ATTACHMENT E

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: SIMIN SHIRAZI, Respondent, and DEPARTMENT OF TRANSPORTATION, Respondent.	Case No. 2013-1160 OAH No. 2014090772

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on September 1 and 2, 2015, in Sacramento, California.

Preet Kaur, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Simin Shirazi was present throughout the hearing and represented herself.[1]

Evidence was received, the record was closed, and the matter submitted for decision on September 2, 2015.

ISSUE

The following issue is before the Board of Administration for determination:

[1] There was no appearance by or on behalf of the Employment Development Department.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FILED October 5, 2015

Based upon respondent's physical condition, is respondent permanently disabled or substantially incapacitated from performing the usual duties of a Resident Engineer/Office Engineer for the Department of Transportation (DOT)?

FACTUAL FINDINGS

Respondent's Disability Retirement Application

1. CalPERS received respondent's Disability Retirement Election Application on October 1, 2012. In her application, respondent described her disability, as follows: "Severe Fibromyalgia – Chronic Fatigue & Adrenal Fatigue. Back disc bulge at L4 – L5, stomach pain. I have constant pain on my body at joints & muscles."

Respondent described her limitations/preclusions as: "Hard to sit and concentrate. Always tired & in pain. Fatigue all day & very limited mobility."

Respondent stated in her application that her injury or illness affects her ability to perform her job, as follows: "Hard to concentrate. My Mobility is very limited. Fatigue does not allow me to do most of my job."

Respondent provided other information on her application, as follows: "My position as office engineer requires fast pace & lots of activity. In the last 2 years I have been struggling hard to achieve my tasks and since Jan 2012 it has been almost impossible."

2. Respondent retired for service effective November 29, 2012, and has been receiving her service retirement allowance since that date.

Duties of a Resident Engineer/Office Engineer

3. The DOT prepared a Position Duty Statement effective August 2009, which describes Simin Shirazi's duties as an Assistant Resident Engineer/Office Engineer. The Position Duty Statement includes a general description of duties, as follows:

> Under direction of the Area Senior Construction Engineer and Resident Engineer the incumbent will perform a variety of medium to difficult and complex transportation engineering work. Make estimates of a specialized nature in connection with various highway or other transportation projects. Plans and estimates for completeness and accuracy. Prepare reports and correspondence and conducts engineering investigations to insure compliance with applicable laws, ordinance, plans and specifications. This position will be a training ground for Resident Engineers.

4. On or about October 3, 2012, respondent signed a document titled Physical Requirements of Position/Occupational Title, which described the physical requirements of the job as including up to three hours per day of sitting, walking, bending (neck), twisting (neck, waist), reaching (above shoulder), lifting/carrying zero to 10 pounds, driving; up to six hours per day of sitting and repetitive use of hands; and over six hours per day of keyboard use and mouse use.

Respondent's Evidence

RESPONDENT'S TESTIMONY

5. Respondent gave a detailed account of her medical history and her related inability to effectively and consistently perform her tasks as a Resident Engineer/Office Engineer. Respondent's health problems began with a serious automobile accident while traveling as a passenger on DOT business in 1999. Respondent suffered injuries to her neck, shoulder, and back, resulting in back surgery (laminectomy) in 2002.

6. During the years 2004 through 2006, respondent underwent four abdominal surgeries. In 2004, respondent had a tumor removed from her abdomen, an appendectomy, and colinectomy. In 2006, respondent's gall bladder was removed.

7. Subsequent to these medical events, respondent began to suffer from diffuse pain. Respondent's primary care physician could not identify the cause of the pain, and referred her to a rheumatologist. The rheumatologist diagnosed respondent with fibromyalgia, and prescribed pain medications. Respondent's use of pain medications has been limited because they aggravate her stomach.

8. Respondent sought treatment with a holistic physician, who ordered high doses of vitamins and minerals. This regimen provided some relief for respondent, but her pain symptoms returned when she went back to work with the DOT.

9. As respondent's pain increased, and as she was unable to consistently take pain medications because of stomach problems, she was unable to focus effectively on her tasks at work. She began to make mistakes such as faxing documents to the wrong address and numerical errors on cost estimates.

10. In 2011, respondent took 96 hours of sick leave because of her pain and fatigue. In 2012, respondent was on nonindustrial disability from February 1 to June 1. When respondent returned in June 2012, she was on a reduced work schedule of four hours per day, with the remaining four hours taken as nonindustrial disability, as ordered by her physician.

11. Respondent hoped that limiting her work schedule would allow her to continue working. Respondent's hope was not realized. Because of her pain and fatigue respondent

took 64 hours of sick leave during June 1 to October 1, 2012. She continued to have difficulty concentrating at work because of pain and fatigue, resulting in ongoing errors.

12. Respondent ultimately decided to retire because she felt she was not able to perform her work effectively. In October 2012, respondent retired for service and applied for disability retirement.

JAVEED SHENASI'S TESTIMONY

13. Mr. Shenasi has been married to respondent since 1979. During the first 20 years of their marriage, Mr. Shenasi knew respondent to be a very active and energetic woman in her career and social activities.

14. After the automobile accident in 1999, the surgeries, and diagnosis of fibromyalgia, Mr. Shenasi observed respondent to become increasingly fatigued. He also observed respondent to suffer from pain in her body and migraine headaches. As a result, respondent needs to rest quietly at home for extended periods of time. This is contrary to what had been respondent's normal energetic and outgoing nature.

15. Respondent's pain and fatigue have caused them to cancel trips and limited her ability to visit with their children in other cities as often as she would if she did not suffer from pain and fatigue.

SARA PARANDEH'S TESTIMONY

16. Ms. Parandeh is respondent's niece. She lived with respondent and her husband for approximately two and a half years. She recently moved into her own apartment, but still talks with respondent in person or by telephone every day.

17. Ms. Parandeh has observed respondent to frequently complain about body pain and migraine headaches, and also that respondent lacks energy and wants to have quiet in the house.

CATHERINE YAVROM'S TESTIMONY

18. Ms. Yavrom has known respondent as a neighbor for approximately two years. They often study and meditate together, and stay in contact in person or by text message.

19. Ms. Yavrom's observation is that respondent suffers from pain and fatigue. She stays home and rests much of the time. She does not often get out for walks or other activity.

RAMIN YAVROM'S TESTIMONY

20. Dr. Yavrom is married to Catherine Yavrom, and has also known respondent as a neighbor for approximately two years.

21. Dr. Yavrom is a retired chiropractor. His license to practice in California expired in 2009, and he is not licensed in any other state.

22. Dr. Yavrom reviewed the various clinical records relating to respondent's diagnosis and treatment, and the independent medical examination (IME) reports prepared pursuant to respondent's application for disability retirement. Dr. Yavrom did not perform a formal physical examination of respondent, but has observed her as a neighbor.

23. Dr. Yavrom's informal observation as a neighbor is that respondent suffers from fatigue and pain. Dr. Yavrom's observations and conclusions do not qualify as an expert opinion because he is unlicensed and did not perform a formal examination of respondent.

CalPERS's Expert

24. CalPERS retained Douglas Haselwood, M.D., a rheumatologist, to conduct an IME. Dr. Haselwood conducted an IME of respondent on April 30, 2013, and issued an IME report on that date. Dr. Haselwood issued a supplemental report dated September 17, 2013, summarizing his findings and conclusions generated from his review of interval medical records pertaining to respondent. Dr. Haselwood issued a second supplemental report dated August 12, 2015, summarizing his findings and conclusions originating from his review of interval medical records pertaining to respondent.

25. Dr. Haselwood took respondent's history, conducted a physical examination, and reviewed respondent's medical records and diagnostic studies. In his IME report dated April 30, 2013, Dr. Haselwood gave a diagnosis, as follows:

> Chronic, complex and, as yet, somewhat poorly defined widespread musculoskeletal pain, fatigue, and dysfunction syndrome presumptively representing the cumulative effect of A) Age appropriate degenerative mechanical musculoskeletal phenomenon, B) Lumbosacral osteoarthritis and discogenic disease status post decompressive surgery (2002), C) Nonspecific widespread myofascial discomfort with a hypervigilance for same, D) Modest obesity and depression/anxiety associated with life stressors. In this context, I cannot substantiate the diagnosis of a syndrome of fibromyalgia. Likewise, there is insufficient evidence to implicate an evolving systemic or inflammatory rheumatic condition.

Dr. Haselwood's IME report dated April 30, 2013, discusses his diagnosis, as follows:

> In the context of her degenerative and posttraumatic/surgical musculoskeletal afflictions . . . Ms. Sharzi [Shirazi] has

> legitimate sources of musculoskeletal discomfort. Unfortunately, the unusually high and incapacitating level of widespread musculoskeletal pain, fatigue and dysfunction and the resulting levels of physical impairments perceived by Ms. Sharzi [Shirazi] are based predominantly on self assertion and subjective criteria.
>
> With all due respect to the conclusions of Ms. Sharzi's [Shirazi] treating rheumatologist I cannot, in the context of the available medical record historical and physical evidence, confirm the diagnosis of the syndrome of fibromyalgia with the presumption that such a diagnosis could, in any reasonable fashion provide objective criteria upon which to determine pathophysiologic parameters of a permanent physical disability from the performance of even sedentary work.

26. In his supplemental IME report dated September 17, 2013, Dr. Haselwood reviewed additional records from respondent's treating rheumatologist and physical therapist. With respect to the rheumatologist's records, Dr. Haselwood concluded that "there is no adequate documentation as to objective physical findings/impairments related to fibromyalgia and depression that would result in such profound physical limitations."

With respect to the physical therapist's records, Dr. Haselwood concluded as follows: "I do not have special expertise in the procedural mechanisms for comprehensively conducting and interpreting the findings of a formal residual functional capacity test. . . . In this regard, I would certainly defer to an independent interpretation of Ms. Sharzi's functional capacity evaluation report by someone with expertise in the performance and interpretation of such testing." There is no evidence of a follow-up report by someone with expertise in such testing.

27. In his supplemental IME report dated August 12, 2015, Dr. Haselwood reviewed additional records from 10 of respondent's treating and consulting clinicians in various specialties including rheumatology, physical medicine, orthopedics, neurosurgery, neurology, and psychology. With respect to his review of these additional clinical records, Dr. Haselwood concluded that they do not cause him to change any of his findings and conclusions stated in his reports dated April 30, 2013, and September 17, 2013.

28. Dr. Haselwood reviewed the usual duties of a Resident Engineer/Office Engineer. He concluded that there are no specific job duties that respondent is unable to perform, and that respondent is not presently substantially incapacitated from performing the work of a Resident Engineer/Office Engineer.

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Discussion

29. Respondent testified convincingly that she continues to experience pain. However, she did not offer any medical opinion that she is substantially incapacitated from performing the usual duties of a Resident Engineer/Office Engineer. Even if the diagnoses of her treating clinicians are taken at face value, expert testimony is necessary to clarify whether the conditions render respondent substantially disabled. In the absence of such expert opinion, respondent failed to establish that she qualifies for disability retirement. Consequently, respondent's disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By reason of her employment, respondent is a member of CalPERS and eligible to apply for disability retirement under Government Code section 21150.[2]

2. To qualify for disability retirement, respondent must prove that, at the time she applied, she was "incapacitated physically or mentally for the performance of his or her duties in the state service." (Gov. Code, § 21156.) As defined in Government Code section 20026,

> "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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

3. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, 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.) An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of the 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

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[2] 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 or 21077.

the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the [sheriff's] condition are dependent on his subjective symptoms."].)

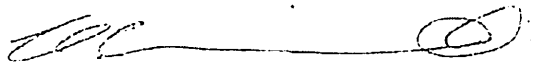
4. *Mansperger*, and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date she applied for disability retirement, she was substantially unable to perform the usual duties of a Resident Engineer/Office Engineer due to her physical condition. Respondent did not present sufficient evidence to meet this burden.

5. In sum, respondent failed to show that, when she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual duties of a Resident Engineer/Office Engineer due to her physical condition. Her application for disability retirement must, therefore, be denied.

ORDER

The application of respondent Simin Shirazi for disability retirement is denied.

DATED: October 1, 2015



TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings