

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:

BEVERLY POWERS,

Respondent,

and

CALIFORNIA DEPARTMENT OF
TRANSPORTATION,

Respondent.

Case No. 2014-0595

OAH No. 2014100644

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on December 14, 2015, in Sacramento, California.

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

No one appeared for or on behalf of respondent Beverly Powers or respondent California Department of Transportation. Each respondent's default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to both respondents.

Evidence was received, the record was closed, and the matter was submitted for decision on December 14, 2015.

SUMMARY

This appeal is limited to determining whether Ms. Powers is permanently and substantially incapacitated for the performance of her usual job duties as an Associate Governmental Program Analyst with the California Department of Transportation due to

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 30 Dec 20 15

[Handwritten Signature]

orthopedic (bilateral shoulder, back, neck, and right knee) and psychological (depression) conditions. No medical evidence establishing Ms. Powers's substantially incapacity was introduced. Therefore, her application for disability retirement benefits must be denied.

FACTUAL FINDINGS

Ms. Powers's Employment History

1. Ms. Powers was working as an Associate Governmental Program Analyst for the California Department of Transportation when she filed her application for service pending disability retirement. She is a state miscellaneous member of CalPERS subject to Government Code section 21150¹ by virtue of that employment, and has the minimum service credit necessary to qualify for disability retirement. Ms. Powers retired for service, effective December 31, 2012, although the last time she actually worked was during a one-week period in March 2011, as discussed further below.

Ms. Powers's Disability

2. Ms. Powers did not testify at hearing. The history of her alleged disability was culled from the independent medical examination performed by Robert Henrichsen, M.D., which is discussed further below. Ms. Powers was injured at work on November 23, 2010, when she caught her foot on a piece of multi-density fiber board, which caused her to trip and fall. She landed on both of her knees and elbows, and experienced significant pain. She was taken by ambulance to Shasta Medical Center, where she was diagnosed with a fracture of the left shoulder greater tuberosity and neck pain. X-rays of her spine were negative for fractures. Ms. Powers was released with a splint and sling for her left arm.

Ms. Powers's Application for Service Pending Disability Retirement

3. Ms. Powers signed a Disability Retirement Election Application seeking service pending disability retirement benefits on April 7, 2012. She described the injury or illness which affected her ability to perform her job as "chronic neck/back/shoulder/hip pain, fibromyalgia, depression." She identified her physical limitations/preclusions as not being able to sit or stand for prolonged periods of time or to move her right shoulder "hardly @ all w/o severe pain." She favors her left shoulder because of the limited mobility of her right shoulder, which is increasingly causing pain in the left shoulder. Her neck hurts on the right side, which causes headaches. She cannot use her right hand, and she has pain that radiates down both legs and causes "twitching" and "burning" sensations. Ms. Powers also explained

¹ That statute 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."

that her injury or illness prevents her from lifting more than two pounds, renders her unable to “concentrate like I would like to be able to,” and impairs her memory and stamina.

4. Ms. Powers explained on her application that she has not performed the duties of her position as an Associate Governmental Program Analyst since her injury on November 23, 2010, except for a one-week period in March 2011, during which she tried to return to work, but ultimately was unable to due to pain. She also explained, however, that she has been volunteering two to three days per week, for two to three hours each day, at North Cottonwood School, an elementary school located in Cottonwood, California. She spends her time grading papers and tutoring students. She wrote the following about her volunteer work:

Although I struggle w/fatigue and pain, I need to get out as much as poss. My hrs have been mostly 8:30 - 11:00 for 2d a week. But I try really hard to get the third day in for gift projs, etc. I worry still about my body crashing and excessive absences even w/a FT position, or employment; I could not be a good steward of my time d/t my inability to judge my own body's reactions to time/circumstances/crashes. Volunteering has allowed me out for my own sanity/pain, enjoying the kids, but I still pay a big price. Fatigue/pain on days off/wknds. And I still “miss” time @ volunteering that would otherwise cause many absences at an otherwise normal job.

5. On June 21, 2013, CalPERS denied Ms. Powers's application based on its review of medical records. Ms. Powers timely appealed the denial. Anthony Suine signed the Statement of Issues on September 26, 2014, solely in his official capacity as the Chief of the Benefit Services Division of CalPERS.

Job Duties of an Associate Governmental Program Analyst

6. The Duty Statement for Ms. Powers's position as an Associate Governmental Program Analyst with the California Department of Transportation explains that the “working title” for the position is “Assistant Project Manager.” The Duty Statement provides the following general statement about the position:

Under the supervision from the Chief, Office of Program/Project Management Support (Staff Services Manager I), the incumbent will be an expert in the use of eXpert Project Manager (XPM) application to support project management, the Caltrans Work Breakdown Structure (WBS) and Resource Breakdown Structure (RBS), the Caltrans project management process, including project planning, scheduling, and statusing processes, and Critical Path Method (CPM) techniques.

The following are the physical requirements of Ms. Powers's position and the frequency with which each is performed during any given shift:

Constantly:² Sitting, standing, walking, fine manipulation, simple grasping, repetitive use of hand(s), keyboard use, and mouse use

Frequently: Bending (neck), bending (waist), twisting (neck), twisting (waist), reaching (about shoulder), and reaching (below shoulder)

Occasionally: Crawling, kneeling, squatting, pushing and pulling, power grasping, and lifting/carrying up to 10 pounds

Never: Running, climbing, and lifting/carrying more than 10 pounds³

Medical Evidence

Ms. Powers's evidence

7. No medical evidence was introduced on Ms. Powers's behalf at hearing. However, Dr. Henrichsen's independent medical examination of Ms. Powers included his review of her medical records, which is summarized below.

CalPERS's evidence

Dr. Henrichsen

8. CalPERS called Dr. Henrichsen 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. Powers on May 1, 2013. Dr. Henrichsen prepared a report documenting his IME, and that report was introduced into evidence. His hearing testimony was consistent with his report.

9. At the IME, Ms. Powers complained of headaches, reduced motion of the right shoulder with pain, and some left shoulder pain. She also had pain in the lower one-third of the left humerus, which seemed to be the focal area of her symptoms. The pain radiated to the left elbow. She also complained of pain in the cervical and thoracic spine, and the right

² "Constantly" is more than six hours, "frequently" is three to six hours, and "occasionally" is up to three hours.

³ Ms. Powers used a cart to assist her with lifting/carrying items weighing more than 10 pounds.

hip and right knee area. Ms. Powers reported that she is unable to vacuum, wash her car, or mow her lawn. She also stated she could not wash heavy pans or do heavy laundry. Overall, her pain is worse when she lies down, lifts, sits, reaches, stands, climbs, or stoops, and she rated her pain a "5" to "6" on a 10 scale.

10. Dr. Henrichsen started his physical examination of Ms. Powers by examining her while she was standing. His examination revealed that she had normal strength when standing on her toes and then on her heels. She was able to squat and then return to a standing position while holding on to the examining table. She was able to flex each knee so that her heel was 20 centimeters from her buttocks while balancing on the opposite leg.

Next, Dr. Henrichsen examined Ms. Powers while she was lying face down on the examination table. She had no spinous process or midline tenderness. Nor did she have any nodules, trigger points, or spasms of her spine musculature.

Upon examination of her lower extremities while lying face up on the examination table, Ms. Powers was able to lift her left leg about twice as high as her right. Lifting her right leg caused some pain in her right hip from an area just above the trochanter. She had no radicular syndrome with ankle flexion or extension. Rolling her left leg back and forth at the hip while it was resting on the table did not show signs of trochanteric bursitis or hip joint pathology. The range of motion of both hips was within acceptable limits, and caused no irritation in either hip joint. Knee range of motion and ankle range of motion were both within acceptable limits, bilaterally, although she had "some tenderness" on the inside of her right knee near the joint as well as a "slight amount" of crepitus upon flexion and extension of both knees.

Finally, Dr. Henrichsen examined Ms. Powers while she was sitting on the edge of the examination table, and she was able to fully extend each knee. Abduction and adduction resistance at the knees did not cause low back pain, but right hip and knee flexion caused "some back pain." The range of motion of her cervical spine was within acceptable limits, and she had a negative Spurling's sign. She had some tenderness on the right side of her cervical spine, but no trigger points, nodules, or spasticity. Pressing down on her head and pulling up on her jaw and occiput did not cause significant symptoms.

Ms. Powers was able to shrug her shoulders well and adduct the scapulae appropriately. Dr. Henrichsen viewed her scapular muscles while standing in front of and behind her, and found no evidence of scapular dysfunction or atrophy. She had no winging of either scapular under specific direct loading, and her scapular region was not tender. The range of motion of her shoulders showed "some" reduction on the right side. The range of motion of each elbow was normal, and she had no olecranon and bursitis or olecranon nodules.

11. Dr. Henrichsen's IME of Ms. Powers included a review of her medical records from September 8, 2010, through October 4, 2012, which he then summarized in his IME report. The summary of those records indicated Ms. Powers had been experiencing pain in

the left shoulder, left elbow, right knee, and low back for more than two years before her November 23, 2010 workplace accident, but continued to perform her usual duties as an Associate Governmental Program Analyst. Dr. Henrichsen wrote the following about his review of Ms. Powers's medical records:

There are a large amount of symptoms which have been ongoing for several years. Apparently, the symptoms started about the time of 2008. She last worked when she tripped and fell on 11/22/2010 [*sic*]. Her occupation is that mostly of a sedentary job doing desk work. She sustained a greater tuberosity fracture from a fall in November 2010 and that fracture has healed. She has good motion of her left shoulder. There are also the symptoms in the left elbow olecranon area, presumably from the fall and examination by several physicians of that area has been normal. The right knee has had some chronic pain and at most, the knees have some patellofemoral articular surface irregularity, but otherwise they are normal. She has some right hip pain which is not explained by examination. My examination finds little in the way of trochanteric tenderness and no crepitus. Dr. Nichols released her to work on 3/7/2011.

There has been a lot of discussion about fibromyalgia. She actually does not have paired trigger points, for which I searched carefully. No physician has described paired trigger points consistent with the true diagnosis of fibromyalgia.

12. Based upon his IME of Ms. Powers, Dr. Henrichsen wrote:

In general, her examination demonstrates that she has restricted motion of her right shoulder, she has lots of aches and pains, and she has degenerative disease consistent with age. She had a specific slip and fall in November 2010 and that left shoulder fracture is healed. It is not a preclusion to her occupation. She was working before that specific fall in November 2010 with the same and similar pain issues, and actually following a previous thoracic spine MRI scan, T7-T8 demonstrated an osteophyte disc complex indenting the spinal cord that had improved secondary to her later thoracic spine MRI scan of 10/26/2011. Her examinations by all physicians have not shown nerve impingement from the cervical, thoracic, or lumbar spine on any consistent basis.

Therefore, Dr. Henrichsen concluded Ms. Powers is not substantially incapacitated for the performance of her usual job duties as an Associate Governmental Program Analyst with the California Department of Transportation due to orthopedic (bilateral shoulder, back,

neck, and right knee) conditions. While he acknowledged she has chronic pain issues, he was unable to trace any of her pain to an orthopedic condition.

13. Dr. Henrichsen was provided additional medical records for Ms. Powers after he completed his IME report on two separate occasions. On each occasion, he reviewed the additional records, and prepared a supplemental IME report summarizing the records and explaining that none of the additional records caused him to change his opinion that Ms. Powers is not substantially incapacitated. Additionally, he was provided a DVD recording, showing Ms. Powers exiting a store called the Elegant Bean and getting into the driver's side of a car, exiting that same car in the parking lot of North Cottonwood School, and using both arms to carry miscellaneous items while walking from the car into the school. Dr. Henrichsen prepared a third supplemental report explaining that nothing he saw on the DVD recording changed his opinion that Ms. Powers is not substantially incapacitated.

Andrea Bates, M.D.

14. CalPERS also called Dr. Bates, a board-certified psychiatrist, as an expert witness at hearing. She conducted an IME of Ms. Powers on May 8, 2013, and then prepared a written report. Dr. Bates's report was admitted into evidence, and she testified in a manner consistent with it.

15. Ms. Powers reported a family psychiatric history to Dr. Bates, explaining her daughter, sister, and father each had a history of suicide attempts, and each had previously been admitted to a psychiatric hospital. She also explained she began taking Prozac for depression at age 32, but switched to other antidepressants, including Wellbutrin, after 16 years due to weight gain. She tried psychotherapy with one practitioner, but left after approximately three to four months due to a personality conflict. She has been seeing a different psychotherapist on a weekly basis since August 2012.

16. Ms. Powers described herself to Dr. Bates as being "very depressed" because her sister had "a massive heart attack" and passed away two months prior to the IME, and her mother passed away from a suspected stroke the Saturday prior to the IME. In light of those recent deaths and "the natural/assumed grieving process," Dr. Bates focused her interview on Ms. Powers's functioning and mood prior to April 11, 2013. Ms. Powers explained that prior to that date, "I have a lot of days where I want to stay in bed and I don't want to get up. I don't know if it is because of the pain." But she also stated, "I volunteer at the school 3 days a week, 8:30 to 11. I love that. That is my little respite to get me out of the house, out of my pain. I get to do stuff with them, correct their papers. They are fun to be around and that is my respite." She further explained, "I spend like 300.00 dollars a year on these kids. I love those kids. They give me a little something."

17. Dr. Bates asked what interfered with Ms. Powers's ability to perform her job, and Ms. Powers answered, "one is, I take a great amount of pride in doing what I am doing and my greatest fear is not being able to perform the way that I would like to perform and if I make mistakes, the jobs could be very grave for the job." She then stated, "criticism for

errors I don't tolerate." Ms. Powers also felt she was unable to perform her job because "I am afraid of the pain." She explained, "I can't get comfortable when I lay down ... typing I can do ... I think I can do typing ... I don't know, I haven't tried it except for like 20 minutes." She also expressed concern about her ability to hold meetings, stating, "I don't know how I would handle it, but my biggest thing is the mistakes and being able to focus and concentrate."

18. After conducting a mental status examination of Ms. Powers, Dr. Bates concluded her psychomotor activity, affect and mood, speech, and thought content were "unremarkable." She described Ms. Powers as "cooperative" during the interview, and as having "cried, laughed and joked at appropriate times during the interview. There were episodes of incongruent laughter at times and evidence of underlying anger from a psychodynamic perspective." Ms. Powers's thought process was "tangential," her judgment was "good" with no gross deficits observed, her insight was fair with "limited psychological insight, and she denied any suicidal or homicidal ideations. Dr. Bates found no "significant evidence" of cognitive impairment.

19. Dr. Bates concluded that "Ms. Powers demonstrated evidence of symptoms of chronic depression and she may have a dysthymic disorder." Nonetheless, she opined that Ms. Powers is not substantially incapacitated for the performance of her usual duties due to a psychological (depression) condition, explaining:

Ms. Powers was asked, "What interferes with your ability to do the job at this time?" She stated, "One is, I take a great amount of pride in doing in what I'm doing and my greatest fear is not being able to perform the way that I would like to perform and if I make mistakes the jobs could be very grave for the job." This concern was prophylactic in nature. Ms. Powers was concerned with her ability to perform the job as well as she is accustomed.

Another reason that Ms. Powers felt she was unable to perform her job was stated as, "I am afraid of the pain." Ms. Powers stated, "I can't get comfortable when I lay down ... typing I can do ... I think I can do typing ... I don't know. I haven't tried it except for like 20 minutes."

From a psychiatric perspective alone, I found that she was not substantially incapacitated from performing the essential duties of the position.

At hearing, Dr. Bates expounded upon the opinions expressed in her report by explaining that the fact that Ms. Powers is able to volunteer at a school on a regular basis and derive a substantial amount of pleasure from doing so further demonstrates that her depression is not incapacitating.

20. Dr. Bates was provided additional medical records for Ms. Powers after she completed her IME report. She reviewed those records, and prepared a supplemental IME report explaining that none of the records caused her to change her opinion about Ms. Powers.

Discussion

21. When all the medical evidence is considered, Ms. Powers did not meet her burden to introduce medical evidence that she is substantially incapacitated for the performance of her usual duties as an Associate Governmental Program Analyst with the California Department of Transportation due to orthopedic (bilateral shoulder, back, neck, and right knee) or psychological (depression) conditions. That is not to say she does not suffer from pain or depression, or that such pain or depression would not make it more difficult for her to perform her job duties. But discomfort alone, even if it makes performance of one's duties more difficult, is insufficient to establish a substantial incapacity. (*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.)

Ms. Powers was required to produce a competent medical opinion to establish her substantial incapacity. (Gov. Code, § 21156, subd. (a)(2).) She did not appear at hearing, no medical experts testified on her behalf, and none of the medical records summarized by Dr. Henrichsen contained a medical opinion that she is substantially incapacitated for the performance of her usual duties. Therefore, her application for disability retirement should be denied.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Ms. Powers has the burden of proving she qualifies for disability retirement, and she must do so 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. 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.

3. 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.” And the employer of such a member may not terminate the member’s employment based on his disability, but instead must apply for a disability retirement on the member’s behalf. (Gov. Code, § 21153.)

4. 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.

5. 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.) An increased risk of further injury is insufficient to constitute a present disability. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

Conclusion

6. Ms. Powers did not meet her burden of producing competent medical evidence demonstrating she is substantially incapacitated for the performance of her usual duties as an Associate Governmental Program Analyst with the California Department of Transportation due to orthopedic (bilateral shoulder, back, neck, and right knee) or psychological (depression) conditions. Therefore, her application for disability retirement should be denied.

ORDER

Respondent Beverly Powers's application for disability retirement is DENIED.

DATED: December 28, 2015

DocuSigned by:
Coren D. Wong
F42B76F5E756451

COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings