the medical records provided to him as part of the evaluation. Dr. Wall, a primary care physician, saw respondent Johnson on approximately 15 occasions from January 12, 2009, through April 8, 2010. The only reference to fibromyalgia was a July 1, 2010 note that respondent Johnson was under Dr. Wall's care for stress and fibromyalgia "flare up." Dr. Sahdev Saharan, a rheumatologist, saw respondent initially on July 11, 2011. His diagnosis was fibromyalgia, recording a tender point calculation of 16. Dr. Saharan saw respondent Johnson three times thereafter, continuing a presumptive diagnosis of fibromyalgia and noting no further evidence of an underlying systemic or inflammatory rheumatic condition. His January 10, 2012 note concluded: "At this time fibromyalgia symptoms seem to be under control." Despite the note, Dr. Saharan submitted a physician's report on disability to CalPERS on September 28, 2011, describing a primary diagnosis of fibromyalgia with 15 of 18 tender points with diffuse muscle aching and pain. He pronounced respondent Johnson permanently incapacitated for performing her physical duties of her work. In his report, Dr. Haselwood observed that Dr. Saharan did not provide adequate objective documentation to support his conclusion that the presumptive diagnosis of fibromyalgia permanently disabled respondent Johnson from her sedentary work. In Dr. Haselwood's testimony, he explained that fibromyalgia is a syndrome, not a disease. It was developed to categorize a large group of patients with widespread musculoskeletal pain and dysfunction with no other pathophysiologic disease. Initially, 18 potential "tender points" were identified and the diagnosis required 11 or more. More recently, this method has been eliminated and fibromyalgia today is simply defined by a patient filling out two questionnaires. If the patient describes a certain level of generalized pain and the pain is limiting their functioning to a certain extent and there is no other obvious cause, the physician may diagnose fibromyalgia. No physical examination or clinical findings are required.

15. Dr. Haselwood diagnoses were chronic complex, widespread musculoskeletal pain and dysfunction syndrome associated with a myriad of other somatic symptomatology representing the cumulative effect of (A) age appropriate osteoarthritis; (B) degenerative and discogenic disease in the lumbosacral spine; (C) nonspecific widespread myofascial discomfort with a hypervigilance for same; (D) obesity and physical deconditioning; and (E) a significant element of nonorganic amplification presumably related to chronic depression/anxiety associated with occupational and life stressors. He could not substantiate the diagnosis of fibromyalgia syndrome and there was no evidence of an evolving systemic or inflammatory rheumatic condition.

16. Dr. Haselwood concluded that respondent Johnson had the physical ability to perform the essential duties of her occupation of accounting officer. There were no duties that she was unable to perform and she was not substantially incapacitated for such sedentary duties.

17. In a supplemental report dated January 14, 2013, Dr. Haselwood maintained his opinion that respondent Johnson was not incapacitated. This followed his review of Dr. Wall's responses to a "Multiple Impairment Questionnaire," presumably filled out by respondent Johnson. Dr. Wall described her predominant disabling conditions as total body pain, fatigue and dizziness aggravated by physical exertion and stress. Dr. Haselwood observed that the assessment of physical impairment by Dr. Wall was based almost entirely on subjective criteria and respondent Johnson's self-assertions.

18. In a second supplemental report dated March 25, 2013, Dr. Haselwood reviewed additional medical records authored by Dr. Sahran and Dr. Wall and a consultation report authored by Nancy Huang-Santos, a neurologist. Respondent Johnson visited Dr. Sahran on May 12, 2012, and November 19, 2012. Dr. Sahran reported a diagnostic assessment of fibromyalgia with fluctuating symptomatology with no physical findings. Dr. Wall's chart note of July 19, 2012, focused on respondent Johnson's trip to an emergency room two weeks earlier for an anxiety attack and abdominal pain. Dr. Wall's examination of respondent Johnson found tenderness across her low back and he diagnosed abdominal pain fibromyalgia and anxiety disorder. His chart note of November 12, 2012, described a flare-up of the fibromyalgia in the preceding week with lumbar and thoracic spine tenderness and numerous tender points. His physician's report of disability to CalPERS dated March 7, 2013, included the "trigger points" in respondent Johnson's shoulders and neck as objective evidence of fibromyalgia and he concluded that she was permanently incapacitated from performing her tasks as an accounting officer. Dr. Huang-Santos' consultative report of January 3, 2013, included a diagnostic assessment of symptoms and clinical exam consistent with fibromyalgia in the context of physician findings of trigger points in all extremities and back. Multiple sclerosis was ruled out based on a brain MRI scan. Dr. Haselwood stood by his original conclusion that respondent Johnson was not substantially incapacitated.

Kent E. Rogerson, M.D.

19. Dr. Rogerson is a board-certified psychiatrist. He saw respondent Johnson on November 26, 2013, and prepared a report dated January 10, 2014, that was received in evidence. Dr. Rogerson testified at the administrative hearing and discussed the contents of his report.

20. Dr. Rogerson asked respondent Johnson to complete the Minnesota Multiphasic Personality Inventory-2. She required much more time than is typical, having to finish it after the clinical interview. After reviewing respondent Johnson's occupational requirements as an accounting officer, Dr. Rogerson asked respondent Johnson about the history of her psychiatric symptoms. Respondent Johnson reported that her anxiety and depression began approximately four years earlier and she was treated by her primary physician Dr. Wall with prescriptions for Zoloft and Paxil. The medications had not been helpful, in her opinion. She felt her work supervisor was not sympathetic to the pain caused by her fibromyalgia that began in 2010. The pain interfered with carrying out her duties in a timely manner which increased her anxiety. Her ability to concentrate and focus on tasks was impaired. Her long commute to Sacramento for work exacerbated her pain and stress. Respondent Johnson was treated for a panic attack and atrial fibrillation in July of 2012 and has since had difficulty keeping the panic attacks under control. She was not then experiencing panic attacks, but she said she had little energy and experienced anxiety and depression that precluded her from working. In addition to the prescriptions for anti-anxiety and antidepressant medications, she was taking medications for generalized pain, tension headaches, migraines, stomach upset, restless legs, and anemia.

21. Dr. Rogerson performed a mental status examination of respondent Johnson. Respondent could only recall three digits forward and four digits backward when read seven numbers in sequence. She was able to subtract 7 from 25, but asked if she could use her fingers. Dr. Rogerson felt she was trying to appear more impaired than she actually was. In his testimony, Dr. Rogerson commented that it was puzzling that respondent Johnson did better on reciting the numbers backwards which is more difficult for most people and that respondent Johnson's difficulty with simple subtraction made no sense as she held a master's degree in accounting. Dr. Rogerson also interpreted the MMPI-2 results as possibly reporting an exaggerated picture of her situation and problems. Dr. Rogerson's diagnoses were Axis I, Adjustment Disorder with Mixed Mood, Probable exaggeration of illness and disability, rule out overuse of prescription medications; and Axis II, Personality Disorder, Not Otherwise Specified.

22. In the portion of his report entitled "Assessment," Dr. Rogerson opined that there are no specific job duties that respondent Johnson is unable to perform because of a mental condition. She was not substantially incapacitated for her usual duties based on a psychiatric illness.

Joseph Serra, M.D.

23. Dr. Serra, a board-certified orthopedic surgeon, saw respondent Johnson, at the request of CalPERS, on May 12, 2015. He wrote a report the same day and the report was received in evidence. Dr. Serra testified at the continued administrative hearing and discussed the contents of his report.

24. Dr. Serra asked respondent Johnson to fill out a history questionnaire and used it in his oral elicitation of a history. He commented in his report that it was very difficult keeping her on task and she seemed confused with a poor memory of events. Respondent's primary medical complaints were left hip pain, low back pain, fibromyalgia, neck pain, and arthritis. She first developed pain in her hands, then shoulders, then neck, and then her head. Respondent Johnson related that the pain gradually spread all over her body. She had been treated with epidural steroid injections and radiofrequency ablations in her lower back over five years by Dr. Mansoor. The most recent injection was February of 2015. Respondent Johnson was seen by Dr. Gary Murata, an orthopedist, one month before Dr. Serra's evaluation. Dr. Murata x-rayed her hip and told her she had minor arthritis.

25. Respondent Johnson's then-present complaints were fibromyalgia with pain all over. The pain was constant and the fibromyalgia flared up with neck movement. She rated her pain as 8 or 9 on a 10 point scale. Her low back pain is constant and both dull and sharp. It radiates from her left knee to her hip and lower back. She sleeps in a hospital bed because of the pain. She also had sciatic pain radiating to her left foot. Her left hip pain is constant and sharp with weight-bearing and turning. She has muscle tightness and intermittent pain in her shoulders. She described migraine and tension headaches, dizzy spells, and balance issues. She uses a cane. Respondent's symptoms are aggravated by twisting, reaching, stooping, and bending. She can only stand for ten minutes. Her prescribed medications only take the edge off the pain.

26. Dr. Serra performed an orthopedic physical examination of respondent Johnson. The neck examination revealed tenderness in the paravertebral musculature in the posterior cervical spine radiating toward the trapezii. Cervical range of motion was normal for flexion and extension, but 50 percent of normal for rotation. Lateral bending elicited pain at 50 percent of motion. Dr. Serra regarded the range of motion examination of respondent Johnson's shoulders as "quite invalid." Range of motion test results were inconsistent, including the results of active and passive range of motion movements of respondent Johnson's upper extremities. Dr. Serra concluded that respondent Johnson was capable of moving both shoulders through a normal range of motion, but she preferred to complain of pain and weakness rather than performing the tests in a valid manner. The examination of respondent Johnson's lower back revealed tenderness to palpation of the left paravertebral musculature from L1 to S1. Respondent Johnson reported during the palpation of her lumbosacral spine that her knees were giving out causing her to almost fall. The range of motion for the lumbosacral spine was markedly limited due to respondent Johnson's subjective complaints of pain. Flexion was 10 percent of normal, extension 10 percent of normal, lateral bending 25 percent of normal, and rotation 50 percent of normal bilaterally.

Examination of respondent Johnson's left hip revealed tenderness in the hip joint region. There was essentially full range of motion in both hips with complaints of pain with internal rotation and abduction of the left hip.

27. Dr. Serra reviewed the records relating to treatment of respondent Johnson by Dr. Saharan, emergency physician Dr. Manshadi (atrial fibrillation visit), Dr. Wall, Dr. Huang-Santos, Dr. Haselwood, and Dr. Rogerson. He summarized, without comment, the treatment, diagnostic studies, and evaluations.

28. Dr. Serra's impressions were back pain by history, probably early degenerative disc disease or mild osteoarthritis; chronic left hip pain with unknown etiology but possibly early arthritis; status post gastric bypass; morbid obesity; history of anxiety, depression and panic attacks; and complaints of neck pain. Dr. Serra opined that respondent Johnson is not unable to perform her usual duties by reason of a physical condition. In his orthopedic opinion, she was not substantially incapacitated for the performance of her usual duties as an accounting officer. Dr. Serra concluded that respondent Johnson was not putting forth her best effort in the examination and was exaggerating her subjective complaints to a significant degree.

29. During cross-examination, respondent Johnson asked Dr. Serra to review and comment upon an Imaging Report based on a lumbar spine MRI of respondent Johnson taken on May 29, 2015, and read by Dr. Anil Khosia. The report describes mild disc desiccation, mild diffuse annular bulge, and small central disc protrusion at L4-L5. Also included is mild diffuse annular bulge and mild bilateral facet osteoarthritis at L5-S1. Dr. Khosia's impressions repeated these findings, but noted the absence of neural compression, large disc herniation or canal stenosis. Dr. Serra commented that the report did not change his opinions and that it showed mild changes at L4-5 and L5-S1. Dr. Serra explained that there was no indication of nerve root compression or shifting of the vertebrae.

Respondent's Medical Opinion Evidence

30. Respondent Johnson did not call any medical experts to support her application for an industrial disability retirement. She offered the Imaging Report described in Factual Finding 29 and it was received in evidence. Respondent Johnson testified and established that she is now being treated at the Stanford University Pain Clinic in an effort to determine the source of her pain. She has curtailed her daily activities as she cannot care for her house. Her only physical exercise consists of slow walking and swimming. Her husband helps her bathe. She is precluded from driving because of the medications she regularly takes. She suffers from sleep apnea and her use of machines to assist her night respirations only made the condition worse. This renders her more fatigued during the day.

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LEGAL CONCLUSIONS

1. An applicant for retirement benefits has the burden of proof to establish a right to the entitlement absent a statutory provision to the contrary. (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 57.) The party asserting the affirmative at an administrative hearing has the burden of proof including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn.5, citing *So. Cal. Jockey Club v Cal. etc. Racing Bd.* (1950) 36 Cal.2d 167, 177.)

2. Government Code section 20026 reads, in pertinent 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....

3. Incapacity for performance of duty means the substantial inability to perform usual duties. (*Mansperger v Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876.) In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, at page 860, the court rejected contentions that usual duties are to be decided exclusively by State Personnel Board job descriptions or a written description of typical physical demands. The proper standard is the actual demands of the job. (See also, *Thelander v. City of El Monte* (1983) 147 Cal.App.3d 736.) The ability to substantially perform the usual job duties, though painful or difficult, does not constitute permanent incapacity. (*Hosford, supra*, 77 Cal.App.3d 854, at p. 862.)

4. Respondent Johnson had the burden of producing evidence to support her application for industrial disability retirement, including the burden to produce “competent medical opinion” that her physical condition rendered her substantially incapacitated for the performance of her usual duties. Respondent Johnson did not sustain her burden. CalPERS presented competent medical opinion evidence establishing that respondent Johnson is not substantially incapacitated for the performance of her usual duties as an accounting officer by reason of her claimed injuries. Therefore, respondent Johnson’s application must be denied.

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ORDER

Respondent Johnson's appeal from CalPERS' determination that she was not permanently disabled or incapacitated for the performance of her usual duties as an Accounting Officer (Specialist) with respondent California Department of Transportation at the time that her application for industrial disability retirement was filed is DENIED.

Dated: September 10, 2015

DocuSigned by:

Karl Engeman

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KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings