

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 and Earlier Retirement
Date of:

Case No. 2014-0720

YVETTE BRAVO,

OAH No. 2015031242

Respondent,

and

STOCKTON UNIFIED SCHOOL
DISTRICT,

Respondent.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on January 26, 2016, in Sacramento, California.

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

Respondent Yvette Bravo was present at the hearing and represented herself.

There was no appearance by or on behalf of the Stockton Unified School District (District). The District was duly served with a Notice of Hearing. The matter proceeded as a default against the District pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on January 26, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED February 20 16
MARCIE LARSON

ISSUES

1. Whether, at the time respondent filed her application for disability retirement on the basis of her orthopedic conditions (back and neck), lupus, hepatitis C, and fibromyalgia, respondent was permanently disabled or incapacitated from performance of her duties as an Office Assistant (Assistant) for the District?¹
2. If respondent is found to be permanently disabled or substantially incapacitated from the performance of her duties as an Assistant for the District, whether she failed to timely file her application for disability retirement as a result of inadvertence, mistake, surprise, or excusable neglect correctable by Government Code section 20160, which would entitle her to retroactively change her retirement date to September 26, 2006?

PROCEDURAL FINDINGS

1. On April 5, 2012, respondent signed application for service retirement pending disability retirement (application). CalPERS received the application on May 10, 2012. Until approximately October 30, 2006, respondent was employed as an Assistant with the District. Respondent retired for service effect September 1, 2011. 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 chronic pain in her neck and back. Respondent also noted that she had lupus, hepatitis C and fibromyalgia. Respondent requested that the effective date of her retirement be back dated to September 20, 2006.
3. CalPERS obtained reports concerning respondent's orthopedic conditions, prepared by Anh Le, M.D., Elizabeth Ross, N.P., Brien Ecker, M.D., Madelaine Aquino, M.D. and Joseph Serra, M.D., who conducted an Independent Medical Evaluation (IME) of respondent. After reviewing the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of her duties as an Assistant, based on her orthopedic conditions, at the time she filed her application.
4. 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 medical records to support her claimed lupus, Hepatitis C and fibromyalgia conditions. Ms. Herrera testified that respondent was required to provide medical

¹ The Statement of Issues identifies applicant's orthopedic conditions as a basis for respondent's disability retirement application. However, respondent also listed on the application lupus, Hepatitis C, and fibromyalgia as additional conditions for CalPERS to consider. Respondent was permitted to offer testimony and evidence at hearing concerning her lupus, hepatitis C, fibromyalgia, and orthopedic conditions.

documentation to demonstrate that she was continuously disabled from her lupus, hepatitis C and fibromyalgia conditions from the time she stopped working for the District in 2006, until the present. Respondent failed to provide any evidence of being continuously disabled. Respondent's medical records indicated that she was not diagnosed with lupus and fibromyalgia until after she left the District. Her treatment for lupus began in 2008. Respondent was diagnosed with hepatitis C while she was employed by the District. However, she did not provide medical documentation to CalPERS demonstrating that hepatitis C condition was incapacitating. As a result, for the purposes of determining whether respondent was eligible for disability retirement, CalPERS also did not consider respondent's lupus, hepatitis C and fibromyalgia conditions.

5. On April 14, 2014, CalPERS notified respondent and the District that the application for disability retirement was denied. CalPERS also notified applicant that her request to have her disability retirement become effective earlier than the first day of the month in which CalPERS received her application, was also denied. CalPERS explained that pursuant to Government Code section 20160, CalPERS has the authority to allow an earlier effective date for retirement if the mistake was "due to excusable inadvertence, oversight or mistake of fact or law on the part of the claimant." However, CalPERS determined that respondent had "knowledge of the application process." Therefore, Government Code section 20160 did not apply. Respondent was advised of her appeal rights.

6. By letter dated June 18, 2014, respondent filed an appeal and request for hearing. Respondent referenced her lupus and hepatitis C conditions as a basis for disability in her appeal.

7. On March 27, 2015, Diane Alsup, in her official capacity as Interim Chief, Benefit Services Division, Board of Administration, CalPERS, signed and thereafter filed the Statement of Issues.

FACTUAL FINDINGS

Respondent's Employment History and Duties as an Assistant

1. Respondent worked for the District as an Assistant from 1993, until her last date of service effective on October 30, 2006. Respondent was 48 years old when she stopped working for the District.

2. As set forth in the District's duty statement, an Assistant for the District, "performs a variety of general clerical duties in support of an assigned office, answers the telephone, and greet and assist students, parents and visitors." An Assistant must be able to perform the following physical demands of the position:

- Enter data into a computer terminal/typewriter and operate standard office equipment

- Sit for extended periods of time
- See and read a computer screen and printed matter with or without vision aids
- Hear and understand speech at normal levels and on the telephone, with or without hearing aids
- Lift and/or carry up to 25 lbs at waist height for short distances
- Bend at the waist
- Reach overhead, above the shoulders and horizontally, grasp, push/pull

3. On May 10, 2012, CalPERS received a completed "Physical Requirements of Position/Occupational Title" (Physical Requirements), signed by respondent. According to the Physical Requirements, when working as an Assistant, respondent would: (1) frequently (three to six hours per day) reach below her shoulders, use fine manipulation, simple grasping, repetitive use of hands, keyboard and mouse use; (2) occasionally (up to three hours a day) sit, stand, walk, squat, bend and twist her neck and waist, reach above her shoulders, push and pull, power grasp, carry up to 25 pounds, walk on uneven ground, drive and be exposed to dust, gas fumes or chemicals; and (3) never ran, crawl, climb, kneel, carry more than 25 pounds, work with heavy equipment, or be exposed to: excessive noise, extreme temperature, dust, gas fumes, chemicals, work at heights, operate foot controls or repetitive movements, use special visual or auditory protective equipment or work with bio-hazards.

Independent Medical Evaluation by Joseph Serra, M.D.

4. On October 3, 2013, at the request of CalPERS, Dr. Serra conducted an IME of respondent. Dr. Serra prepared a report and testified at the hearing in this matter. Dr. Serra is a board-certified orthopedic surgeon. Dr. Serra operated a private practice from 1966 until 2002. He treated orthopedic patients. Dr. Serra teaches orthopedics to doctorate students in the physical therapy program at the University of Pacific. He is also an Adjunct Professor at Stanford University Department of Emergency Medicine. Since 2000, Dr. Serra has performed IMEs for CalPERS.

5. As part of the IME of respondent, Dr. Serra interviewed respondent, obtained a personal and medical history, had respondent complete an examinee questionnaire, conducted a physical examination, and reviewed respondent's medical records related to her orthopedic conditions. Dr. Serra also reviewed respondent's duty statement and the physical requirements of her position as an Assistant.

BACKGROUND AND COMPLAINTS

6. During the evaluation, Dr. Serra obtained background and a history of complaints from respondent, related to her orthopedic conditions. Respondent told Dr. Serra that she began to have neck and back problems in 2001. The pain was gradual. Respondent was treated by Dr. Le, an orthopedic surgeon. From 2001 until 2006, Dr. Le administered respondent epidural steroid injections. Respondent stopped treating with Dr. Le in 2006, because she no longer wanted steroid injections. At some point, respondent was referred to Dr. Aquino. Respondent was "discharged" by Dr. Aquino because respondent was found to be taking narcotics that had not been prescribed by Dr. Aquino. Specifically, respondent's dentist had prescribed her Vicodin after a dental procedure. Respondent did not disclose this information to Dr. Aquino. Respondent also reported to Dr. Serra that she was on a methadone program and had been receiving methadone daily for approximately four years.

7. Respondent complained that she had "constant burning pain in her neck." She also had intermittent spasms in her neck muscles. She rated her neck and back pain as a "7-8" on a scale of 1 to 10. Respondent also stated that she had constant pain and spasms in her low back. Respondent reported that she was able to vacuum her home, make a bed, and carry light groceries. She is not able to wash a car or do yard work. Lifting, sitting, bending, standing, walking, crouching, climbing and stooping increased her symptoms. Respondent's symptoms were relieved by rest.

8. Dr. Serra also noted in his report that respondent's past medical history included a diagnosis of lupus, hepatitis C, fibromyalgia, and carpal tunnel syndrome. She also had gastric bypass surgery performed in 2006.

PHYSICAL EXAMINATION

9. Dr. Serra conducted a physical examination of respondent. Dr. Serra noted that during the examination of respondent's cervical spine, she had tenderness in the "lower cervical paravertebral musculature extending out into trapezia bilaterally." Dr. Serra found no evidence of "spasm, guarding, or crepitus in the cervical spine." Respondent's range of motion in her cervical spine for flexion was 100 percent of normal. Extension, bilateral rotation, and bilateral bending were 75 percent of normal.

10. Dr. Serra found no evidence of atrophy in respondent's upper extremities. Her strength bilaterally was "excellent." She also had no signs of carpal tunnel syndrome.

11. Dr. Serra also examined respondent's lower back. He found no evidence of "pelvic tilt, scoliosis or muscle spasm." Respondent "complained of minimal tenderness to palpation over the paravertebral musculature at the L5 level." Respondent's range of motion of the lumbar spine revealed "flexion of 100 percent of normal, extension 50 percent, with the complaint of back stiffness, lateral bending was 100 percent bilaterally and rotation was 100 percent bilaterally." Respondent was able to bend forward at the waist and touch her fingertips to her toes, "with ease." After Dr. Serra checked respondent's range of motion of

the lumbosacral spine, respondent complained of “generalized pain to the entire lumbar area extending out to both flanks.”

12. Dr. Serra also conducted a neurologic examination of the upper and lower extremities. Respondent’s motor and sensory function for the upper and lower extremities were “intact.” Her reflexes “revealed biceps, triceps, and brachioradialis to be 2+ bilaterally. Her peripheral pulses were intact.” Respondent was able to perform straight leg raises to 90 degree when sitting and lying down. Respondent complained of tightness and discomfort over her lateral hips when she performed the straight leg raise lying down. Dr. Serra found no evidence of “sciatic stretch signs.” Respondent’s squatting was 50 percent of normal. Dr. Serra also tested respondent’s strength with heel and toe standing, which respondent was able to perform. Although respondent resisted performing the heel and toe standing because she was concerned that she would fall and injure her back.

REVIEW OF MEDICAL RECORDS

13. Dr. Serra reviewed respondent’s medical records and diagnostic studies from 1998 through April 2012. Dr. Serra testified that the MRI, x-rays and medical records he reviewed demonstrate that respondent was diagnosed with degenerative disc disease at multiple levels of her lumbar and cervical spine. He found no evidence of radiculopathy.

DIAGNOSIS AND OPINION

14. Dr. Serra diagnosed respondent with:

- (1) Degenerative disc disease, cervical spine, multiple levels, mild. No radiculopathy.
- (2) Degenerative disc disease, lumbar spine, multiple levels, mild. No radiculopathy.
- (3) Hepatitis C by history.
- (4) History of Lupus.
- (5) Fibromyalgia by history.
- (6) Status post gastric bypass surgery.
- (7) Four year history of methadone maintenance, current.

15. Dr. Serra opined that “orthopedically” there are no specific job duties that respondent is unable to perform because of her conditions. He also opined that “there is an exaggeration of complaints.” He opined that respondent’s subjective complaints were “vague” and “far outweigh any objective findings.” Dr. Serra opined that based on his

evaluation and review of respondent's job duties, respondent can perform all the functions of the Assistant 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

16. Respondent is 58 years old. She lives with her two adult sons and her mother, Yvonne Bravo, who testified at hearing. Respondent stopped working for the District in September 2006, because she could not get out of bed due to her neck and back pain. Respondent was diagnosed with hepatitis C when she was employed at the District. The hepatitis C made respondent feel tired, but the condition did not cause her to stop working. Respondent was not diagnosed with lupus or fibromyalgia until after she stopped working for the District. Respondent has never received treatment for fibromyalgia. She started receiving treatment for lupus after she stopped working in 2006.

17. Respondent visits a pain clinic each day to obtain methadone for neck and back pain. She takes Paxil for depression. Respondent had epidural shots for her neck and back pain. Dr. Le told respondent that he could not perform surgery on her neck and back because it would be a "four level fusion" that would disable her if she had the surgery.

18. Respondent testified that she did not file for disability retirement when she stopped working for the District, because she thought she had to be 55 years old to file. Respondent called CalPERS several times between 2006 and 2012, to inquire about filing for disability retirement. Respondent admitted that in 2006 she was told by a CalPERS representative that she could file for disability retirement at any time. Respondent did not do so because she overwhelmed by the paperwork she was required to complete. Respondent's mother attempted to help her with the paperwork.

19. At the hearing, respondent submitted medical records and letters from her treating physicians, which were admitted as administrative hearsay, and have been considered to the extent permitted under Government Code section 11513, subdivision (d).² Respondent did not call any doctors to testify at the hearing. The medical records and letters do not state that respondent is substantially incapacitated from the performance of her duties as an Assistant for the District, based upon her orthopedic conditions, lupus, hepatitis C, or fibromyalgia.

² 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

20. When all the evidence is considered, Dr. Serra's opinion that respondent is not permanently disabled or substantially incapacitated from performance of the duties of an Assistant for the District, was persuasive. Respondent's physical examination and the medical records reviewed by Dr. Serra revealed that respondent has mild degenerative disc disease in her lumbar and cervical spine. Respondent was able to perform all the tests administered by Dr. Serra during the physical evaluation. Respondent's cervical and lumbar spine range of motion was good during the examination conducted by Dr. Serra. There was no evidence that respondent suffered from any pressure on her nerve roots which would indicate radiculopathy. Dr. Serra persuasively opined that respondent's orthopedic conditions do not prevent her from performing the usual and customary duties of an Assistant.

21. Respondent claimed that she was unable to perform her job duties due to her orthopedic conditions, lupus, hepatitis C, and fibromyalgia. However, 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.³

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

³ Because applicant did not establish that she is permanently disabled or incapacitated from performance of her duties as an Assistant, there is no need to reach the issue of whether respondent failed to timely file her application for disability retirement as a result of inadvertence, mistake, surprise, or excusable neglect correctable by Government Code section 20160, which would entitle her to retroactively change her retirement date.

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. 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 an Assistant for the District at the time she filed her disability retirement application. Therefore, based on the Factual Findings and Legal Conclusions as a whole, respondent is not entitled to retire for disability pursuant to Government Code section 21150.

ORDER

The application of Yvette Bravo for disability retirement is DENIED.

DATED: February 11, 2016

DocuSigned by:
Marcie Larson
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MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings