

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:

MARTHA G. HAYWOOD,

Respondent,

and

CALIFORNIA DEPARTMENT OF
MOTOR VEHICLES,

Respondent.

Case No. 2013-1035

OAH No. 2014110831

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on November 12, 2015, in Sacramento, California.

Elizabeth Yelland, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Martha Haywood was present at the hearing and represented herself.

There was no appearance by or on behalf of the California Department of Motor Vehicles (Department). The Department was duly served with Notices of Hearing. The matter proceeded as a default against the Department, pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on November 12, 2015.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED *Nov 20 2015*
Rachy Pasley

ISSUE

The issue on appeal is whether, on the basis of orthopedic conditions (neck and right shoulder), respondent is permanently disabled or incapacitated from performance of her duties as a Motor Vehicle Technician for the Department.

PROCEDURAL FINDINGS

1. On July 1, 2012, respondent signed and thereafter filed with CalPERS an application for service retirement pending disability retirement (application). Until approximately July 5, 2011, respondent was employed as a Motor Vehicle Technician (Technician) with the Department. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150.
2. In filing the application, respondent claimed disability on the basis of orthopedic conditions, which included right and left shoulders, neck, right and left hips, knee, as well as asthma, stress and heart.
3. CalPERS obtained reports prepared by Randall Schaefer, M.D., Michael Charles, M.D., and Mohinder Nijjar, M.D., concerning respondent's claimed conditions. After reviewing the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of her duties as a Technician, based on her orthopedic conditions, at the time she filed her application.
4. On July 1, 2013, CalPERS notified respondent and the Department that the application for disability retirement was denied. Respondent was advised of her appeal rights.
5. Respondent filed an appeal and request for hearing by letter dated July 31, 2013. Respondent contended that her asthma, heart, stress and hip conditions were not considered by CalPERS in making the determination that she was not permanently disabled or incapacitated from performance of her duties as a Technician.
6. On August 30, 2013, Mari Cobbler, Retirement Program Specialist for CalPERS sent respondent a letter which explained that her orthopedic conditions were the only conditions for which she established continuous disability from the last day she received pay from the Department. Ms. Cobbler also stated that CalPERS did not receive a Physician's Reports on Disability or other medical records to substantiate that respondent's claimed asthma, heart, stress, knee and hip conditions were continuous disabilities that were substantially incapacitating or permanent. Respondent was informed that if she wanted to have CalPERS consider these conditions, she needed to have her physician complete a Physician's Report on Disability and submit medical records to support her claims.

At hearing, Nicole Herrera, Retirement Program Specialist II for CalPERS testified that she reviewed respondent's disability application file and found that respondent did not submit a Physician's Report on Disability or medical records to support her claimed asthma, heart, stress, knee and hip conditions. As a result, respondent's claimed asthma, heart, stress, knee and hip conditions were not considered by CalPERS for purposes of determining whether respondent was eligible for disability retirement.

7. On November 19, 2014, Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, signed and thereafter filed the Statement of Issues.

FACTUAL FINDINGS

Respondent's Employment History

1. Respondent worked for the Department as a Technician, until her last date of service effective on July 5, 2011. Respondent was 56 years old. Prior to working for the Department, respondent worked for the California Teachers' Retirement System (CalSTRS) performing data entry. In approximately March 2007, while working for CalSTRS, respondent reported problems with her neck and right shoulder, which she attributed to repetitive use at work. Specifically, she keyed information into a computer seven hours per day. Respondent testified that when she transferred to the Department, she continued to have problems with her neck and right shoulder, which she contended prevented her from performing her duties.

Duties of a Motor Vehicle Technician

2. As set forth in the Department's position statement, 85 percent of the duties of a Technician for the Department required respondent to apply the provisions of the California Vehicle Code and other laws and regulations pertaining to motor vehicle registrations, to make determinations of registration requirements for commercial vehicles, code and prepare applications for data transfer using a computer system, provide the public information about forms and applications for registration, receive and make telephone calls, interact with other state agencies, access computer systems to obtain vehicle registration information, accurately make computations using a calculator, and prepare letters. Approximately 15 percent of the time, respondent was required to assist the public, accept payment of fees, issue receipts and process refunds. Approximately five percent of the time, respondent was required to complete other duties as assigned.

3. On October 15, 2012, CalPERS received a completed "Physical Requirements of Position/Occupational Title" (Physical Requirements), signed by a representative of respondent's employer and respondent. According to the Physical Requirements, when working as a Technician, respondent: (1) occasionally (up to three hours a day) sat, stood, walked, pushed and pulled, simple grasped, and lifted between one and 10 pounds; and (2)

never ran, crawled, climbed, kneeled, squatted, bent her neck or wrists, twisted her neck or wrist, reached above or below her shoulder, engaged in fine manipulation, power grasped, repetitively used her hands, used a keyboard or mouse, lifted over 11 pounds, or operated foot controls or repetitive movement.

Physician's Report on Disability

4. On October 15, 2012, respondent's treating orthopedic physician Randall Schaefer, M.D. signed a "Physician's Report on Disability" form which was filed with CalPERS in support of respondent's application. On the form, Dr. Schaefer listed in Section 4, respondent's diagnosis as:

Status post right acromioplasty, mumford and SLAP repair.
There is pain [and] weakness with abduction strength testing.
The impingement sign is positive. [Right] shoulder MRI scan demonstrates partial RC [rotator cuff] tear [and] AC joint arthritis.

Under the section "restriction/limitations," Dr. Schaefer wrote "permanent work restriction of no repetitive use. No overhead work or lifting more than 10 lbs."

5. Dr. Schaefer marked both the "yes" and "no" boxes in response to Section 5, question 1 on the form: "Is the member currently, substantially incapacitated from performance of the usual duties of the position for their current employer?"

6. Dr. Schaefer marked the "yes" box in response to Section 5, question 3 on the form: "Was the job description/duty statement reviewed to make your medical opinion?" Dr. Schaefer also marked the "yes" box in response to Section 5, question 4: "Was the Physical Requirements of Position/Occupational Title reviewed to make your medical opinion?"

7. CalPERS sent Dr. Schaefer a letter dated January 8, 2013, in which he was asked to provide clarification of his response to Section 5, question 1, on the Physician's Report on Disability form. Specifically, Dr. Schaefer was asked to mark on the letter "yes" or "no" in response to the question "Is the member currently substantially incapacitated from performance of her usual duties as a Motor Vehicle Technician?" Dr. Schaefer was asked to return the letter to CalPERS.

8. On January 11, 2013, the January 8, 2013 CalPERS letter was faxed back to CalPERS, with Dr. Schaefer's signature and a check mark next to the "no" in response to the question of whether respondent was substantially incapacitated from performance of her usual duties as a Motor Vehicle Technician.

Independent Medical Evaluation

9. On May 14, 2013, at the request of CalPERS, Mohinder Nijjar, M.D. conducted an independent orthopedic medical evaluation (IME) of respondent. Dr. Nijjar prepared a report and testified at the hearing in this matter. Dr. Nijjar is a qualified medical evaluator and he is certified by the American Board of Orthopedic Surgery. He has been licensed to practice medicine in California since 1980.

10. As part of the IME of respondent, Dr. Nijjar interviewed respondent, obtained a personal and medical history, conducted a physical examination, and reviewed respondent's medical records related to her orthopedic conditions. Dr. Nijjar also reviewed respondent's duty statement and the physical requirements of her position as a Technician.

BACKGROUND

11. During the evaluation, Dr. Nijjar took a detailed history of complaints from respondent, related to her orthopedic conditions. Respondent informed Dr. Nijjar that on approximately March 6, 2007, she had problems with her neck and lifting with her right shoulder. She attributed the problems to her job, because she engaged in "keying seven hours per day" and her work station was not "ergonomically correct." The result was that she suffered from pain and discomfort. Respondent was referred to a doctor who diagnosed her with "strain/sprain of the cervical spine, thoracic spine and lumber spine" and strain/sprain of the right shoulder."

12. In September 2011, Dr. Schaefer performed arthroscopic acromioplasty, Mumford procedure, SLAP repair for a tear and debridement of the subscapularis tendon. As a result of the surgery, respondent developed adhesions. Dr. Schaefer performed a second surgery for lysis of the adhesions and manipulation of the shoulder on December 28, 2011.

RESPONDENT'S COMPLAINTS AND PHYSICAL EXAMINATION

13. Respondent's complaints at the time of the IME, included constant neck pain that varied in intensity, radiating to the right scapular area. The pain increased with sudden turning of the neck and prolonged stationary positioning of the neck. Respondent also complained of right shoulder pain that varied in intensity. The pain increased with overhead reaching, sudden movement in certain directions and repetitive turning such as scrubbing. Respondent also complained of decreased range of motion in her shoulder and numbness in the right upper extremity.

14. Dr. Nijjar conducted a physical examination of respondent. Respondent's cranial nerves were normal. Concerning respondent's cervical spine, Dr. Nijjar noted that respondent had a slight straightening of the cervical curvature and minimal tenderness in the midline at C4 and C5 area. Respondent also had minimal paraspinal muscle spasm on the right side and slight tenderness in that area. Dr. Nijjar noted that respondent has limited range of motion in the cervical spine and complained of pain when she moved. The range of

motion testing for respondent's cervical spine demonstrated that ranges for flexion, extension, left and right lateral bending and turning that were slightly less than normal. Dr. Nijjar also noted that respondent's thoracic spine was normal.

15. Respondent's right scapular area had no tenderness over the trapezius or rhomboids, or along the medial borders of the scapula. Dr. Nijjar also found no atrophy of the supra or infrascapular muscles, which demonstrated that there was no nerve or muscle damage.

16. The right shoulder examination revealed well-healed surgery scars. Respondent had minimal tenderness over the anterior acromion process and no tenderness over the outer aspect of the shoulder. Respondent had no signs of rotator cuff tear or SLAP lesion, and there was no atrophy noted in the deltoid muscle. The range of motion in the right shoulder was normal for adduction and external rotation. Extension and internal rotation were slightly less than normal. Respondent's flexion was 110 degrees, with normal at 160 degrees. Her abduction was 120 degrees, with normal at 180 degrees.

17. Dr. Nijjar examined respondent's upper arms and forearms. Respondent's upper arms bilaterally measured 33 centimeters and her forearms bilaterally measured 25 centimeters. Dr. Nijjar testified that these measurements demonstrated that there was no atrophy on respondent's right arm.

18. Examination of respondent's upper extremities revealed that deep tendon reflexes, biceps, triceps and brachioradialis were equal on both sides. Respondent also did not exhibit any loss in sensation in her upper extremities. Her motor strength test was equal bilaterally.

19. Dr. Nijjar tested respondent's grip strength using Jamar testing. Despite no evidence of atrophy on her right side, respondent failed to exert sufficient effort with her right hand to register a reading.

REVIEW OF MEDICAL RECORDS

20. Dr. Nijjar also reviewed respondent's medical records from March 12, 2007, through August 31, 2012, related to respondent's orthopedic conditions. The medical records confirmed the surgeries performed on respondent's right shoulder by Dr. Schaefer. Respondent's medical records indicate that after her first surgery in September 2011, her shoulder pain decreased, but she lacked full range of motion. As a result, in December 2011, Dr. Schaefer placed respondent under anesthesia to remove scar tissue and to manipulate the right shoulder to improve range of motion. Respondent continued to complain of neck and shoulder pain. Dr. Schaefer noted that respondent had a permanent work restriction of no repetitive use, no overhead work and no lifting of more than 10 pound.

DIAGNOSIS AND OPINION

21. Dr. Nijjar diagnosed respondent with:

- (1) Strain/sprain of the cervical spine superimposed on mild disc bulges at C3, 4, C4 5, and C5 6, with no radiculopathy;
- (2) Impingement syndrome, right shoulder, status post arthroscopic surgical Mumford procedure, debridement of the shoulder and manipulation of the right shoulder under anesthesia.

22. Dr. Nijjar testified that respondent's mild disc bulges are expected as part of the normal aging process. He did not find radiculopathy which would be compression of the discs. He also did not find evidence of nerve damage. Shoulder impingement can cause inflammation and pain. The Mumford procedure was conducted to reduce the impingement.

23. Dr. Nijjar opined that based on his medical evaluation, review of respondent's medical records and review of the Technician job duties, respondent can perform all the functions of the position. He further opined that respondent was not substantially incapacitated from the performance of her duties, as a result of her orthopedic conditions.

Respondent's Evidence

24. Respondent attributed her orthopedic injuries to her manager at CalSTRS. Respondent contended that she was required to sit at her desk in a manner that caused her nerve damage. Respondent took time off and transferred to the Department. She worked for a short time, but she was required to perform work that required repetitive use of her right arm. As a result, she felt that she could no longer work.

25. Respondent also contended that because her workers compensation claim was accepted by the Department, her disability retirement should have been treated the same. At the hearing, respondent submitted some of her worker's compensation records and reports. Respondent did not call any doctors to testify at the hearing. Respondent's worker's compensation reports and records were admitted as administrative hearsay, and have been considered to the extent permitted under Government Code section 11513, subdivision (d).¹

¹ Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Discussion

26. When all the evidence is considered, Dr. Nijjar's opinion that respondent is not permanently disabled or substantially incapacitated from performance of the duties of a Technician was persuasive. Respondent's physical examination did not reveal any objective evidence that her orthopedic conditions would prevent her from performing the usual and customary duties of a Technician. Furthermore, Dr. Nijjar's opinion was supported by Dr. Schaefer, respondent's orthopedic doctor.

27. Respondent did not present competent medical evidence to support her disability retirement application. In the absence of supporting medical evidence, respondent's application for disability retirement must be denied.

LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21150, subdivision (a), which provides in pertinent part, that "[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..."

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..." (Gov. Code, § 21156, subd. (a)(1).) 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 ... on the basis of competent medical opinion.

3. "Incapacity for the performance of duty" under Government Code section 21022 [now section 21151] "means the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Substantial inability to perform usual duties must be measured by considering applicant's abilities. Discomfort, which makes it difficult to perform one's duties, is insufficient to establish permanent incapacity from performance of one's 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.) A condition or injury that may increase the likelihood of further injury, as well as a fear of future injury, do not establish a present "substantial inability" for the purpose of receiving disability retirement. (*Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal. App. 3d 854, 863-864.) As the court explained in *Hosford*, prophylactic restrictions imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature.

4. An applicant for disability retirement must submit competent, objective medical evidence to establish that at the time of application, she was permanently disabled or incapacitated from performing the usual duties of her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.) In *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. Findings issued for the purposes of worker’s compensation are not evidence that respondent’s injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at 207; *English v. Board of Administration of the Los Angeles City Employees’ Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego*, (1989) 214 Cal.App.3d 563.)

6. The burden of proof was on respondent to demonstrate that she is permanently and substantially unable to perform her usual duties such that she is permanently disabled. (*Harmon v. Board of Retirement of San Mateo County, supra*, 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) Although respondent asserted subjective complaints of disability, she did not present competent, objective medical evidence to establish that she was permanently disabled or incapacitated from performance of her duties as a Motor Vehicle Technician for the Department at the time she filed her disability retirement application. Therefore, based on the Factual Findings and Legal Conclusions, respondent is not entitled to retire for disability pursuant to Government Code section 21150.

ORDER

The application of Martha Haywood for disability retirement is DENIED.

DATED: November 19, 2015

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Marcie Larson
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MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings