

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 Disability Retirement)
against:

MARIA EUGENE GOMEZ

and

SANTA ANA UNIFIED SCHOOL
DISTRICT,

Respondents.

Case No. 2014-0088

OAH No. 2015020987

PROPOSED DECISION

Ralph B. Dash, Administrative Law Judge, Office of Administrative Hearings, heard this matter on October 20, 2015, in Los Angeles, California.

Preet Kaur represented Complainant.

Maria Eugene Gomez (Respondent) represented herself.

The Statement of Issues was served and due notice of the time and place for hearing was given as required by the Government Code. There was no appearance by or on behalf of Santa Ana Unified School District (SAUSD or District).¹

Evidence having been received and the matter having been submitted, the Administrative Law Judge makes the following Proposed Decision.

//

//

¹ Due to the failure to appear at the hearing by SAUSD after service of proper notice of the proceedings, its default is noted pursuant to Government Code section 11520.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 27 Oct 2015
Amy Miller

FINDINGS OF FACT

1. Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), made the Statement of Issues in his official capacity.²

2. At the time she filed her application for disability retirement (application) (Exhibit 3), dated July 9, 2012, Respondent was employed by SAUSD as a "mild-moderate paraeducator" (teacher's aid for children with disabilities).³ Respondent had worked for the District in excess of 25 years. Based on that employment, Respondent is a local miscellaneous member of CalPERS. She has the minimum service credit to qualify for retirement. In fact, Respondent retired for service pending the determination whether she could retire for disability. On April 26, 2013, CalPERS denied Respondent's application (Exhibit 4).

3. On the application, Respondent listed her disabilities as "herniated disk back, knees, wrists (carpal tunnel)."

4. Respondent worked at a District high school during the entire length of her employment. According to the Job Function Analysis for her position (Exhibit 13), 100 percent of her time was spent doing the following: "Follow teacher's direction in assisting modification of inappropriate behavior based upon knowledge of [Individualized Education Plan] Assist teacher in the supervision of students in and out of the classroom; assist in keeping the campus a safe environment for all students; supervise students during lunchtime, recess or on the school grounds as necessary and in the and in the classroom to assist in teaching appropriate peer relationships; assist in maintaining classroom in a clean, orderly healthful condition" The job analysis does not describe the types of disabilities Respondent could expect her students to have. It did require, however, that Respondent "understand the exceptional needs of Special Education students and demonstrate compassion accordingly."

5. Over the years, Respondent fell several times at work, in one instance having been deliberately tripped by a student. After one fall in 2006, Respondent underwent right knee surgery. After another fall in 2008, Respondent underwent back surgery, a laminotomy at L4-L5.⁴ Respondent later complained of pain still radiating down her left leg, as well as

² The Statement of Issues inadvertently referenced CalPERS itself as the complainant.

³ "Mild-moderate" refers to the degree of disability of children who are intellectually disabled. At the time the job function analysis was prepared (according to Exhibit 13, it was last revised in 2005), these children were referred to as mentally retarded. Respondent also worked with children diagnosed with autism, and children who were physically handicapped.

pain in her wrists (carpal tunnel syndrome) and pain in her shoulder (bursitis). She also complained of ongoing knee pain.

6. After receipt of her disability retirement application, CalPERS wanted Respondent to undergo an Independent Medical Examination (IME). At the request of CalPERS, Keola Chun, M.D., examined Respondent on January 9, 2013, and wrote his report (Exhibit 8) the same day. Dr. Chun is a board certified orthopedic surgeon. He is also a Qualified Medical Examiner. Since 2002 and up until recently, 70 percent of Dr. Chun's practice was in handling Worker's Compensation claims. That has dropped to 10 percent after his move to an HMO group. He sees 30 to 40 patients per day. Over the past five years, he has done "two to three" IME's for CalPERS annually.

7. Dr. Chun testified in accordance with his report. In fact, his testimony consisted largely of his reading portions of it. He started his testimony with an account of his qualifications and his background. He then stated that in conducting an IME, his practice is not to read any medical records until after he completes his physical examination. Later in his testimony he stated that he reads the records before he prepares his actual report. Prior to his examination of Respondent, Dr. Chun read Respondent's Job Function Analysis and Exhibit 14, the "Physical Requirements" of her job. He did not ask Respondent what she actually did while working for the District.

8. In his report, Dr. Chun noted that Respondent's "primary complaint is that of left-sided lower back pain. This is constant in nature. The pain will radiate into the left buttock and down the left lower extremity to her heel. She describes tingling and numbness throughout the entirety of the left lower extremity."

9. Dr. Chun began his substantive testimony by revealing what may be considered actual bias against Respondent, or at least bias against the type of claim Respondent has made in her application. In his introduction to explaining the results of his examination, Dr. Chun stated that Respondent presented as a "typically classic workers' comp claim" with "typically exaggerated complaints." One of his diagnoses of Respondent was "symptom magnification." He later explained that he used the term "symptom magnification" as being synonymous with "malingering."

10. Dr. Chun stated that Respondent "did not cooperate" during his examination in that she did not exhibit "reproducible symptoms." That is, she exaggerated her complaints during certain portions of the examination, but did not exaggerate the complaints "when she was distracted." He noted that Respondent "complained of tenderness everywhere she was touched" but there was no correlation to the touch vis-à-vis the underlying musculature or nerve. Every test that Dr. Chun administered led him to believe that Respondent was simply

⁴ A laminotomy is an orthopedic neurosurgical procedure that removes part of a lamina of the vertebral arch in order to decompress the corresponding spinal cord and/or spinal nerve root that causes radicular pain which is a type of pain that radiates into the lower extremity directly along the course of a spinal nerve root.

prevaricating. It was Dr. Chun's opinion that Respondent was not substantially incapacitated for the performance of her duties as a mild-moderate paraeducator for SAUSD.

11. After receipt of Dr. Chun's report, CalPERS asked him for clarification regarding Respondent's "wrists/carpal tunnel conditions." Dr. Chun said nothing of these conditions in his report. Without further examination of Respondent, Dr. Chun supplemented his report on March 14, 2013 (Exhibit 10). In that supplemental report, Dr. Chun stated that at the time of his examination, Respondent stated that "her wrists have no strength." In the supplemental report, Dr. Chun noted that Respondent's "Tinel signs" were negative "as they produced pain only over the region being tapped, but not any radiating nerve pain."⁵ Dr. Chun then noted that Respondent "demonstrated poor compliance with the Jamar dynamometer grip test." He could not explain why he had omitted Respondent's Jamar information from his original report or in his supplemental reports. Dr. Chun again opined "there are no specific job duties that the member is unable to perform"

12. On a date not established by the evidence, CalPERS sent Dr. Chun additional medical records relating to Respondent.⁶ These records were from a Dr. Lewis, who conducted an Agreed Medical Examination (AME) of Respondent, apparently for a worker's compensation claim, and who found Respondent to be permanently disabled and unable to perform her usual and customary duties for the District. Dr. Chun prepared another supplemental report, dated July 8, 2013, in which he noted that he had reviewed these records and his opinion had not changed.

13. Unlike Dr. Chun, Dr. Lewis apparently found objective signs that correlated with Respondent's complaints of knee pain. He found Respondent to have, even after surgery, a "degenerative tear of the medial and lateral meniscus of the right knee." He also diagnosed her with "adhesive capsulitis" [frozen shoulder], "bilateral carpal tunnel syndrome," "degenerative disk disease" in her neck,⁷ and "low back disorder." Dr. Chun did

⁵ The Tinel signs have been found to be an unreliable indicator of carpal tunnel syndrome. "In 80 upper extremities clinically suspected of carpal tunnel syndrome, electromyography (EMG) was performed and the Phalen and Tinel signs were sought. These two signs showed relatively low sensitivity (60-67%) and specificity (59-77%) despite a statistically significant association with the EMG findings. These two signs are not reliable as clinical criteria for carpal tunnel syndrome." (<http://www.ncbi.nlm.nih.gov/pubmed/394086>.) Under Government Code section 11425.50, subdivision (c), ". . . The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence." The foregoing citation was presented to this Administrative Law Judge in connection with a matter heard for the Medical Board of California.

⁶ All reviews of medical records by Dr. Chun that are contained in his various reports were admitted as direct evidence.

⁷ This finding was in addition to the "congenital fusion" in the neck, which Dr. Chun also found.

not comment on any of these findings, either in his various reports or in his testimony. Nor did he comment on Dr. Lewis's opinion that, "it is not within the physical capabilities of the patient to return to her usual and customary work." (Exhibit 8, page 6; Exhibit 11, page 2.)

14. On October 1, 2015, CalPERS sent still more medical records to Dr. Chun for his review. Dr. Chun wrote his third Supplemental Report (Exhibit 12) the following day. Dr. Chun again summarized the records but made no comment thereon except to state that his opinion still had not changed. Included in the records he reviewed and summarized were the charts of Christopher M. Fleming, M.D., Respondent's long-standing treating orthopedist. Of particular importance to Respondent is the summary of her visit with Dr. Fleming on November 18, 2014.⁸ Dr. Fleming found, apparently after his review of an MRI, that, despite Respondent's surgery at L4-L5 (where Respondent's radicular back pain originates), Respondent had "herniated disk pulposus . . . with moderate degenerative disc disease" at the same lower spine level.⁹ Dr. Fleming also noted that Respondent had chronic right knee pain with a meniscal tear and "probable carpal tunnel syndrome." He noted that Respondent should see a pain management specialist and referred her to one.

15. Respondent testified and explained her actual job duties as a paraeducator for high school students with disabilities (i.e., special needs children), and how she was not able to perform those duties at the time she filed her disability retirement application. Respondent worked with both physically and mentally disabled children. She would work with these children both in special education classrooms and in "regular" classrooms when the children were "mainstreamed." One of her "100 percent" duties was keeping the children safe. This meant that she would have to accompany some students to the bathroom and physically lift these high school-age students on and off the toilet. She had to push some children in wheelchairs. She had to ensure the children stayed safe on the playground and that they were not harassed by "normal" students (or each other). Some of the children could become upset, and act out, by seemingly innocuous things, such as having a substitute teacher. Respondent would have to attend to these students and calm them down while at the same time keep her eye on her other students. It is a stressful and physically demanding job.

16. Respondent was visibly distressed when testifying about not being able to work. She stated that she felt "useless" and that she "would still be working if this had not

⁸ Respondent provided what appears to be a complete copy of Dr. Fleming's office notes, which were admitted as administrative hearsay (part of Exhibit B). 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 factual finding.

⁹ Herniated nucleus pulposus is a condition in which the soft, gelatinous central portion of an intervertebral disk is forced through a weakened part of the disk, resulting in back pain and nerve root irritation.

happened to me.” According to Respondent’s “Interactive Accommodation Assessment Summary” (Exhibit C), which was used by the District when Respondent attempted to go back to work, Respondent graduated high school and has taken “college units with focus in Early Childhood Education.” She has a “District Certificate in NCLB [No Child Left Behind]” and has “bilingual Spanish interpreter skills.” Despite having this background, the District could offer her no alternative employment. The District noted that Respondent’s doctors had precluded her from, among other things, heavy lifting, squatting, prolonged sitting or walking and repetitive grasping, all of which she needed to do as part of her regular duties as a paraeducator for special needs children.

CONCLUSIONS OF LAW

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that s/he is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) “Preponderance of the evidence means evidence that has more convincing force than that opposed to it.” (Citations omitted.) . . . The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant.” (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) (Emphasis in original.) In meeting the burden of proof by a preponderance of the evidence, Respondent “must produce substantial evidence, contradicted or uncontradicted, which supports the finding.” (*In re Shelley J.* (1998) 68 Cal.App.4th 322 at p. 329.)

2. Government Code section 20026 provides in part:

“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.

3. Government Code section 21150 provides in part:

Any 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

The term “incapacitated for the performance of duty” has been interpreted to mean that the employee is substantially unable to perform the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689; *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876-877.)

4. Government Code section 21156 provides in part:

If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, 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

5. In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 860-861, the court stated, "In determining eligibility for disability retirement, the applicant's actual and usual duties must be the criteria against which any impairment is judged, and generalized job descriptions and physical standards are not controlling."

6. The court in *White v. State of California* (1971) 21 Cal.App.3d 738, 759-750, explained how the weight to be given to an expert's opinion is measured.

The weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion." (Citation); its value "rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion . . ." [Citation.] Such an opinion is no better than the reasons given for it [Citation], and if it is "not based upon facts otherwise proved, or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence. [Citations.]"

7. Dr. Chun's opinion that Respondent is not physically incapacitated for the performance of her usual duties as a special education paraeducator for the District is given diminished weight. He did not know Respondent's actual job duties (Finding 7). Consequently, there is no way to assess the persuasiveness of his opinion that Respondent is or is not incapacitated from performing those duties. (See *Jennings v. Palomar Pomerado Health Systems* (2004) 114 Cal.App.4th 1108, 1117: "Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an 'expert opinion is worth no more than the reasons upon which it rests.'" Dr. Chun's testimony is given little weight for the addition reason that it appeared he may have been biased against Respondent. He expressed this bias while testifying (Finding 9), and it is reasonable to assume he held this same bias while he conducted the IME and prepared his reports.

8. The preponderance of the competent medical evidence established that, as of the date of her retirement application, Respondent was substantially incapacitated from performing her usual and customary duties as a special education paraeducator for the Santa Ana Unified School District. Dr. Lewis, who conducted the AME, was of the opinion that Respondent could not perform her usual and customary duties for the District (Findings 12 and 13). And Dr. Fleming, Respondent's treating physician, put such limitations on Respondent's physical

activities that she could not perform those duties (Findings 14 and 15).

ORDER

The appeal of Maria Eugene Gomez from the denial by CalPERS of her application for disability retirement is granted. CalPERS shall grant the application.

Date: 10-26-15



RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings