

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:

Case No. 2014-0099

ANTOINETTE M. KEY,

OAH No. 2015040717

Respondent,

and

DEPARTMENT OF CORRECTIONS,
SIERRA CONSERVATION CENTER,

Respondent.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on January 29, 2016, in Sacramento, California.

The California Public Employees' Retirement System (CalPERS) was represented by John Shipley, Staff Attorney.

Antoinette M. Key appeared on her own behalf.

There was no appearance by, or on behalf of, the Department of Corrections, Sierra Conservation Center.¹

Evidence was received in the form of documents and testimony, the record was closed and the case was submitted for decision on January 29, 2016.

¹ Compliance with service requirements under Government Code sections 11504 and 11509 was established. With respect to the Department of Corrections, this matter proceeded by way of default under Government Code section 11520.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED *January 19, 2016*
Kathie E. Schrey

FACTUAL FINDINGS

1. Antoinette M. Key (respondent) was employed as an Office Technician by the California Department of Corrections, Sierra Conservation Center. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150.² She has the minimum service credit necessary to qualify for retirement. On March 2, 2012, respondent filed an application for service pending disability retirement with the Benefits Services Division of CalPERS. In filing the application, respondent claimed disability on the basis of a psychological condition.

2. CalPERS obtained or received medical reports concerning respondent's psychological condition from competent medical professionals. After reviewing the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of her duties as an Office Technician at the time her application for disability retirement was filed.

By letter dated November 1, 2013, CalPERS notified respondent of its determination and advised her of her appeal rights. Respondent filed an appeal and request for hearing by letter dated November 6, 2013. CalPERS filed a Statement of Issues on July 23, 2015. Per the Statement of Issues, respondent's appeal is limited to the issue of whether, on the basis of a psychological condition, she is permanently disabled or incapacitated from performance of her duties as an Office Technician for the Department of Corrections, Sierra Conservation Center.

Job Duties

3. Respondent worked as an Office Technician (Typing) for the Department of Corrections, Sierra Conservation Center. The Duty Statement for respondent's position provides as follows:

Under the direction of the Supervisor of Correctional Education Programs, the Office Technician exercises initiative and independence in performing duties relative to the Education Department. Evaluates situations accurately and takes appropriate actions as needed. Meets and deals tactfully with staff and public. Uses good judgment and discretion in answering questions and giving out information.

4. Office Technician work is comprised of largely clerical functions. The Job Description for Sierra Conservation Center provided that 35 percent of respondent's

² 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."

responsibilities involved the following: “Independently prepares records, educational correspondence, contracts, legal and confidential or sensitive documents. Compiles and prepares education records and various reports (i.e., education, transcripts and classes from other institutions. Internal correspondence, memoranda, records, and reports).” Another 30 percent of respondent’s duties and responsibilities involved maintaining administrative files on policies and procedures, staff location and schedule information; typing performance and other employee reports; requesting and retrieving reports; and maintaining inventory, orders and supplies for all supervisors.

Work History

5. Respondent commenced employment with the State of California in 2000. In 2004 she began working for the Department of Corrections, Sierra Conservation Center. She noted that at the time of her job interview, she disclosed that she was dyslexic, and was assured by the Education Principal, Michael Lawson, that this was not an issue because there were other workers available to do duties that her dyslexia would otherwise prevent her from performing. She described her job responsibilities as verifying the education background of inmates, and maintaining inventory for the Education Department. She indicated that her job performance and experience was good until she was placed in a different position where she encountered difficult working relationships with her superiors. From April 2010, she experienced increasing employment difficulties, and believes there was a campaign against her to convince her to resign. She experienced humiliation and a sense of worthlessness when her diagnosed dyslexia was disclosed publicly at an Education Department meeting in April 2010. She described being given increased tasks and complicated assignments. She believes she was subject to demeaning, berating and discriminatory actions at work.

6. Respondent became increasingly distressed and on September 2, 2010, she was authorized to go on a medical leave of absence based upon her anxiety symptoms. The triggering event appears to have been an encounter with her new Principal and Vice Principal on September 1, 2010. She met with them to discuss perceived deficits in her performance, and respondent claimed that she was the victim of false allegations relating to her job performance. By September 2, 2010, respondent’s primary care physician described respondent having symptoms including anxiety, panic episodes, cephalgia, body tremors and chest pain.

Respondent did not return to work. She has not been employed in any other position since September 1, 2010. She retired from state service effective February 15, 2012.

Psychiatric Expert Evaluations

7. Robert T. Levine, M.D. On February 2, 2011, respondent was evaluated by Robert T. Levine, M.D. as part of an agreed psychiatric medical examination. She described experiencing at that time a sense of discouragement and apprehension resulting from her employment. Dr. Levine noted her expressed concerns including: “dyscontrol, worthlessness, anxiety, petulance, insomnia, resentment, bewilderment, overwhelm [*sic*],

animosity, reduced self-esteem, trepidation, ambivalence, hopelessness and helplessness.” Dr. Levine interviewed respondent and obtained her past history (family, education, employment, and marital), and performed a mental status examination. He arranged for her to take the Minnesota Multiphasic Personality Inventory – 2 (MMPI-2), and he reviewed her medical records.

8. Dr. Levine made the following observations upon mental status examination:

She was emotional when discussing the employment adversities. She was alert and oriented to time, place and person. There was no evidence of hallucinations, delusions, paranoid ideation, paranoid trends or other forms of psychotic behavior. Her associations were clear, logical and coherent. There were no signs of loose or disordered associations of any sort. Her speech was clear and goal oriented. Her affect was appropriate to thought content.

Dr. Levine further noted that respondent’s cognitive functions were intact and her general fund of information was commensurate to her education and occupational background.

9. Dr. Levine diagnosed respondent with both Acute Stress Reaction and Generalized Anxiety Disorder. He noted that her Acute Stress Reaction was manifested by her following concerns: “distraction, anxiety, reduced self-esteem, emotional lability, betrayal, difficulties coping, dyscontrol, petulance, worthlessness, and discouragement.” He further noted that her Generalized Anxiety Disorder was manifested by the following: “excessive ruminations, anxiety, restlessness, muscle tension, sleep disturbance, concerns of dyscontrol, emotional lability, diminished self-esteem, embarrassment; and a sense of trepidation regarding placement in public situations.”

10. Dr. Levine opined that respondent’s diagnosed symptomatology resulted in temporary psychiatric disability beginning September 1, 2010. However, he noted that respondent had not reached a level of psychiatric maximum medical improvement. He indicated that she could benefit from psychiatric treatment modalities including, “attendance of weekly psychotherapy sessions for a period of at least four months, and the continuance of currently prescribed medications (Xanax and Wellbutrin) for a period of at least six months.”

11. Andrea Bates, M.D. On December 10, 2012, respondent was evaluated by psychiatrist Andrea Bates, M.D. CalPERS referred respondent to Dr. Bates for an independent medical examination (IME). Dr. Bates prepared an IME Report on December 24, 2012, and a Supplemental Report on July 2, 2013. She also testified at hearing.

12. Dr. Bates obtained respondent’s occupation history, social history, and medical/psychiatric history. She reviewed respondent’s job duties, application for disability retirement, applicant’s treating physician’s reports on disability, and additional medical

records. She conducted a mental status examination. Regarding respondent's cognitive functioning, she made the following observations: "I found no significant evidence of frank, severe, acute cognitive impairment on screening exam, though the screening did not rule out learning or cognitive problems of a more subtle nature." Dr. Bates characterized respondent's insight and judgment as fair, and other mental status items as unremarkable.

13. Respondent reported to Dr. Bates on December 10, 2012, that in the three weeks prior to the evaluation she was "much better, much better. I'm up and going and pulling weeds and trimming trees. It is a lot better talking to Dr. Day and realizing I wasn't to blame."

14. Dr. Bates diagnosed respondent along Axis I as follows: 1) History Anxiety Disorder NOS, improved; 2) History Depressive Disorder NOS, improved; 3) Rule out Mood Disorder NOS; and 4) Learning Disorder. Dr. Bates determined that respondent was able to perform her usual job duties, and that her mental condition did not prevent her from performing any specific job duties. She explained her opinion as follows:

Ms. Key provided a credible history that there was a period of time that she had some significant depression and anxiety symptoms. Those symptoms probably had some effect on her ability to perform her job duties at one time, but those symptoms have become much improved in recent months and were not disabling at the time of my interview.

During that time period, because her concentration may have decreased from usual it is possible that the symptoms of the learning disability became more problematic and symptomatic even though Ms. Key had been employed for several years, as generally learning disabilities are long term chronic conditions, not acute mental health disorders, and usually not amenable to acute treatments in that sense.

I have found that the examinee was not acutely disabled from performing her usual job duties that she had been able to perform prior to the episode of anxiety and depression that she had experienced at about the time she stopped working. It is reasonable to assume that the examinee was able to previously perform the duties even though she had learning disabilities, because she had done so for many years.

15. In her July 2, 2013 Supplemental Report, Dr. Bates confirmed that respondent's dyslexia condition had been considered in her earlier IME Report in context of respondent's general learning disability. Dr. Bates indicated that her opinion regarding respondent's disability remained the same.

16. At hearing, Dr. Bates testified in a manner consistent with her above described IME reports. She recognized that respondent had some limitations, but believes that such do not substantially incapacitate her for performance of her usual duties as an Office Technician. Dr. Bates reviewed the Agreed Psychiatric Medical Examination prepared by Dr. Levine. She noted that his diagnostic findings were consistent, his report was reasonable and did not contradict anything in her report. Dr. Levine's report looked ahead to a future date when respondent's condition might improve. Dr. Bates believes this in fact occurred by the time she evaluated respondent in December 2012. Dr. Bates described respondent as one who has a chronic ongoing problem with anxiety, and whose condition can be managed adequately. Dr. Bates noted that in respondent's case, her condition became acutely difficult at the time she left employment, but has since improved to a degree where she is not incapacitated from performance of her duties as an Office Technician.

Respondent's Testimony

17. Respondent has not worked since September 2010. At that time she recalls feeling overwhelmed and seeing her physician because she was "shaking so bad." She felt depressed and "hated life." She indicated that her mood has improved with time. Instead of "laying on the couch all day," as she earlier reported, respondent and her boyfriend now have a daily routine. Her activities include usual activities of daily living including feeding her pets, checking on their horses and preparing meals. She indicated that she cannot write out bills or other paperwork. She experiences feelings that she is being judged by how well she is doing things. She feels like she is being ridiculed, noting that such goes back to her supervisor telling her that he was disappointed in her work performance. She experiences occasional dizziness and shaking. She remains on medications to get through the day. Respondent does not believe she can return to work. She has not undergone any individual counseling or therapy sessions.

Discussion

18. Respondent has not demonstrated through competent medical/psychiatric evidence that she is permanently disabled or incapacitated from performance of her duties as an Office Technician with the Department of Corrections, Sierra Conservation Center.

19. In this regard, the psychiatric evaluation reports of both Dr. Levine and Dr. Bates are consistent and support a finding that respondent's psychological condition, while initially disabling, was not permanent. Dr. Bates's evaluation report and testimony was particularly persuasive that although respondent had some significant depression and anxiety symptoms that impacted her ability to perform her job duties, those symptoms improved over time and were not disabling by the time Dr. Bates evaluated her in December 2012. Dr. Levine had earlier anticipated that this would be the case and indicated that respondent had yet to reach a level of psychiatric maximum medical improvement, which he believed would occur were she to engage in psychotherapy sessions for a period of at least four months, and continue on prescribed medications.

20. For all the above reasons, respondent's application for disability retirement should be denied.

LEGAL CONCLUSIONS

1. Under Government Code section 21150, members incapacitated for the performance of duty shall be retired for disability. Government Code section 20026 provides that "'Disability' and 'incapacity for performance of duty' as a basis of retirement, means disability of permanent or extended and uncertain duration, as determined by the board... on the basis of competent medical opinion." In *Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, the court construed the term "incapacitated for the performance of duties" to mean a substantial inability to perform the employee's usual duties. (*Id.* at p. 876.) The applicant in *Mansperger* was a warden with the Department of Fish and Game whose physician opined that he could no longer perform heavy lifting and carrying. The evidence established that such tasks were an infrequent occurrence, and the applicant's customary activities were the supervision of hunting and fishing. The *Mansperger* court found that the applicant was not entitled to disability retirement because, although he suffered some physical impairment, he could perform most of his usual job duties.

2. Subsequently, in *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, the Court of Appeal applied the *Mansperger* test to the disability retirement claim of a California Highway Patrol Sergeant who sustained injuries to his back and leg, which restricted his ability to carry out some of the functions of a patrol officer, including driving a patrol car for lengthy periods. Regarding whether there must be actual present disability, or whether fear or possibility of future injury is sufficient to find disability, the court noted that "Hosford relied and relies heavily on the fact that his condition increases his chances for further injury . . . this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently in existence." The *Hosford* court held that the disability or incapacity must presently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. (*Id.* at p. 862.)

3. Respondent has the burden of proving entitlement to disability retirement. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.3d 234, 238.) It is well accepted that CalPERS may rely on decisions affecting other pension plans when the laws are similar, and since Government Code section 31724 (County Employees' Retirement Law) is similar to Government Code section 21151 (California Public Employees' Retirement Law), the rule concerning burden of proof shall be applied to cases under CalPERS law. (*Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal.App.3d 937, 947.)

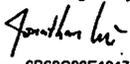
4. The matters set forth in Findings 4 through 19 have been considered. It was not established through competent medical evidence that respondent's psychological

condition substantially disabled her from the performance of her usual and regular duties as an Office Technician with the Department of Corrections, Sierra Conservation Center.

ORDER

The application of Antoinette M. Key for disability retirement is denied.

DATED: February 9, 2016

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JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings