

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
Service Pending Disability Retirement of:

Case No. 2014-0834

EVA A. SCHREPEL,

OAH No. 2015050289

Respondent,

and,

DEPARTMENT OF EDUCATION,

Respondent.

PROPOSED DECISION

This matter was heard before Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, on October 12, 2015, in Sacramento, California.

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

Eva A. SchrepeL (respondent) did not appear.¹

No appearance was made by or on behalf of the Department of Education.

Evidence was received, the record was closed, and the matter was submitted for decision on October 12, 2015.

ISSUE

At the time of respondent's application for service pending disability retirement, was respondent permanently disabled or substantially incapacitated from the performance of her duties as an Associate Governmental Program Analyst (AGPA) for respondent Department

¹ Proper service of the Notice of Hearing was made pursuant to Government Code section 11509. The matter proceeded as a default hearing.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED October 16 2015

Jana Kuris

of Education, based on neurological (post traumatic brain syndrome, chronic pain syndrome, fibromyalgia, acute post traumatic headaches, cognitive impairments, loss of balance) and hematological (idiopathic thrombocytopenia purpura) conditions?

FACTUAL FINDINGS

Duties of an Associate Governmental Program Analyst

1. At the time of her application for her service pending disability retirement, respondent was employed as an AGPA for the Department of Education. The Department of Education's Job Description/Duty Statement (duty statement) describes the essential duties and responsibilities of the job classification as follows: performing a variety of administrative and analytical tasks in the areas of personnel, technology, web and data management; providing resources, support and technical assistance in the Career and College Transition Division; responding to questions and providing advice to Division and school district staff on compliance requirements; reviewing, researching and analyzing laws and reports related to school reform and career development; reviewing funding documents; providing training and support to funding contacts; reviewing web documents; and performing other job-related duties as required.

2. The physical requirements of the job include: frequent (three to six hours) repetitive use of hands, keyboard use and mouse use; occasionally (up to three hours) standing, walking, bending (neck and waist), reaching above and below shoulder(s), fine manipulation, and simple grasping.

The job does not require: running; crawling; kneeling; climbing; squatting; pushing and pulling; power grasping; lifting and carrying; walking on uneven ground; driving; working with heavy equipment; being exposed to excessive noise, extreme temperature and humidity, dust, gas fumes or chemicals, working at heights; operating foot controls; using special visual or auditory protective equipment; and working with biohazards.

Respondent's Employment History

3. Respondent was employed by the Department of Education. The evidence did not establish when she was first employed. At the time respondent filed her application for service pending disability retirement, she was employed as an AGPA. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150. Respondent retired for service effective January 19, 2014.

Respondent's Disability Retirement Application

4. On December 18, 2013, CalPERS received respondent's Disability Retirement Election Application (application). In response to the question on the application about her specific disability, and when and how it occurred, respondent wrote: "Post Traumatic Brain

Syndrome, ITP (Idiopathic Thrombocytopenia purpura), Chronic Pain Syndrome, Fibromyalgia, Acute post traumatic headaches[.]” Respondent wrote that her disability occurred on January 18, 2013, as a result of ITP. She stated, ” I passed out and hit my head which resulted in a brain hemorrhage[.]”

Respondent stated that her limitations/preclusions due to her injury or illness were “Neurological impairment including recurrent dizziness, loss of balance, cognitive impairment & recurrent migraines. Slower cognitive processing.” She stated that her neurological impairment has resulted in loss of memory and slower cognitive processing which make it difficult to organize and follow through on complete reasoning processes. Her “dizziness and loss of balance also increased the number of injuries as a result of recurring falls which would be a liability in the workplace.”

5. On May 15, 2014, Anthony Suine, Chief of the Benefit Services Division, notified respondent that her application had been denied based upon a finding that her neurological (post traumatic brain syndrome, chronic pain syndrome, fibromyalgia, acute post traumatic headaches, cognitive impairments and loss of balance) and hematological (idiopathic thrombocytopenia purpura) conditions were not disabling, and that she was not substantially incapacitated from the performance of her job duties as an AGPA. Respondent timely appealed the denial.

Respondent’s Injuries, Treatment and Assistance

6. On January 18, 2013, respondent woke up to go to the bathroom. On her way back to bed, she lost consciousness and hit her head. Her husband heard a thump on the floor. Respondent did not bite her tongue, nor did she wet herself. She recalled feeling barely coherent after the fall. She had shortness of breath and felt very dizzy. She went back to bed. The following day, she went to work. Thirty minutes after her arrival, she began feeling dizzy, vomited once, and spoke unintelligibly. She started 80 milligrams of Prednisone (daily) one week prior to the fall, which may have played a role in her fall.

7. Respondent went to Methodist Hospital of Sacramento after feeling dizzy at work. It was noted upon examination that respondent was a 51 year-old woman with a past medical history notable for gastric bypass with 100 pounds of weight loss, total knee replacement and hip surgery, chronic migraines, chronic neck and back pain due to fibromyalgia, cervical and lumbar disease, multinodular goiter, thrombocytopenia², and chronic pain syndrome. Respondent also complained of a “massive headache,” neck and left facial pain. Her computed tomography (CT) scan showed a very small brain hemorrhage, however she was neurologically intact, her neurological examination was normal, and no neurosurgical intervention was deemed necessary. CT’s of respondent’s cervical spine and facial structures were normal. A CT angiogram of the neck showed no vascular malformation or vascular pathology.

² Deficiency of platelets in the blood.

8. On February 5, 2013, respondent had ongoing symptoms of dizziness, unsteadiness, gait imbalance, headache, vision changes, slower cognitive processing and intermittent double vision. On examination, there was no concern noted. She had normal sensation, strength and mental status. A magnetic resonance image (MRI) was taken of respondent's brain. A small subdural hematoma was found, with no mass effect. A head CT scan taken on February 23, 2013, showed no new hemorrhages.

9. Throughout 2013, respondent continued to experience dizziness, headache, neck pain, poor balance and cognitive problems. She took medications for her fibromyalgia and migraine headaches. Her diagnoses were as follows:

- a. History of tobacco abuse, quit in 1985
- b. Obesity
- c. History of meniscal tear due to motor vehicle accident status post meniscal surgery 2/9/2001
- d. Chronic back and knee pain, 2001
- e. Irritable bowel syndrome
- f. Fibromyalgia
- g. Chronic migraine headaches
- h. Right lower leg localized osteoarthritis
- i. History of chest pain 5/11
- j. Status post appendectomy
- k. Status post hip surgery
- l. Status post total knee replacement
- m. History of chronic narcotic use and/or intolerance pre-existed to subject incident
- n. Status post syncope³, query micturition syncope, 1/18/2013 with subsequent neurological abnormalities, including small right-sided subarachnoid hemorrhage, small subdural hematoma with radiographic evidence of

³ Temporary loss of consciousness caused by a fall in blood pressure.

minimal edema in the right superior frontal gyrus deemed to be a small contusion, a mild traumatic brain injury, transient post-concussion syndrome consisting of migraine headaches, possible short-term memory difficulties, impaired concentration, and dizziness.

- o. Multiple ongoing neurological complaints, including cognitive impairment, language difficulties, memory difficulties involving both short and long-term recall, anxiety, migraine headaches, etiology uncertain
- p. Chronic neck, midback, and low back pain, pre-existed to subject incident, transiently exacerbated following the subject incident
- q. Multiple non-physiological findings on neurological examination, including effort-related weakness, non-physiologic pain responses, and functional gait disorder (astasia-abasia)

CalPERS' Expert – Eric Van Ostrand, M.D.

10. Dr. Van Ostrand is board-certified in neurology. He is a neurologist at the Permanente Medical Group in Sacramento, specializing in the peripheral nervous system and neuro-diagnostic evaluations. He testified at hearing. On April 2, 2014, Dr. Van Ostrand conducted an independent medical examination (IME) of respondent at the request of CalPERS. Dr. Van Ostrand reviewed respondent's medical, social, occupational and treatment history, performed a physical examination and prepared a report dated April 2, 2014. Dr. Van Ostrand described respondent's current complaints as follows:

Impaired Cognition

11. Respondent reported that her cognition was slower. She was easily distracted and it was harder to focus on various tasks. She experienced difficulty getting the correct words out, noting that she often "becomes stuck on words." Her memory has been negatively impacted. She reported decreased short and long-term recall. She stated, "If I'm not distracted with a lot of things going on," her short-term memory deficits are minimal. She had difficulty remembering names, and became easily frustrated with electronic devices. She had difficulty understanding conversations. She found that her short-term memory improved over time.

Impaired Balance

12. Respondent indicated that her impaired balance was the primary reason that she had been unable to return to work. She fell, on average, once per week. Her balance

became worse when her eyes were closed. Her balance had neither improved nor worsened over time. She often used a single point cane for support. She walks unspecified distances with a cane, and pushes herself to walk more.

Anxiety

13. Since her fall, respondent breaks down and cries due to stress or anxiety. She has daily bouts of anger or crying fits. She denied any depression.

Axial Pain

14. Respondent stated that since her motor vehicle accident 20 years ago, she suffers from cervical, thoracic, and lumbosacral spinal pain. She reported that her discs are "disintegrating." Her chronic and diffuse axial pain "shoots all over" her body, including her head and face. Her pain is gradually worsening over time, and she relates this to her multiple falls. Her average pain level now is 8/10 on a scale from zero to 10. On a more symptomatic day, her pain will escalate to a 9/10 to 10/10, decreasing to a 4/10 to 5/10 on a less symptomatic day.

Migraine Headaches

15. Respondent reported suffering from chronic migraine headaches dating back to her motor vehicle accident 20 years ago. Five years ago, she would experience one headache a month. Since her fall, her headaches have increased to two to three times per week, usually lasting three to five days at a time. The intensity of her headaches has also increased. The only accompanying symptom is nausea or vomiting, which occurs at least once a week. An average pain level is 9/10. A more severe headache is at a 10/10 level.

Other Reported Symptoms

16. At an unspecified point in time, respondent began experiencing numbness and tingling over the lateral aspect of both legs. She does not pay attention to these symptoms, and sees this as a "side effect" of her falls.

Physical Examination

17. Dr. Van Ostrand conducted a physical examination of respondent's head, eyes ears, nose and throat, cranial nerves, motor control, sensation, coordination, reflexes, musculoskeletal system, gait and station, cognition and language, and respondent's pain levels in her spine. He noted that respondent's January 2013 fall occurred "in a patient who is on chronic narcotic medications for a variety of chronic pain complaints." He further noted that respondent's medical records reflected "a myriad of ongoing subjective complaints primarily involving chronic pain issues, cognitive difficulties, and impaired balance. It was noted that these symptoms have rendered her unable to return to work."

Dr. Van Ostrand's neurologic examination noted non-physiologic pain responses involving the axial skeleton, a functional gait disorder as evidence by prominent astasia abasia (inability to stand or walk in a normal manner), poor effort during motor testing, and impaired short-term memory/concentration marked by anxiety and a tearful state.

Dr. Van Ostrand's opinion was that, at the time of his examination, there was no neurological reason that respondent could not perform her job duties. However, he indicated that there was a period of incapacity which began on January 18, 2013, to May 14, 2013. During this time, it was medically more likely than not that respondent was incapacitated because of a "transient exacerbation of her chronic pain issues, medication related issues (multiple narcotic side effects), and possible cognitive/memory/speech/language issues." Dr. Van Ostrand did not detect the existence of any objectively definable neurological deficits which would preclude respondent's ability to participate fully in her specific and required job duties.

Dr. Van Ostrand found that there was "unequivocal evidence of symptom embellishment" regarding respondent's systemic weakness, imbalance and pain complaints. During the cognitive testing portion of the neurological examination, respondent became tearful at times, leading to a significant negative impact on her ability to fully participate in the testing.

Dr. Van Ostrand concluded that respondent was not substantially incapacitated, and that respondent did not have any neurologic issues beyond May 14, 2013.

Conclusion

18. Dr. Van Ostrand persuasively concluded that respondent is not permanently disabled or substantially incapacitated from performing the usual duties of an AGPA. Respondent did not appear for the hearing. The above matters having been considered, respondent has not established through competent medical evidence that, at the time of application, she was permanently disabled or incapacitated from performing the usual duties of her position as an AGPA.

LEGAL CONCLUSIONS

1. Respondent has the burden of proof to establish by a preponderance of evidence that she is "incapacitated for the performance of duty,"⁴ which courts have

⁴ Although no court construing CalPERS law has ruled on this issue, courts applying the County Employees' Retirement Law have held that the applicant has the burden of proof. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691.) CalPERS may rely on decisions affecting other pension plans when the laws are similar. (*Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal.App.3d 937, 947.) In this case, Government Code section 31724 (County Employees'

interpreted 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, 877.) Discomfort, which may make it difficult to perform one’s duties, is insufficient to establish permanent incapacity from performance of one’s 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 retirement. (*Hosford, supra*, 77 Cal.App.3d at p. 863.)

2. Pursuant to Government Code section 21150, members incapacitated for the performance of duty shall be retired for disability. Government Code section 20026 provides that “‘Disability’ and ‘incapacity for performance of duty’ as a basis of retirement, means disability of permanent or extended and uncertain duration, as determined by the board... on the basis of competent medical opinion.” In *Mansperger, supra*, 6 Cal.App.3d at p. 873, the court construed the term “incapacitated for the performance of duties” to mean a substantial inability to perform the employee’s usual duties. (*Id.* at p. 876.) As the court explained in *Hosford*, prophylactic restrictions imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Hosford, supra*, 77 Cal.App.3d at p. 863.) An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697 [finding that a deputy sheriff was not permanently incapacitated from the performance of his duties, because “aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the [the sheriff’s] condition are dependent on his subjective symptoms.”].)

3. *Mansperger, Hosford* and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date she applied for disability retirement, she was substantially unable to perform the usual duties of an AGPA on the basis of neurological (post traumatic brain syndrome, chronic pain syndrome, fibromyalgia, acute post traumatic headaches, cognitive impairments, loss of balance) and hematological (idiopathic thrombocytopenia purpura) conditions. Respondent did not present any evidence to meet this burden.

4. In sum, respondent failed to show that when she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual

Retirement Law) is similar to Government Code section 21151 (California Public Employees’ Retirement Law), and the rule concerning the burden of proof is therefore applicable. Furthermore, Evidence Code section 664 creates the general presumption that a public agency has performed its official duty. Here, CalPERS has fulfilled its duty to determine respondent’s eligibility for disability retirement, and the burden falls on respondent to rebut the presumption of Evidence Code section 664 by proving incapacitating disability.

and customary duties of an AGPA for the Department of Education. Her application for disability retirement must, therefore, be denied.

ORDER

The application for service pending disability retirement filed by respondent Eva A. Schrepel is DENIED.

DATED: October 15, 2015

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Danette C. Brown
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DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings