

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:

REBECCA A. FOGLE,
Respondent,

and

DEPARTMENT OF GENERAL SERVICES,
Respondent.

Case No. 2014-0841

OAH No. 2015050306

PROPOSED DECISION

Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, heard this matter on October 8, 2015, in Sacramento, California.

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

Rebecca A. Fogle (respondent) represented herself.

CalPERS properly served the Department of General Services (DGS) with the Notice of Hearing. DGS made no appearance. This matter proceeded as a default against DGS pursuant to Government Code section 11520.

The matter was submitted for decision on October 8, 2015.

ISSUE

Is respondent permanently and substantially incapacitated from performing her usual duties as an Associate Programmer Analyst (Specialist) for DGS, on the basis of internal (endometrial cancer) and neurological (neuropathy) conditions?

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED NOV. 10 20 15
Lissa Kunis

FACTUAL FINDINGS

1. Respondent is 66 years old. She worked for DGS as an Associate Programmer Analyst (Specialist) and is a local miscellaneous member of CalPERS subject to Government Code section 21150 with the minimum service credit to qualify for retirement.¹

2. Respondent stopped working for DGS in October 2011 to undergo a surgical procedure related to her being diagnosed with uterine cancer. She received radiotherapy and chemotherapy treatment through mid-2012. Respondent returned to work intermittently in 2012, but stopped working—even on an intermittent basis—in early-2013 due to the side effects of her treatment and what she described as “chronic fatigue problems” and “focusing issues.”

3. About February 26, 2013, respondent filed a Disability Retirement Election Application (Application). On the Application, respondent checked the box which indicated “Service Pending Disability Retirement” as the Application Type. She specified her disability as “Endometrial Cancer” and described her “limitations/preclusions” as follows:

Have “chemo brain” so that foggy brain clouds thinking, memory and comprehension. Loss of 22 pounds; weakened strength and low stamina. Inability to retain focus and follow through. Residual neuropathy in feet bothersome. Fatigue.

Respondent specified that her injury or illness affected her ability to perform her job as follows:

Loss of deep concentration ability job requires. Unable to comprehend detailed/complex instructions/ideas verbal and written. Problem remembering what I’ve been told, tasks and names. Difficulty figuring solutions to problems. Distracted from job completion. Easily fatigued, overall body weakness. Stress extremely debilitating. Fearful I might damage data and or IT applications now.

4. On July 19, 2013, respondent submitted a Physician’s Report on Disability (Physician’s Report) to CalPERS, which had been completed by her treating physician. The Physician’s Report included the following information:

¹ Government Code section 21150 provides: “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, unless the person has elected to become subject to Section 21076 or Section 21077.”

Member History

Describe How Injury Occurred: COGNITIVE CHANGES; CHRONIC FATIGUE; SUBJECTIVE MENTAL COGNITIVE ISSUES IN RELATIONSHIP TO PRIOR SURGERY; RADIOTHERAPY AND CHEMOTHERAPY FOR CA UTERUS.

Member Subjective Complaints

Subjective Symptoms: SUBJECTIVE INABILITY TO CONCENTRATE FROM THERAPY; SUBJECTIVE MEMORY DYSFUNCTION; COGNITIVE IMPAIRMENT.

Diagnosis/Objective Findings

Diagnosis 1: CA UTERUS

Objective Findings 1: BLEEDING

Diagnosis 2: COGNITIVE CHANGES.

Objective Finding 2: SUBJECTIVE INABILITY TO CONCENTRATE, MEMORY IMPAIRMENT, NEUROPATHY – TINGLING IN FEET AND FINGERS, RADIATION INDUCED DIARRHEA.

Comments: PATIENT FEELS THAT HER JOB DEMANDS ARE TOO COMPLEX FOR HER TO HANDLE WITH HER ABOVE DISABILITIES.

Member Incapacity

Is the member currently, substantially incapacitated from performance of the usual duties of the position for their current employer? YES.

If yes, you must describe specific work activities that the member is unable to perform due to her incapacity: SUBJECTIVE BRAIN IMPAIRMENT WITH DIMINISHED CLEAR THINKING AND MEMORY. UNABLE TO DO COMPLEX WORK OR PROBLEM SOLVING. SUBJECTIVELY UNABLE TO UPDATE SOFTWARE AND CARRY COMPLEX COMPUTER TASKS. SUBJECTIVE CHRONIC FATIGUE AND DEALING WITH STRESS WITH COMPLEX TASKS AND DEADLINES.

Member Mental Status

Is the member mentally able to handle financial affairs and enter into legally binding contracts? YES.

Is the member competent to endorse checks with the realization of the nature and consequences of the act? YES.

5. CalPERS notified respondent in writing that her Application had been denied, and informed her of her right to appeal. Respondent appealed and requested an evidentiary hearing. On November 19, 2014, complainant, Anthony Suine, Chief, CalPERS Benefit Services Division, made and filed the Statement of Issues in his official capacity.

Duties of an Associate Programmer Analyst (Specialist)

6. The duties of an Associate Programmer Analyst (Specialist) for DGS include a variety of functions dedicated to maintaining and improving the organization's automated information systems, responding to user change requests, and maintaining software applications. An Associate Programmer Analyst (Specialist) must develop, maintain and debug, test, deploy and document complex custom software applications by writing and modifying code, writing system documentation using programming languages, relational databases, web servers, and report software on a daily basis. An Associate Programmer Analyst (Specialist) must also analyze and recommend changes to automated information systems and manage records from production database systems by writing and running Structured Query Language (SQL) code using server client tools. The position requires the ability to communicate effectively, implement system improvements, acquire and install software, and regularly generate reports.

Respondent's Testimony

7. Respondent's testimony echoed what she provided on her Application. She asserted that she can no longer perform her job due to cognitive impairment, memory loss, fatigue, and a lack of stamina, which she attributed to chemotherapy treatments she received for uterine cancer. She had "12 bags of toxic chemicals and 25 bouts of radiation administered" to her between December 2011 and June 2012 that, in her assessment, resulted in the aforementioned cognitive and physiological limitations. She lost 22 pounds, and developed irritable bowel syndrome and neuropathy in her feet and toes. According to respondent, "chemo changed [her] life ... [she] was weakened and was a different person [after her treatment]." She now must take breaks to get through the day, which were unnecessary prior to her treatment.

8. Respondent asserted that CalPERS did not fully understand the complexity and challenges of her position when it determined she was not permanently disabled or incapacitated from performing her job duties. Her Application included her handwritten full-page description of her job duties and how she believed she was precluded from performing those duties. She also submitted a complete and detailed three-page job description, and a Physical Requirements of Position/Occupational Title form that specified the frequency of her physical job activities. Respondent felt the testing of her cognitive functioning inadequate to determine her ability to perform her job because it included basic math equations and "simplistic questions" like "Who is the President of the United States?" and

“Can you write checks without difficulty?” Respondent also asserted that the Public Employees Retirement Law, disability retirement forms (the Application, Physician’s Report of Disability, and Physical Requirements of Position/Occupational Title) and medical evaluations were inadequate to assess someone with her condition because CalPERS “doesn’t have the proper statutes, procedures and policies to properly assess [her medical condition].”

9. Respondent testified to the complexity of her job duties, but provided little evidence of how her medical condition affected her ability to perform those duties. Post-treatment, she experienced difficulty remembering names and found it necessary to break certain processes down into smaller pieces to complete them. Respondent was also concerned that she “would be a drag on the team because she would not be up to par,” and worried about “the risk of damaging essential data and incapacitating [her] office.”

Expert Opinion

10. CalPERS retained Michael Bronshvag, M.D., and Sophia Cole, M.D., as expert witnesses. No expert witness testified on behalf of respondent.

11. Dr. Bronshvag is board-certified in Internal Medicine and Neurology. He reviewed respondent’s medical records and job description, conducted an independent medical examination (IME) of respondent on October 21, 2013, and issued his IME report on October 24, 2013.

12. During the evaluation, respondent told Dr. Bronshvag that she suffered from “cognitive impairment with comprehension problems and memory problems.” She also complained of symptoms in her feet she believed to be neuropathy syndrome. Respondent stated that she was tired all the time, had difficulty sleeping, and that stress triggered bowel irritability.

13. Dr. Bronshvag reviewed respondent’s social history and work history and completed a physical examination. After reviewing all of the information obtained, Dr. Bronshvag diagnosed respondent as follows:

1. Treatment (apparently successful) relevant to cancer of the uterus – endometrium – with surgery (ovarian metastasis but no positive lymph nodes), chemotherapy, and radiotherapy.
2. Slight sensory neuropathy – apparently residual to chemotherapy.
3. Asthenic – fatigue – depressive symptoms.

14. It was Dr. Bronshvag’s opinion that a comprehensive workup of respondent’s claims should include an MRI, neuropsychological testing for cognitive memory

performance, psychiatric evaluation relevant to depressive issues, metabolic workup relevant to her medical status and the possibility of ongoing medical issues, and electrodiagnostics relevant to neuropathy. His IME report notes that “it is well within the realm of possibility that such a workup could document and confirm the patient’s subsequent complaints. Her Kaiser doctors have either not performed such a workup or it is not described by the patient or documented in the records provided to me. ... At the present time, I neither confirm nor dismiss Ms. Fogle’s description but instead state that her descriptions are subjective and undocumented.” Dr. Bronshvag found that respondent was not substantially incapacitated for the performance of her usual job duties, because he did not find any job duties she could not perform.

15. At hearing, Dr. Bronshvag reiterated that respondent was not substantially incapacitated for the performance of her job duties, based on the information available to him during his evaluation. Though he determined respondent was not substantially incapacitated, he questioned whether he would have reached the same finding had a more comprehensive workup and examination been requested and completed—as asserted by respondent.

16. Dr. Cole is board-certified in Internal Medicine. She also performed an IME on respondent and issued her report on April 10, 2014. Respondent described the same subjective symptoms to Dr. Cole that she reported to Dr. Bronshvag and reiterated at hearing. Dr. Cole reviewed respondent’s history of present illness and related treatment. She noted that from January through March 2012, respondent received adjuvant chemotherapy with carboplatin and Taxol. Dr. Cole also reviewed respondent’s family history, work history, habits and daily activities, and performed a physical examination. After completing her evaluation, Dr. Cole diagnosed respondent as follows:

1. Fatigue, post chemotherapy.
2. Slight sensor neuropathy, subjective, apparently residual chemotherapy.
3. Uterine cancer, vascular invasion, metastasis to the right ovary, status post successful treatment with surgery, chemotherapy, and radiation therapy.

17. It was Dr. Cole’s opinion that respondent suffered from slight sensory neuropathy, likely resulting from treatment utilizing the chemotherapeutic agents Taxol and carboplatin. However, she found no evidence of cognitive defects on either the mental status examination or neurosensory examination. Dr. Cole could not substantiate any objective evidence of sensory loss, cognitive impairment, or physical impairment. She determined that respondent had subjective neurocognitive symptoms that accounted for her inability to resume work, and found no supportive objective symptoms. Dr. Cole concluded that respondent was not substantially incapacitated for the performance of her usual duties.

18. Dr. Cole testified that she found respondent's hobby of writing short stories supportive of her findings, in addition to the tests performed and materials reviewed as part of her IME. She found that respondent's ability to recall details from her short stories and narrate them in a logical fashion was inconsistent with her claimed cognitive impairment. Dr. Cole also observed respondent present her case at hearing, which included cross examination of witnesses and oral argument. In Dr. Cole's opinion, respondent presented in a logical and detailed fashion with no signs of cognitive impairment—consistent with what she observed when she evaluated respondent in April 2014.

Discussion

19. It was the opinion of both Drs. Bronshvag and Cole that respondent is not substantially incapacitated from performing her usual and customary duties as an Associate Programmer Analyst (Specialist) for DGS. Their opinions were persuasive and supported by competent medical evidence. Conversely, respondent provided little evidence to support her claim of cognitive impairment. She dedicated most of her time at hearing to criticizing the process for determining whether she was substantially incapacitated—rather than providing competent medical evidence of her asserted incapacity. The Physician's Report contains no objective findings of diminished mental capacity. Respondent's slight sensory neuropathy does not preclude her from performing her usual job duties. She did not produce a medical expert to testify on her behalf. Respondent's concern that she would slow down her team or potentially damage essential data is not a basis for determining that she is substantially incapacitated. She did not present competent medical evidence to support her disability retirement application. Absent competent medical evidence, respondent's disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of her employment, respondent is a state miscellaneous member of CalPERS, who is subject to disability retirement under Government Code section 21150.²

2. To qualify for disability retirement, respondent has the burden of proving that she is "incapacitated physically or mentally for the performance of ... her duties." (Gov. Code, § 21156.) Government Code section 20026, defines "Disability" and "incapacity for performance of duty" as a basis of retirement, to mean "disability of permanent or extended

² Government Code section 21150, in relevant part, provides:

(a) 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 or 21077.

and uncertain duration, as determined by the board, ... on the basis of competent medical opinion." (Underlining added.)

3. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876 (*Mansperger*), the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.)

4. In *Mansperger*, the court found that a fish and game warden who had applied for disability retirement was not incapacitated from the performance of his duties, because the work activities he was unable to perform were not common occurrences, and he could otherwise "substantially carry out the normal duties of a fish and game warden." (*Mansperger, supra*, 6 Cal.App.3d at p. 876.) In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 860 (*Hosford*), the court found that prophylactic restrictions imposed to prevent the risk of future injury or harm were 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.) In *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697 (*Harmon*), the court found 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 sheriff's] condition are dependent on his subjective symptoms."

5. *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 permanently and substantially unable to perform her usual duties as an Associate Programmer Analyst (Specialist) for the DGS. Although respondent asserted subjective complaints of disability, she did not present competent medical evidence to establish that she was permanently and substantially incapacitated from performing her usual duties as an Associate Programmer Analyst (Specialist). She failed to meet her burden of proving that she is entitled to disability retirement based on internal (endometrial cancer) and neurological (neuropathy) conditions. Her application for disability retirement must therefore be denied.

ORDER

The Application of Rebecca A. Fogle for disability retirement is DENIED.

DATED: November 6, 2015

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Ed Washington
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ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings