

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:

MARISOL ROMO,

Respondent,

and

TULARE COUNTY CHILD CARE,

Respondent.

CalPERS No. 2014-0226

OAH No. 2014050200

PROPOSED DECISION

This matter was heard before Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings, State of California, on December 16, 2015, in Fresno, California.

The California Public Employees' Retirement System (CalPERS) was represented by Christine Murphy, Deputy Attorney General, Department of Justice.

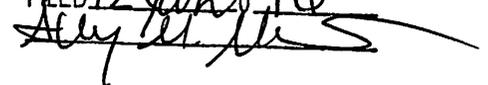
Marisol Romo (respondent) was present and represented herself.

FACTUAL FINDINGS

1. Anthony Suine, Chief, Benefit Services Division, CalPERS, made and filed the Statement of Issues in his official capacity.
2. Respondent was employed by Tulare County Child Care as a Teacher Assistant at the time she filed her application for disability retirement (Application). By virtue of her employment, respondent is a local miscellaneous member of CalPERS subject to Government Code section 21150.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

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3. On March 19, 2012, respondent signed her Application, which was received by CalPERS on April 3, 2012. In filing the Application, disability was claimed on the basis of an orthopedic (lower back and degenerative disc disease) condition.

4. After a review of respondent's medical evidence concerning her orthopedic condition, CalPERS determined that respondent's condition was not disabling; and that respondent was not substantially incapacitated from the performance of her job duties as a Teacher Assistant with Tulare County. By letter dated September 17, 2013, CalPERS notified respondent of its decision to deny her Application and advised her of her appeal rights. Respondent filed an appeal on or about October 12, 2013.

5. The appeal is limited to the issue of whether respondent is permanently disabled or substantially incapacitated from performance of her usual and customary duties as a Teacher Assistant for Tulare County on the basis of an orthopedic condition (lower back and degenerative disc disease).

Job Duties

6. Respondent has worked for Tulare County as a Teacher Assistant for approximately 15 years. Her last day of work was May 6, 2012.

7. The Tulare County Office of Education Duty Statement for a Teacher Assistant – Preschool summarizes the position responsibilities as follows: “[t]o assist [the] teacher in planning, instructing and supervising children aged 2.9 to kindergarten age in experiences designed to promote social, emotional, motor skills, problem solving skills, intellectual and language growth needed for successful transition into kindergarten.” Examples of duties include, but are not limited to the following:

Provide and maintain safe, secure and healthful environment for children at all times; Demonstrate a caring, loving and patient attitude toward children; Be aware of total classroom/playground situation even when working with one (1) child; Assist teacher with helping children to learn basic skills and concepts including, but not necessarily limited to, social skills, nutrition, health and safety, large and small muscle development, creative arts and math; Assist teacher with demonstrating to children routine activities such as habits of caring for own clothing and picking up and putting away toys and books; going to the bathroom, eating snack and lunch and taking a nap; As part of classroom team, assist with daily activities to meet all curriculum goals; Attend regular staff meetings to evaluate classroom activities and routines; Assist teacher with implementation of established curriculum and/or daily activities with sufficient ability to be flexible/individualized when required; Be proficient in language skills in order to demonstrate how to serve as model

for language development; Assist teacher with demonstrating a positive teacher-child-parent interaction to reinforce the parent figure as model figure for the child; Help plan and participate in parent meetings; Advocate for parents; Make home visits per school year, as requested by teacher; Assist with maintenance of confidential files as requested; Assist teacher with gathering of evidence documenting children's progress (e.g. anecdotal notes, portfolios, parent contacts); Perform related duties as required.

8. The Duty Statement also details the Working Conditions of a Teacher Assistant – Preschool as:

Environment: Classroom for preschool children. Outside in play area, sand box, nature walks. Traveling to meetings throughout Tulare County. Occasional travel and/or training outside Tulare County. The noise level can be from extremely quiet to high.

Physical Abilities: Sitting in small chairs and standing for extended periods of time. Sitting on floor. Kneeling and crawling. Bending, stooping and crouching. Talking and hearing. Regularly picking up 25 lbs or more – preschool children. Close vision, distance vision, peripheral vision, depth perception, and the ability to adjust focus.

9. On the CalPERS Physical Requirements of Position/Occupational Title form, Tulare County provided the following information about the physical requirements of the Teacher Assistant - Preschool position.

- a. Occasional tasks, for up to three hours per shift, include: running, crawling, climbing, reaching (above shoulder), pushing & pulling, repetitive use of hand(s), lifting 11 to 25 pounds for a distance 12 feet and 4 feet high, lifting 26 to 50 pounds for a distance of 5 to 10 feet and 3 feet high, walking on uneven ground, exposure to extreme temperature and humidity wetness, exposure to dust gas, fumes or chemicals, working with bio-hazards (e.g. blood borne pathogens, sewage, hospital waste.)
- b. Frequent tasks, for three to six hours per shift, include: sitting, standing, walking, kneeling, squatting, reaching (below shoulder), and power grasping.
- c. Constant tasks, for over six hours per shift, include:

bending (neck and waist), twisting (neck and waist), fine manipulation, lifting 0 to 10 pounds for a distance of 12 feet and 4 feet high.

Respondent's Medical History

10. In her own words, respondent provided the following information in response to questions on her Application.

a. What is your specific disability; when and how did it occur?

Spinal disease – back pain and discs are bad. Also, lots of pain. Dr. said: there is going to be more pain while time passes. I do not know when it happened. Dr. says: looks like it happened at a very young age.

b. What are your limitations/preclusions due to your injury or illness?

Can't sit more than 5 min. or stand. Pain is really bad. Cannot walk more than 3 min., depending on my day, climb or stoop, kneel or crouch, crawl, handle large objects or reach [because there is] to much pain.

c. How has your injury or illness affected your ability to perform your job?

It has affected my ability to perform my job. I cannot do anything I mentioned above. If I do, I will be in too much pain. Pain medications help very little, sometimes not at all. I do not like the feeling of pain medications.

11. Respondent submitted a Physician Report with her Application. The Report was authored by Dr. Agustin Rubio, Adventist Health, Central Valley Network, who is respondent's primary care doctor. Dr. Rubio diagnosed respondent with Lumbago (low back pain) and Degenerative Disc Disease (DDD), which Dr. Rubio opined were permanent and substantially incapacitating. However, no medical records or reports authored by Dr. Rubio were offered at hearing.

Independent Medical Examination

12. CalPERS requested an Independent Medical Examination (IME) of respondent. Joseph Serra, M.D., a qualified orthopedic surgeon, was retained by CalPERS to evaluate respondent and her orthopedic condition. Dr. Serra drafted an IME Report and a Supplemental Report; both reports were admitted into evidence. Dr. Serra testified at hearing consistent with his reports. To write his reports, Dr. Serra examined respondent on June 17, 2013, and he reviewed respondent's medical and non-medical (e.g., job duty statement) records.

13. At the examination, Dr. Serra took a medical history from respondent and an accounting of her present medical complaints. Respondent told Dr. Serra that she has been heavysset since she was seven-years-old and had back pain her entire life. Currently, she has constant and extreme burning pain in her low back, which radiates to her hips. Sometimes, her hips "pop." She has swelling in her legs, and her legs often fall asleep and become numb. She also has tingling in her anterior thighs, lower legs, and feet, and sometimes her hands tingle too. She has frontal lobe headaches, which she describes as migraines; at times, she is sensitive to light. Finally, she described pain in her upper thoracic spine as well as cervical pain.

14. Dr. Serra's physical examination of respondent revealed no evidence of scoliosis or spasm in the back, but increased lumbar lordosis (swayback). During very light palpation over the paravertebral musculature in the lumbosacral area, respondent complained of exquisite tenderness; so much so, respondent reached back and grabbed Dr. Serra's hand to stop his palpations. Dr. Serra described it as "bizarre."

Dr. Serra found it "impossible to evaluate" respondent's range of motion in the lumbosacral spine (e.g., extension, lateral bending, rotation), because respondent would place her hand on her back and bend no further than 10 to 15 degrees. In addition, respondent refused to perform a squat because of pain. At the lower extremities, Dr. Serra noted that respondent had significant genu valgum ("knock-knee") because of her weight, and walked with a waddle gait pattern. His neurologic examination revealed motor functions to be essentially intact. Sensory examination of the lower extremities was within normal limits. Patellar and Achilles reflexes were 2+ with reinforcement. Peripheral pulses were intact. Respondent was able to dorsiflex her ankles, but complained of pain in the lower back and neck when doing so in a sitting posture. Straight leg raises in a sitting posture was negative to 90 degrees bilaterally. When supine, respondent complained of being unable to lie flat. Straight leg raise test was positive to 45 degrees bilaterally, with complaints of pain in her cervical spine, lower back, and buttocks. Range of motion in her hips was intact. Heel and toe standing were carried out well. Lasegue and Trendelenburg were negative.

15. Dr. Serra then reviewed respondent's medical files, as well as respondent's duty statement. Her medical files consisted solely of chart notes made by Dr. Rubio and no diagnostic studies.

16. Dr. Serra's findings and diagnostic impressions of respondent are as follows:

- (1) Morbidly obese;
- (2) Significant functional overlay;
- (3) Subjective complaints of low back pain;
- (4) Complaints of neck pain;
- (5) Complaints of back pain.

17. Dr. Serra was the only physician to testify in this case. His testimony was straightforward and his medical opinion was credible. Dr. Serra opined that there were no specific job duties that respondent is unable to perform. She is not substantially incapacitated from the performance of her duties. She has no incapacity and significantly exaggerates her pain complaints. Dr. Serra testified that respondent has had no change in her medical condition during her tenure with Tulare County; therefore, if respondent could complete her job duties in the preceding 15 years, she is still able to do her job duties today. In addition, Dr. Serra expressed concern that respondent was not involved in any physical rehabilitation to moderate her alleged pain (e.g., walking, etc.).

18. For all the above reasons, respondent has failed to establish, through competent medical evidence, that her orthopedic (lower back and degenerative disc disease) condition is substantially disabling and prohibits her from performing her regular duties as a Teacher Assistant for Tulare County.

LEGAL CONCLUSIONS

Applicable Laws and Statutes

1. In determining whether a member is eligible to retire for disability, the board shall make a determination on the basis of competent medical opinion. (Gov. Code, § 21156, subd. (a)(2).) Disability, as a basis of retirement, means disability that is permanent or extended and of uncertain duration. (Gov. Code, § 20026.)

2. A member incapacitated for the performance of duty shall be retired for disability if she is credited with five years of state service, regardless of age. (Gov. Code, § 21150, subd. (a).) An applicant must demonstrate their substantial inability to perform their usual duties on the basis of competent medical evidence. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.)

3. According to Government Code section 21154, "[o]n receipt of an application

for disability retirement of a member, the board may order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty.”

4. 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 her duties and is eligible to retire for disability, the board shall immediately retire her for disability. (Gov. Code, § 21156, subd. (a)(1).)

Determination

5. No cause exists to grant respondent’s Application within the meaning of Government Code sections 21156, and applicable case law. Respondent did not establish that she is permanently disabled or incapacitated from the performance of her duties as a Teacher Assistant – Preschool, based upon competent medical evidence, on the basis of her orthopedic condition. At hearing, respondent failed to submit any competent medical evidence upon which CalPERS can rely. (Factual Finding 11.) Dr. Serra testified competently and clearly about his examination of respondent and his review of her medical files. (Factual Findings 13 through 16.) Dr. Serra applied the CalPERS standard of substantial incapacity and determined that respondent is not disabled; and she can perform the essential functions of her job. (Factual Finding 17.) In other words, respondent is not medically precluded from performing her usual duties as a Teacher Assistant – Preschool with Tulare County.

ORDER

The application of Marisol Romo for CalPERS Disability Retirement is DENIED.

DATED: January 8, 2016

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ERIN R. KOCH-GOODMAN
Administrative Law Judge
Office of Administrative Hearings