

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:

DEBORAH LYN BUCHKO,

Respondent

and

CALIFORNIA DEPARTMENT OF
TRANSPORTATION,

Respondent.

Case No. 2014-0719

OAH No. 2015020314

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings (OAH), State of California, heard this matter on November 6, 2015, in Sacramento, California.

John L. Shipley, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS), and was accompanied by Marguerite Seabourn, Assistant Chief Counsel.

Respondent Deborah Lyn Buchko represented herself.

No one appeared for or on behalf of respondent California Department of Transportation, 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 CalPERS to submit evidence of proper service of the Statement of Issues and Notice of Hearing on the California Department of Transportation. On November 19, 2015, CalPERS filed with OAH a letter that included e-mail correspondence between CalPERS and the California Department of Transportation and other documents which demonstrated that the California Department of Transportation was aware of the November 6, 2015 hearing date. Those documents are

PUBLIC EMPLOYEES RETIREMENT SYSTEM

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Kathleen Schrey

marked collectively as Exhibit 17 and are admitted for jurisdictional purposes, without objection. The record was closed and the matter submitted for decision on November 20, 2015.

SUMMARY

This appeal is limited to determining whether Ms. Buchko 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 orthopedic (shoulders, neck, hands, and carpal tunnel syndrome) conditions. Ms. Buchko did not introduce persuasive medical evidence demonstrating her substantial incapacity. Therefore, her application for disability retirement benefits should be denied.

FACTUAL FINDINGS

Ms. Buchko's Employment History with the California Department of Transportation

1. Ms. Buchko was hired by the California Department of Transportation in 1998, and was working for that employer as an Associate Governmental Program Analyst at the time she filed her application for service pending disability retirement. She is a local miscellaneous member of CalPERS subject to Government Code section 21150¹ by virtue of that employment. She has the minimum service credit necessary to qualify for disability retirement. Ms. Buchko retired for service, effective February 28, 2013.

At hearing, Ms. Buchko explained she “loved” her job and coworkers, and was not ready to retire when she did. However, her supervisor at the time did not believe Ms. Buchko was physically capable of performing her job duties, and encouraged Ms. Buchko to apply for disability retirement. Ms. Buchko further explained she felt her supervisor “nudged me out the door” at the time because the supervisor wanted to hire a friend to fill Ms. Buchko’s position. Ms. Buchko “would be happy to go back to work,” but did not believe she has been the same mentally or physically since she fell down the stairs at work as discussed further below.

Ms. Buchko's Disability.

2. Ms. Buchko fell down several stairs at work on October 3, 2011, landing outstretched on her hands and knees, mainly on her right side. She immediately felt pain in her right shoulder, arm, and knee. She continued to work over the next couple of weeks with

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.”

increasing right shoulder pain. She eventually sought medical treatment, initially from her primary care physician, but eventually through the workers' compensation system. As of the date of hearing, Ms. Buchko was continuing to treat with Carl Shin, M.D., a pain specialist to whom she was referred by her employer's workers' compensation carrier.

Ms. Buchko's Application for Service Pending Disability Retirement

3. On November 7, 2013, Ms. Buchko signed a Disability Retirement Election Application seeking service pending disability retirement. She identified her specific disabilities as "fell down stair – hurt shoulder, neck, hands – surgery on detached bicep." And she wrote that she was unable to sit for longer than 45 minutes or perform repetitive keystrokes as a result of such disabilities. Furthermore, she indicated her neck, arm, and carpal tunnel pain was constant.

4. Based on its review of reports prepared by Randall K. Schaeffer, M.D., Carl H. Shin, M.D., and Joseph Serra, M.D., CalPERS denied Ms. Buchko's application for disability retirement due to orthopedic (shoulders, neck, hands, and carpal tunnel syndrome) conditions. Ms. Buchko timely appealed the denial. On February 5, 2015, Anthony Suine, Chief of the Benefit Services Division of CalPERS, signed the Statement of Issues solely in official capacity.

Job Duties of an Associate Governmental Program Analyst

5. An Associate Governmental Program Analyst "is responsible for assisting in the maintenance and the operational integrity of approximately 450,000 square feet at the 1120 N Street Headquarters facility and leased facilities at other Department of Transportation (Department) locations throughout Sacramento." A person working in that position is expected to be able to perform the following physical requirements for the following durations during any given shift:

- a. **Constantly:** sitting, fine manipulation, simple grasping, repetitive use of hand(s), keyboard use, mouse use, and lifting/carrying up to 25 pounds
- b. **Frequently:** bending at the neck, bending at the waist, twisting at the neck, twisting at the waist, and reaching below shoulder
- c. **Occasionally:** standing, walking, crawling, kneeling, squatting, reaching above shoulder, pushing & pulling, and lifting/carrying between 26 and 50 pounds

- d. **Never:**² running, climbing, power grasping, lifting/carrying greater than 51 pounds, walking on uneven ground, driving, working with heavy equipment, exposure to excessive noise, exposure to extreme temperature, humidity, wetness, exposure to dust, gas, fumes, or chemicals, working at heights, operation of foot controls or repetitive movement, use of special visual or auditory protective equipment, and working with bio hazards (e.g., blood borne pathogens, sewage, hospital waste, etc.)

Ms. Buchko explained at hearing that she agreed with the above description of the physical requirements of her position and the duration for which she performed them, except she was “constantly” moving computers, monitors, and televisions for four to five hours on any given day. She further explained that she was the procurement officer and building manager, and her disabilities prevented her from performing such tasks as climbing ladders or onto tables to hang clocks or change the time on clocks.

Medical Evidence

Ms. Buchko’s evidence

6. Ms. Buchko did not call any medical experts to testify at hearing, but introduced several documents. Only three of those documents, however, provided evidence supporting the conclusion that she is substantially incapacitated for the performance of her usual job duties – Dr. Shin’s Primary Treating Physician’s Progress Report dated July 18, 2013, his Physician’s Report on Disability dated January 28, 2014, and Joel W. Renbaum, M.D.’s, June 23, 2015 Agreed Medical Examiner report.

7. Dr. Shin noted in his Primary Treating Physician’s Progress Report that Ms. Buchko underwent nerve conduction studies on both arms on April 24, 2012, which were positive for “mild bilateral carpal tunnel syndrome.” In his subsequent Physician’s Report on Disability, he identified the job duties/work activities that she is substantially incapacitated from performing as “reaching above shoulder height.” Additionally, Dr. Shin checked the box on the form indicating he considered Ms. Buchko’s duty statement and the Physical Requirements of Position/Occupational Title form in reaching his opinion. There was no evidence that Dr. Shin completed his Physician’s Report on Disability based on a current physical examination of Ms. Buchko, and, if so, what his objective findings based on that examination were.

8. Dr. Renbaum, a board-certified orthopedic surgeon, performed a physical examination of Ms. Buchko on June 23, 2015, pursuant to the agreement of the parties in her workers’ compensation matter. His subsequent report of that examination was admitted into evidence. The report contained a history of Ms. Buchko’s initial injury, and a summary of

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

her subsequent medical treatment. An April 2012 MRI of her right shoulder “showed a full thickness rotator cuff tear,” and she was referred to Dr. Schaeffer, a board-certified orthopedic surgeon, for treatment. Dr. Schaeffer performed an arthroscopic and open right shoulder surgery to repair the rotator cuff tear on July 27, 2012, and referred Ms. Buchko to postoperative physical therapy.

Ms. Buchko began treating with Dr. Shin in October 2012 for pain management. At the time, she complained of pain in her left shoulder from overusing it after her right shoulder surgery and neck pain down her right upper extremity with increasing right hand numbness. She also complained of chronic right knee pain, which she stated had been increasing since her original injury on October 3, 2011. A November 2012 MRI of Ms. Buchko’s cervical spine showed multiple disc protrusions and disc bulging/disc degeneration at multiple levels.

9. At the Agreed Medical Examiner examination, Ms. Buchko complained of pain in her neck radiating into the trapezius musculature, bilaterally, pain in her mid and lower back into the buttocks, pain in the right shoulder that worsened when she used her right arm, pain in her left elbow, and pain, weakness, and episodes of numbness and tingling in both hands. She reported that her performance of her Activities of Daily Living was greatly impaired by pain, and her pain caused her to be depressed or anxious all the time. At the time, she was taking Norco three times a day, Motrin four times each week, and Lyrica daily for pain, wore a right knee brace, and wore braces on both hands at night.

Upon physical examination of Ms. Buchko’s cervical spine, Dr. Renbaum noted tenderness to palpation from C5 to T1 in the midline and over the trapezius musculature, bilaterally. Both shoulders were tender to palpation over the anterior capsules, with the right greater than the left, and her right shoulder was “mildly positive” for shoulder impingement. Ms. Buchko had no tenderness to palpation in either of her elbows, wrists, or hands or her right knee. Tinel’s sign was negative for carpal tunnel, bilaterally. She had a slight reduction in range of motion in all her upper extremities and her cervical spine.

10. Based on his physical findings, Dr. Renbaum assigned Ms. Buchko a whole person impairment of eight percent for her cervical spine, six percent for her right shoulder injury, four percent for carpal tunnel, bilaterally (two percent for each wrist), and 10 percent for her right knee. He concluded, “I continue to feel that she is not capable of performing her regular work activities. It is noted that she has retired.”

11. Ms. Buchko explained at hearing that she did not seek medical treatment immediately after her initial work injury because she has a “high tolerance of pain.” It was not until her office changed out all the computers and she began experiencing shoulder pain that she decided to seek medical treatment. She further stated that she was still on pain medication as of the date of hearing, and she could not sit for long periods of time. Her knees gave out the week prior to hearing, and she “took a bad fall.” She normally wears a knee brace, but was unable to do so since that accident. A November 2, 2015 list of Ms. Buchko’s current medications did not include any pain medications.

Ms. Buchko was critical of Dr. Serra's opinion that she is not substantially incapacitated, explaining his examination of her was not as extensive and did not take as long as he described at hearing. She also felt he was dismissive of her description of the symptoms she was experiencing and the pain she was feeling. She described a point during Dr. Serra's examination when she became emotional, and said he was dismissive of everything she said afterward.

CalPERS's evidence

Dr. Serra

12. 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. Buchko on September 30, 2013. Dr. Serra prepared a report documenting his IME, and that report was introduced into evidence.

13. Ms. Buchko complained of "chronic pain over her entire body" at the IME. Specifically, she had constant stiffness and pain with motion of her cervical spine, which was worse at night and was partially relieved by pain medication. The pain was worse when she awoke in the morning, but she received some relief from warm showers and massages. She described chronic pain in both shoulders, the mid-portion of her spine, and the lateral aspect of her left hip. She said she had an arthritic knee.

Ms. Buchko reported being unable to vacuum, wash her car, or do lawn work. She was able to carry light groceries and make a bed. She described lying down, lifting, sitting, standing, reaching, walking, crouching, climbing, and stooping as activities which increased her symptoms of pain.

14. Physical examination of Ms. Buchko's cervical spine revealed good maintenance of normal lordotic curvature. She complained of tenderness to palpation over the vertebral musculature in the lower cervical area extending up to the trapezius. Range of motion was "excellent" upon flexion, "not so good" upon extension, and showed "some stiffness" upon rotation and lateral bending. She showed no signs of spasm, guarding, or crepitus with motion of the cervical spine.

Ms. Buchko complained of tenderness to palpation throughout the entire right shoulder capsule and to palpation over the anterior capsule of the left shoulder. She had a reduced range of motion upon internal rotation of her right shoulder only. The range of motion of her elbows, forearms, wrists, and hands were all within normal limits. Three measurements of Ms. Buchko's bilateral grip strength were substantially the same, except the third trial of her left hand (she is right-hand dominant) was stronger than any of the other trials of either hand.

Examination of Ms. Buchko's hands revealed tenderness to palpation over her right thumb joint, but not the left. Neither hand showed signs of thenar atrophy or sensory loss. Tinel's sign was negative for carpal tunnel syndrome, bilaterally.

Examination of the spine indicated that Ms. Buchko stands fully erect with no evidence of tilting to one side or the other. She complained of mild pain upon palpation over the mid-thoracic spine and also the paravertebral musculature in the lower lumbar segments from L3 to approximately S1. There were no signs of swelling or erythema. Range of motion was reduced upon extension, lateral bending, and rotation. Ms. Buchko was unable to touch her toes with their fingertips by approximately eight inches. Straight leg test while sitting and while lying supine were both negative for damage to the sciatic nerve, and Ms. Buchko had no tenderness to palpation over the sacroiliac joints or sciatic notch, bilaterally.

The gross appearance of Ms. Buchko's knees was normal, and there were no signs of swelling in either. She complained of tenderness upon palpation over the medial patellar area of the right knee and medial parapatellar area of the left. Range of motion was within normal range, bilaterally.

15. Dr. Serra concluded Ms. Buchko is not substantially incapacitated for the performance of her usual job duties as an Associate Governmental Program Analyst with the California Department of Transportation, explaining:

It is my orthopedic opinion that there is a significant exaggeration of her complaints. The subjective complaints far outweigh any objective findings. For example, there is no clinical evidence that she has carpal tunnel syndrome, bilaterally. Examination of her cervical spine and thoracolumbar spine reveals subjective complaints, but very little in the way of objective findings.

Dr. Serra was provided additional medical records regarding Ms. Buchko's treatment on two occasions after he completed his IME. He prepared a supplemental report on each occasion, and explained each time that none of the additional records caused him to change his opinion.

16. Dr. Serra testified at hearing in a manner consistent with his IME report. Additionally, he explained that the tenderness he found in Ms. Buchko's right thumb was indicative to him of mild arthritis. The absence of thenar atrophy in either hand meant her sensation and pinch grip were normal, which was indicative of an absence of carpal tunnel syndrome. He was not concerned over her inability to touch her toes by eight inches, given her age and physical condition. Nor was he concerned with her complaints of tenderness upon palpation of the right knee because those complaints were inconsistent as to the exact location of the pain.

Dr. Serra explained that after performing a complete orthopedic physical examination, he was unable to find any objective evidence to support Ms. Buchko's subjective complaints of pain. Therefore, he concluded that there are no specific job duties she cannot perform. He agreed she would "have pain," "be unhappy," and "need to get up to move around" when performing her job duties, but she is not substantially incapacitated for the performance of her usual job duties.

Discussion

17. When all the medical evidence is considered, Ms. Buchko did not meet her burden to introduce 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. That is not to say her subjective complaints of pain in various parts of her body were not believed or were discounted or that such pain 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. Buchko was required to produce a competent medical opinion to establish her substantial incapacity. (Gov. Code, § 21156, subd. (a)(2).) While she introduced evidence of Drs. Shin's and Renbaum's respective opinions that she is unable to continue performing her job duties, neither was persuasive evidence that she is substantially incapacitated. The latter opinion appeared to be based, in part, on an April 24, 2012 nerve conduction study that was positive for "mild bilateral carpal tunnel syndrome." However, Ms. Buchko had a negative Tinel's sign, bilaterally, when Dr. Serra examined both her wrists on September 30, 2013, and again on June 23, 2015, when Dr. Renbaum examined her.

Additionally, neither Dr. Shin nor Dr. Renbaum testified at hearing, and therefore no evidence that either of them understood and applied the proper standard for determining whether Ms. Buchko is substantially incapacitated for the performance of her usual duties as an Associate Governmental Program Analyst was introduced. Such evidence would have been important since both physicians treated her through the workers' compensation system, and the standard for eligibility for workers' compensation benefits is different than that for disability retirement benefits. (Compare *Coca-Cola Bottling Company v. Superior Court* (1991) 233 Cal.App.3d 1273, 1284 ["[A] compensable injury [under workers' compensation] is one which causes disability or need for medical treatments"] with *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877 ["We hold that to be 'incapacitated for the performance of duty' within section 21022 means the substantial inability of the applicant to perform his usual duties".])

Ms. Buchko's application for disability retirement should be denied.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Ms. Buchko has the burden of proving she qualifies for a 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.

Conclusion

5. Ms. Buchko did not meet her burden of producing persuasive medical evidence demonstrating she is 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 (shoulders, neck, hands, and carpal tunnel syndrome) conditions. Therefore, her application for disability retirement should be denied.

ORDER

Respondent Deborah Lyn Buchko's application for disability retirement is DENIED.

DATED: December 10, 2015

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Coren D. Wong
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COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings