

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:

MADHU GHUMAN,
Respondent,

and

EMPLOYMENT DEVELOPMENT
DEPARTMENT,
Respondent.

Case No. 2015-0329

OAH No. 2015041044

PROPOSED DECISION

Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, heard this matter on November 18, 2015, in Sacramento, California.

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

Madhu Ghuman (respondent) represented herself.

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

The matter was submitted for decision on November 18, 2015.

ISSUE

Is respondent permanently and substantially incapacitated from performing her usual duties as a Disability Insurance Program Representative for EDD, on the basis of orthopedic (low back, carpal tunnel, left shoulder, bilateral elbow, bilateral wrist and hand) conditions?

FACTUAL FINDINGS

Respondent's Employment History

1. Respondent is 50 years old and began working for EDD in 2001. She last worked for EDD on September 18, 2014, as a Disability Insurance Program Representative and is a local miscellaneous member of CalPERS subject to Government Code section 21150 with the minimum service credit to qualify for retirement.¹

Respondent's Disability Retirement Application

2. On September 25, 2014, respondent filed a Disability Retirement Election Application (Application) with CalPERS. On the Application, respondent checked the box which indicated "Service Pending Disability Retirement" as the Application Type. She specified her disability as "lower back and neck, carpal tunnel."

3. A document titled "Madhu Ghuman's Disability Details and its Explanations" was attached to respondent's Application and provided additional information regarding her claimed disability. The attachment included the following information:

How did the disability occur –

- 1) **Lower Back Pain** – While I was in Taxes [*sic*] in/around 1985, I had a serious fall on my work/factory floor, impacting my lower back. It was due to some slippery material (Possibly oil) on the floor.
- 2) **Wrist Pain and Neck Pain** – I am in EDD CA state call center, my main job is to sit and work on a computer and take customer calls. So I suppose due to this I have developed Carpal tunnel in my both [*sic*] hands and pain in the neck.

Limitations/Preclusions - 1) Lower Back Pain. When this aggravates, and becomes intense it literally freezes my whole back and body and makes me totally immobile. **2) Wrist Pain and Neck Pain** – I have pain in my both [*sic*] hands and it further moved to my neck, making my arms and neck stiff and painful.

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."

How has your injury affected your ability to perform your job – Both the injury's [*sic*] are impacting my routine duties in the office.

Job Duties – Working on the computer and taking customer calls.

Other information you would like to provide – I had the back injury on my previous work place in TX, which have become worse other the period while working in call center.

Third party injury – Yes.

(Bold in original.)

4. 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 April 16, 2015, complainant, Diane Alsup, Interim Chief, CalPERS Benefit Services Division, made and filed the Statement of Issues in her official capacity.

Duties of a Disability Insurance Program Representative²

5. On October 1, 2009, respondent signed an EDD Position Statement that specifies the duties of her position. The Position Statement provides that the majority of a Claims Representative job requires performing all aspects of disability insurance adjudication work. This includes, reviewing and investigating new and continued claims, identifying and reporting suspected fraudulent claims or activities, using appropriate manuals and other resources to ensure accurate, consistent determinations, documenting all claim actions properly, understanding and adhering to rules and procedures regarding confidentiality of department records, and demonstrating a high degree of professionalism, courtesy, and consideration in all phases of work. A smaller percentage of a Claims Representative's job duties includes serving as a customer service representative, answering general and claim-specific requests for information from the public, including claimant's doctors, attorneys, insurance companies, and employers. A very small percentage of a Claims Representative's job duties includes performing the duties of a field visitor, overpayment representative, appeals representative, workers compensation representative, disability insurance expert, crew leader, on-the-job trainer, field office team member, or performing other duties as assigned.

² Although the Statement of Issues describes respondent's position with EDD as a Disability Insurance Program Representative, the Position Statement in evidence list "Claims Representative" as her position title.

6. On October 1, 2014, an EDD representative and respondent signed a document titled “Physical Requirements of Position/Occupational Title” and submitted it to CalPERS. The document described the type and frequency of physical activities that must be performed by an EDD Disability Insurance Program Representative. This included constantly (over 6 hours) sitting, repetitive hand use, keyboard use and mouse use, and exposure to excessive noise; and occasional (up to 3 hours) standing, walking, bending, twisting, pushing, pulling, fine manipulation, and simple grasping.

Respondent’s Injuries

7. Respondent testified that she experienced a series of injuries over a period of several years. She testified that in 2006, while typing on her computer at work, she experienced significant pain in her hands, wrists, neck, and shoulders. Respondent stated that the pain started slowly and worsened—her hands and shoulders became numb, her head began to ache and she became dizzy. She was referred to Vinay Reddy, M.D., who treated her with morphine.

8. Respondent claimed she experienced similar pain while at home in December 2008. According to respondent, on this occasion she “stiffed up,” went to the floor, and could not move. Her children called for assistance. Respondent stated that she was transferred to U.S. Healthworks for treatment and was diagnosed with carpal tunnel syndrome. She testified that she experienced pain in her hands, wrists, and back while typing at work in 2011, which caused her to miss three weeks of work. Respondent asserted that very similar incidents occurred in 2012, January 2013, and on her last day of work, September 18, 2014. She added that her discomfort has been constant since 2006, with increased pain during flare-ups. According to respondent, her pain level “used to be about a seven [on a scale of one to ten]” but increased to an 8 or 9 in January 2013. She stated that the pain affects her ability to think clearly and communicate with customers.

9. Evangeline Seveses testified at hearing. She is an Associate Governmental Program Analyst for the EDD Disability Insurance Branch who has known respondent since 2004. Her job responsibilities occasionally require her to supervise other employees in a lead capacity. She testified that she observed respondent having difficulty working on multiple occasions due to pain. Ms. Seveses recalled seeing respondent limping and crying at work because of pain and described an occasion in 2013 when respondent had to leave work “on an emergency basis” due to severe pain.

Respondent’s Medical Evidence

10. Respondent did not call an expert to testify at hearing. Instead, she submitted documents to support her claimed incapacity. Respondent submitted two Supplemental State Panel Qualified Medical Evaluation Reports, dated October 16, 2014 and May 4, 2015, prepared by Sarbjit S. Dhese, D.C. Dr. Dhese is a chiropractor certified by the American Academy of Pain Management and the American Board of Chiropractic Specialties.

11. On October 16, 2014, Dr. Dhese performed a Supplemental Qualified Medical Evaluation of respondent and prepared a 25-page report.³ During the evaluation respondent complained to Dr. Dhese that she had bilateral hand and arm pain, bilateral elbow pain, left shoulder pain, trapezius pain, upper back pain, and neck pain. She described her arm and hand pain as a sharp pain in her hands from her wrists to her fingers that occurred daily for about 50 percent of the day. Respondent characterized her level of arm and hand pain as “five to six” on a zero to ten pain scale. She also described bilateral elbow pain that presented as discomfort and heaviness in her upper extremities. Respondent told Dr. Dhese that the pain was present 50 percent of the day and at a pain level of five on a zero to ten pain scale. She also complained of pain in her left shoulder, trapezius muscles, upper back, and neck occurring three times per week and presented as an achy sore sensation with a pain level of five on a ten pain scale.

12. Dr. Dhese reviewed respondent’s social history, work history, medical records, and job description and completed a physical examination. After reviewing all of the information obtained, Dr. Dhese diagnosed respondent as follows:

1. Bilateral carpal tunnel syndrome, verified via examination and prior nerve conduction studies dating back to 2006.
2. Bilateral lateral epicondylitis.
3. Bilateral medial epicondylitis, right greater than left.
4. Acromioclavicular joint dysfunction, primarily due to overuse syndrome of the cervicothoracic and upper extremities with localized swelling and edema bilaterally with subacromial bursitis.
5. Cervical spondylosis.
6. Myofascial and myofibrotic development with deconditioning of the upper extremities and cervicothoracic spinal structures.

13. Dr. Dhese determined that the condition of respondent’s upper extremities improved since his prior evaluation in June 2013, as there was a decrease in overall pain in that area. He noted that respondent had made little progress in strengthening those areas through physical therapy due to staffing issues at the treatment center. The report describes apportionment and whether respondent’s condition reached a permanent and stationary status. The Impairment Rating and Work Restrictions sections within the report include the following information:

Individual can use both upper extremities for self-care, can grasp and hold object[s] with difficulty, but has no digital dexterity. Ms. Madhu has residual neurological losses that are made worse with overlapping wrist tendonitis and lateral and medial elbow epicondylitis. Self-care can be performed [by]

³ Dr. Dhese initially evaluated respondent on June 27, 2013, and prepared a Qualified Medical Evaluation Report. That report is not in evidence.

using her hands to do basic stuff, [by] combing her hair. [L]ifting heavy jars or opening them can be difficult. She also has limited digital dexterity as when she starts [to] type after a period of time the fingers will not keep up with her and will cramp up or mistype.

[¶] ... [¶]

The patient will continue working per the restrictions of Dr. Reddy. She should monitor her bilateral upper extremities and avoid repetitive keyboarding and typing unless she takes adequate breaks necessary. Utilization of elbow and wrist supports should also be utilized by Ms. Ghuman when she is performing repetitive tasks.

[¶] ... [¶]

14. The May 4, 2015 Supplemental Qualified Medical Evaluation Report appears to have been prepared at the request of representatives of the State Compensation Insurance Fund to clarify attribution and any industrial origin of certain injuries. Dr. Dhesi clarified that respondent's neck/cervical and upper back injuries were industrial. He did not modify his prior diagnoses or provide any additional information regarding respondent's ability to perform her job duties.

15. Respondent also submitted a report prepared by Vinay M. Reddy, M.D. Dr. Reddy is a physiatrist specializing in spine and nerve disorders. The report reflects an electrodiagnostic study related to respondent's reported neck pain, upper extremity pain and paresthesias. It appears the study was performed on October 22, 2015. This report specifies that the electrodiagnostic study shows evidence of moderate right carpal tunnel syndrome and mild left carpal tunnel syndrome.

16. Respondent also submitted a report from Anita M. Bajaj, M.D., summarizing the results of an MRI of respondent's cervical spine, taken on September 2, 2015. The report reflects there was no marrow edema or compression fracture, and two to three millimeter disc bulging at the C6-7 level and C4-5 level contributing to borderline to mild spinal canal stenosis. There was also a two to three millimeter lobulated disc osteophyte complex at the C5-6 level contributing to mild central spinal canal stenosis and mild left foraminal exit zone compromise.

17. Respondent also submitted a "Static EMG Interpretation Narrative" and "Thermal Narrative" from Dr. Jignesh Bhakta and a series of chart notes reflecting her visits to Mercy Medical Group in 2014.

CalPERS' Medical Evidence

18. CalPERS called Daniel D'Amico, M.D., as its expert. Dr. D'Amico is a board-certified orthopedic surgeon whose practice encompasses all levels of trauma surgery, total joint surgery, total joint revisions surgery, acetabular fractures and pelvic fractures. He has worked as both an Agreed Medical Examiner and Qualified Medical Examiner on several occasions and has evaluated work-related injuries since 1966.

19. Dr. D'Amico evaluated respondent on December 19, 2014, reviewed her medical records, and wrote a 13-page report. During the evaluation, respondent reported pain in the upper cervical spine area of her neck causing occipital headaches and aching and tightness in her shoulders and upper extremities. She described the pain in her shoulders and upper extremities as diffused and radiating into her arms and along the medial side of her elbow and upper extremities. Respondent also described a uniform distribution of pain all over her hands and forearms. She described right hand weakness that made it impossible for her to grip and numbness of the dorsum of both forearms that occurred whenever she used her upper extremities for activities like typing, or using the phone or computer. Respondent also complained of low back pain and stiffness that occurred when she sat for long periods. She described the pain in this area as both sharp sudden pain and dull diffused pain. Respondent added that walking caused sharp pain in her back that occasionally extends down either leg, and typing caused hearing loss buzzing in her ears and headaches.

20. After conducting the physical examination and reviewing applicant's medical records, Dr. D'Amico reached the following diagnostic impressions:

1. Bilateral carpal tunnel syndrome mild.
2. Soft tissue pain syndrome.
3. Possible overuse and pain of the upper extremities, wrists and hands.
4. Degenerative cervical disc disease.
5. Cervical spondylosis.
6. Bilateral shoulder examination normal.
7. Low back pain and sprain/strain probably resolved.
8. Suspect mild degenerative disc disease of the low back. I do not have x-ray evidence of this finding, however.

21. Dr. D'Amico found that although respondent "complains of pain everywhere" he could not ascertain any significant findings that would be disabling. There were no significant findings of disability related to her wrists or median nerve areas. There was no true ulnar neuritis in her elbows, and he did not find evidence of epicondylitis as claimed in medical reports. There were no abnormal orthopedic findings related to her neck and shoulders. Though Dr. D'Amico assumed respondent had some mild degenerative disc problems and lumbosacral injuries in the past, he found no "significant radiculitis, radiculopathy, muscle weakness, atrophy, dysethesias, parasthesias, or other weakness that would disable her from long periods of sitting." He noted that the medical records reflect that both respondent's chiropractor and Dr. Reddy stated that she can continue to work with

appropriate rest breaks. Dr. D'Amico concluded that respondent could perform each of her job duties and was not substantially incapacitated for the performances of her duties as Disability Insurance Program Representative for EDD.

22. At hearing, Dr. D'Amico reiterated the opinions specified in his December 2014 report. He stated that respondent essentially complained of diffused pain in multiple areas that did not correlate to his objective findings. Dr. D'Amico added that respondent's job is sedentary and there was nothing in the medical records he reviewed or that was identified during his evaluation that indicated that her pain level was disabling. He stated that she was not substantially incapacitated in the performance of her job duties as there were no objective findings that would limit her ability to perform any of her job duties.

Discussion

23. When all the evidence is considered, Dr. D'Amico's opinion that respondent is not substantially incapacitated from performing her usual and customary duties as a Disability Insurance Program Representative was persuasive. Respondent did not present competent medical evidence to support her disability retirement application. In the absence of supporting 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 21150.⁴

2. To qualify for disability retirement, respondent must prove 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 follows:

"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.*

⁴ 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.

(Italics 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.) In *Mansperger*, the court found that a fish and game warden who had applied for disability retirement was not incapacitated for the performance of his duties, because the work activities that 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.)

4. 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.)

5. 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."

6. *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 a Disability Insurance Program Representative for EDD. The evidence established that respondent has prophylactic restrictions, to address largely subjective complaints of pain, which do not preclude her from performing any of her job duties. 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 a Disability Insurance Program Representative. Her application for disability retirement must therefore be denied.

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ORDER

The application of Madhu Ghuman for disability retirement is DENIED.

DATED: December 18, 2015

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Ed Washington
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ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings