

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of the Application for Disability  
Retirement of:

BRENDA K. NOEL,

Respondent

and

CALIFORNIA DEPARTMENT OF MOTOR  
VEHICLES,

Respondent.

Case No. 2014-0388

OAH No. 2014050848

**PROPOSED DECISION**

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings (OAH), State of California, heard this matter on August 25, 2015, in Sacramento, California.

Jeanlaurie Ainsworth, Senior Staff, attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Brenda K. Noel represented herself, and was accompanied by her support person, Vernita Parker.

No one appeared for or on behalf of respondent California Department of Motor Vehicles (Department), its default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to that respondent only.

Evidence was received, and the record was left open to allow responded to submit additional medical evidence, for CalPERS to object to such evidence, and for the parties to submit written closing briefs. Ms. Noel submitted psychological and pain management records (Exhibit E), documents related to her request for reasonable accommodation (Exhibit F), and documents related to her medical demotion (Exhibit G), to which CalPERS objected (Exhibit 26). CalPERS's objections are overruled, except those based on hearsay, and Exhibits E, F, and G are admitted as administrative hearsay. The parties' closing briefs are

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marked as Exhibits 27 (CalPERS's) and H (Ms. Noel's). The record was closed, and the matter was submitted for decision on October 7, 2015.

## SUMMARY

This appeal is limited to determining whether Ms. Noel is permanently and substantially incapacitated for the performance of her usual job duties as a Motor Vehicle Field Representative in the Department's Sacramento Business Depot Call Center due to otolaryngologic (hearing loss) and orthopedic (cervical spine) conditions. Neither the Department nor Ms. Noel introduced persuasive medical evidence demonstrating her substantial incapacity. Therefore, the Department's application for disability retirement benefits for Ms. Noel should be denied.

## FACTUAL FINDINGS

### *Ms. Noel's Employment History with the Department*

1. Ms. Noel began working for the Department as an Office Assistant in the mailroom in 1998. Over the next 13 years, she transferred to different Office Assistant positions throughout the Department.

2. At the end of 2010 or the beginning of 2011, Ms. Noel filed a formal request for a reasonable accommodation with the Department. The specific factual basis for her request was not explored a hearing, but it was based at least in part on a January 19, 2011 medical evaluation by Ralph Arthur Herrera, M.D., which stated: "No lifting over 10 pounds; occasional reaching above the left shoulder; firm gripping, grasping, and keyboard use with the left hand is limited to four hours per day; limit repetitious activities to two hours at one time, and then she must change activity."

3. Ms. Noel's request for a reasonable accommodation was denied by the Department on March 9, 2011. And since it could not accommodate the work restrictions imposed by Dr. Herrera, the Department medically transferred Ms. Noel to a Motor Vehicle Field Representative position in its Sacramento Business Depot Call Center pursuant to Government Code section 19253.5, effective March 25, 2011.<sup>1</sup>

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<sup>1</sup> Government Code section 19253.5, subdivision (c), provides, in pertinent part: "when the appointing power, after considering the conclusions of the medical examination and other pertinent information, concludes that the employee is unable to perform the work of his or her present position, but is able to perform the work of another position including one of less than full time, the appointing power may demote or transfer the employee to such a position. ..." And Government Code section 19253.5, subdivision (e), provides: "the appointing power may demote, transfer, or terminate an employee under this section without requiring the employee to submit to a medical examination when the appointing power relies

4. Prior to Ms. Noel's medical transfer to the Motor Vehicle Field Representative position, she was limited to working no more than six hours per day by Dr. Herrera. After her transfer, however, she was able to resume working a full, eight-hour shift in the Department's Sacramento Business Depot Call Center. She continued working an eight-hour shift until around September 2011, when she went back to working a six-hour shift.

5. Effective at the end of her shift on June 30, 2014, Ms. Noel was medically demoted from a full time, 40 hour per week Motor Vehicle Field Representative position to a part time, 20 hour per week Motor Vehicle Field Representative position pursuant to Government Code section 19253.5.<sup>2</sup> The Department's decision was made, at least in part, on the following permanent restrictions imposed by Dr. Herrera: "1) Keyboard/mouse use no more than 10 cumulative minutes per hour; 2) Lift/carry/push/pull no more than 2 pounds; 3) Neck stretches every 15 minutes; ice as needed for pain; 4) Changing tasks every 2 hours."

6. As of the date of hearing, Ms. Noel was continuing to perform her usual duties as a Motor Vehicle Field Representative in the Department's Sacramento Business Depot Call Center, subject to the restrictions discussed in Factual Finding 5. In fact, she explained she missed work to attend the hearing, and she was intending to return to work the following day.

*The Genesis of the Department's Application for Disability Retirement on Behalf of Ms. Noel*

7. Ms. Noel submitted a medical verification from Dr. Herrera dated August 10, 2011, which stated: "She has chronic medical problems and recent (medical impairment) which preclude her from working in her current position as a Call Center representative. She should be assigned to a position that does not require her to use the phone on a continuous basis, and that will not exacerbate her chronic left shoulder and neck pain." Therefore, the Department engaged in the interactive process with Ms. Noel to determine whether her limitations could be accommodated.

On February 3, 2012, the Department notified Ms. Noel that it was denying her request to limit her job duties to clerical work as a reasonable accommodation. Two weeks later, Ms. Noel opted to have the Department apply for disability retirement on her behalf. On June 26, 2012, David Keenan, then the Chief of Human Resources for the Department, signed and submitted to CalPERS a Disability Retirement Election Application on behalf of

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upon a written statement submitted to the appointing power by the employee as to the employee's condition or upon medical reports submitted to the appointing power by the employee." It was not made clear at hearing whether the Department's decision to medically transfer Ms. Noel was made pursuant to Government Code section 19253.5, subdivision (c) or subdivision (e).

<sup>2</sup> Again, it was not made clear at hearing whether the Department's took such action pursuant to Government Code section 19253.5, subdivision (c) or subdivision (e).

Ms. Noel. On September 17, 2012, Ms. Noel signed her own Disability Retirement Election Application, claiming disability due to otolaryngologic (hearing loss) and orthopedic (cervical spine) conditions.

8. After reviewing reports prepared by Rachel Richards, Au.D., Dr. Herrera, Edward Bubienko, M.D., Rodney Diaz, M.D., and Joseph Serra, M.D., CalPERS denied the Department's application for disability retirement on August 8, 2013. Ms. Noel timely appealed the denial,<sup>3</sup> and Anthony Suine, Chief of the Benefit Services Division of CalPERS, signed the Statement of Issues solely in his official capacity on May 2, 2014.

#### *The Etiology of Ms. Noel's Alleged Disability*

9. The exact etiology of Ms. Noel's alleged disability is unclear, as her hearing testimony was often disjointed and difficult to follow. She explained that one morning in January or February of 2011 she was leaving work on a break when she stumbled as she stood up. She began to feel dizzy, so she sat down in a chair to rest. As Ms. Noel sat in the chair, she began feeling numbness in the left side of her face. She also began losing hearing in her left ear. She asked a coworker to call her husband, and he picked her up from work and brought her to the emergency room.

In her application, however, Ms. Noel wrote that her alleged disability occurred on January 15, 2012. And she described the impetus of the alleged disability as repetitive movement of her neck and shoulder and noise in her left ear. But the medical records and other evidence establish Ms. Noel was suffering from otolaryngologic and orthopedic conditions in 2011.

#### *Job Duties of a Motor Vehicle Field Representative*

10. A Motor Vehicle Field Representative assigned to the Department's Sacramento Business Depot Call Center answers telephone calls from the general public inquiring about various provisions of the Vehicle Code, other statutes and regulations, and various Department policies and procedures pertaining to the registration and ownership of motor vehicles, the licensing of drivers, and the issuance and maintenance of the various occupational licenses issued by the Department. They provide information and explain the use of forms and applications for the registration of motor vehicles, obtaining and renewing driver's licenses and California identification cards, and obtaining and renewing the various occupational licenses issued by the Department. A Motor Vehicle Field Representative is required to use manuals, reference materials, and a computer terminal, keyboard, and mouse to access the information necessary to accurately respond to the caller's inquiry.

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<sup>3</sup> There was no evidence CalPERS took any action with regard to Ms. Noel's application. Therefore, her appeal is only of the denial of the Department's application.

11. A Motor Vehicle Field Representative assigned to the Department's Sacramento Business Depot Call Center is expected to be able to perform the following physical requirements for the following durations during any given shift:

- a. **Constantly:** sitting, bending at the neck, twisting at the neck, fine manipulation, simple grasping, and repetitive use of hands.
- b. **Frequently:** reaching above shoulder, keyboard use, and mouse use.
- c. **Occasionally:** standing, walking, squatting, bending at the waist, twisting at the waist, reaching below shoulder, pushing and pulling, power grasping, and lifting/carrying 10 pounds or less.
- d. **Never:**<sup>4</sup> running, crawling, kneeling, climbing, and lifting/carrying more than 10 pounds.

#### *Medical Evidence*

##### Ms. Noel's evidence

12. Ms. Noel did not call any medical experts to testify at hearing, but produced a plethora of medical records during and after hearing. Those records, however, were of little value in determining whether she is substantially incapacitated because they largely consisted of various healthcare practitioners' progress notes written in conclusory fashion. (*People v. Bassett* (1968) 69 Cal.2d 122, 144 [the value of an expert witness's opinion lies with his explanation of the factual predicate for his opinion]; *People v. Williams* (1962) 200 Cal.App.2d 838, 845 ["[T]he opinion of an expert is no better than the reasons upon which it is based".])

Additionally, an August 11, 2015 Work Status Report signed by Erin F. Forest, M.D., indicated Ms. Noel was released to return to work as of that date, and the only restrictions imposed by Dr. Forest were that Ms. Noel had "Limited use" of both hands (but no specific time limit was indicated), and "must take 10 -15 minute break every 60 minutes" from keyboarding.

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<sup>4</sup> "Constantly" is more than six hours, "frequently" is three to six hours, and "occasionally" is up to three hours.

CalPERS's evidence

**Joseph Serra, M.D.**

13. CalPERS called Dr. Serra as its medical expert at hearing. He is a board-certified orthopedic surgeon who was retained by CalPERS to perform an independent medical evaluation (IME) of Ms. Noel on May 28, 2013. Dr. Serra prepared a report documenting his IME, and that report was introduced into evidence.

14. Upon physical examination, the range of motion of Ms. Noel's cervical spine upon flexion was 100 percent of normal, extension 75 percent of normal, and rotation and lateral bending 50 percent of normal. A neurologic examination of her upper extremities showed reduced grip strength, bilaterally, but she had no loss in muscle mass on either side when looking at the contour of her shoulders and her upper arms, biceps and triceps, and forearms.

15. The range of motion of Ms. Noel's shoulders, left over right, upon abduction was 100/140, flexion 120/140, internal rotation 30/80, external rotation 90/90, and adduction 20/20. Dr. Serra explained at hearing that Ms. Noel's measurements reflected a slight decrease in the range of motion of her left shoulder when compared to her right. But he did not find the slight decrease in the range of motion of her cervical spine and left shoulder particularly alarming, explaining that she complained of pain in her left shoulder and therefore was more than likely favoring her right shoulder over her left which could result in a reduced range of motion.

16. Dr. Serra described his examination of Ms. Noel's lower back as "bizarre." He went on to explain that she was able to bend forward and backwards at the waist about 25 percent of normal. And while her bending at the waist to the left side and then the right was also 25 percent of normal, she complained of pain on her right side when she tilted to the left and pain on her left side when she tilted to the right. Dr. Serra said the following about such complaints of pain: "And that's unusual. Usually it doesn't occur that way. And if it does, it usually isn't in that particular area. It's not just the flank, but it's usually lower."

17. Dr. Serra also described his sensory examination of Ms. Noel's lower extremities as "bizarre" because "it didn't follow the normal neurologic pathways that go to the lower extremity." He described her sensation to light touch and pinwheel as "patchy," and then explained "patchy is unusual because there isn't any neurologic reason for sensation to be in one area and then shift to a totally different area, instead of following the pathway of the nerve that you're testing." He further explained that the only time one can medically account for patchy sensation in the lower extremities "would perhaps be if there was severe trauma to a nerve, but only part of the nerve was damaged." There was no evidence Ms. Noel suffered any such trauma.

18. Testing of the motor function of Ms. Noel's lower extremities also resulted in unusual complaints from her. When asked to bring her toes upward, she complained of pain in her left shoulder. Dr. Serra described such complaint as "bizarre, because there is no nerve pathway that goes from the toes upward to the shoulder." He also described the results of Ms. Noel's straight leg test as "bizarre." When the test was performed with her sitting at the edge of the examination table with her legs dangling over, she was able to lift both legs to 90 degrees. But when the test was performed with her lying down on her back on the examination table, she was unable to raise either leg more than 45 degrees. When Dr. Serra attempted to assist her by gently lifting either leg, he felt her pushing down. He explained that the results of each test should be identical. But what he found even more interesting was the absence of any complaints of back pain by Ms. Noel during either test. Dr. Serra explained that damage to a person's sciatic nerve will elicit complaints of lower back pain radiating down the back of the leg when that particular leg is straightened.

19. Based on the totality of his findings during physical examination of Ms. Noel and a review of the medical records provided, Dr. Serra opined that she is not substantially incapacitated for the performance of her usual duties as a Motor Vehicle Field Representative in the Department's Sacramento Business Depot Call Center as a result of an orthopedic condition. He was unable to correlate her subjective complaints of pain with any objective findings that she suffers from an orthopedic condition.

20. Ms. Noel provided additional medical records after she appealed CalPERS's decision to deny the Department's application. Those records were provided to Dr. Serra for his review, and he prepared a supplemental IME report. However, none of those records changed his opinion that she is not permanently and substantially incapacitated. Therefore, a discussion of those records is not necessary.

**Rodney C. Diaz, M.D.**

21. CalPERS also called Dr. Diaz as its medical expert at hearing. He is board-certified in otolaryngology, with a subspecialty in neurology, and was retained by CalPERS to perform an IME of Ms. Noel on May 28, 2013. Dr. Diaz prepared a report documenting his IME, and that report was introduced into evidence.

22. Dr. Diaz performed a complete examination of both of Ms. Noel's ears, which was unremarkable. Specifically, her outer ears were normal in appearance, her external auditory canals were clear, and the tympanic membranes were clear, translucent, and in neutral position. No tympanic or middle ear lesions, perforation of the tympanic membrane, or effusion of the middle ear were observed in either ear.

23. Dr. Diaz also performed the Weber and Rinne tests to determine whether Ms. Noel's reported hearing loss in her left ear was a sensorineural or a conductive hearing loss.<sup>5</sup>

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<sup>5</sup> The Weber test involves striking a tuning fork and placing it on the middle of the patient's forehead, above the upper lip under the nose over the teeth, or on top of the head

The results of both tests indicated Ms. Noel suffers from a sensorineural hearing loss in her left ear.

24. Based on the totality of his findings during physical examination of Ms. Noel and a review of the medical records provided, Dr. Diaz opined that, while she suffers from some sensorineural hearing loss in her left ear, such loss is not of a degree that renders her substantially incapacitated for the performance of her usual duties as a Motor Vehicle Field Representative in the Department's Sacramento Business Depot Call Center.

### *Discussion*

25. For the reasons explained in Factual Finding 12, neither the Department nor Ms. Noel produced persuasive medical evidence demonstrating she is substantially incapacitated for the performance of her job duties as a Motor Vehicle Field Representative position in its Sacramento Business Depot Call Center due to otolaryngologic or orthopedic conditions. That is not to say Ms. Noel does not suffer from a hearing loss in her left ear. In fact, Dr. Diaz's IME confirmed she suffers some sensorineural hearing loss in her left ear. However, he explained he has had patients who have suffered total hearing loss in one ear who are still able to use the telephone with their other ear. Furthermore, Ms. Noel was continuing to perform her duties as a Motor Vehicle Field Representative, with accommodations, at the time of hearing. Therefore, the Department's application for disability retirement on behalf of Ms. Noel should be denied.

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equidistant from the patient's ears. The patient is asked to report in which ear the sound is heard louder. A "normal" test results in the patient hearing the sound equally in both sides. But a report of hearing the sound louder in the defective ear is indicative of conductive hearing loss (a loss with its root cause in the middle ear) in that ear, whereas a report of hearing the sound louder in the other ear is indicative of sensorineural hearing loss (a loss with its root cause in the inner ear) in the defective ear.

The Rinne test involves striking a tuning fork, placing it against the patient's mastoid bone, and asking the patient to indicate when the sound is no longer heard. Once the patient signals she can no longer hear the sound, the still-vibrating tuning fork is quickly positioned just in front of the outer ear and the patient is again asked to indicate when she can no longer hear the sound. With normal hearing, the patient should still be able to hear the sound when the tuning fork is positioned in front of her outer ear. But a patient with conductive hearing loss is not able to hear the sound after the mastoid test, whereas a patient with sensorineural hearing loss will continue hearing the sound when it is placed in front of the outer ear after the mastoid test. And while this result is similar to that produced by normal hearing, a patient with sensorineural hearing loss reports that the sound has subsided much sooner than one with no loss, which can be verified by the examiner listening to the tuning fork himself.

## LEGAL CONCLUSIONS

### *Applicable Burden/Standard of Proof*

1. The Department has the burden of proving Ms. Noel's eligibility for disability retirement benefits by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

### *Applicable Statutes*

2. A member's employer or the member herself may file an application for disability retirement. (Gov. Code, § 21152, subds. (a), (d).)

3. Government Code section 20026 provides, in pertinent part:

"Disability" and "incapacity for performance of duty" as the basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion.

4. Government Code section 21150, subdivision (a), provides: "A 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, unless the person has elected to become subject to Section 21076, 21076.5, or 21077."

5. Government Code section 21156, subdivision (a), provides, in pertinent part:

(1) If the medical examination and other available information show to the satisfaction of the board ... that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability ... .

(2) In determining whether a member is eligible to retire for disability, the board ... shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

6. The courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform [her] 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 for the performance of her 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 determination. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

*Conclusion*

7. As set forth in Factual Findings 12 through 25, the persuasive medical evidence did not establish that Ms. Noel is permanently and substantially incapacitated for the performance of her usual duties as a Motor Vehicle Field Representative in the Department's Sacramento Business Depot Call Center due to otolaryngologic or orthopedic conditions. Therefore, the Department's application for disability retirement on behalf of Ms. Noel should be denied.

ORDER

Respondent Department of Motor Vehicle's application for disability retirement on behalf of Brenda K. Noel is DENIED.

DATED: November 2, 2015

  
COREN D. WONG  
Administrative Law Judge  
Office of Administrative Hearings