

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for
Disability Retirement of:

NASRIN PEDARSANI,

Respondent.

and

NEWPORT MESA UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. 2012-0270

OAH No. 2015040699

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Bernardino, California on February 16, 2016.

Kevin Kreutz, Senior Staff Attorney, represented complainant Diane Alsup, Interim Chief, Benefit Services Division, California Public Employees' Retirement System.

There was no appearance by or on behalf of respondent Newport Mesa Unified School District.

Respondent Nasrin Pedarsani represented herself.

The matter was submitted on February 16, 2016.¹

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¹ On her own motion, the administrative law judge issued and served an order sealing confidential records.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED March 18, 2016

Sharon Dargatzis

FACTUAL FINDINGS

Jurisdiction

1. Newport Mesa Unified School District employed Nasrin Pedarsani as a preschool teacher assistant. By virtue of her employment, respondent Pedarsani is a local miscellaneous member of the California Public Employees' Retirement System subject to Government Code section 21150. Respondent Pedarsani has the minimum service credit necessary to qualify for retirement.
2. On February 8, 2011, respondent Newport Mesa Unified School District initiated an application for disability retirement for respondent Pedarsani. In filing the application, disability was claimed on the basis of orthopedic conditions (neck, right hip, shoulder and left knee).
3. On March 25, 2011, respondent Pedarsani signed an application for service retirement. Effective February 9, 2011, respondent Pedarsani retired for service retirement and has been receiving her retirement allowance since that date.
4. On May 11, 2011, respondent signed an application for disability retirement.
5. CalPERS obtained medical reports concerning respondent's orthopedic neck, right hip, shoulder and left knee conditions from competent medical professionals. After review of these reports, CalPERS determined respondent Pedarsani was not permanently disabled or incapacitated from performance of her duties as a preschool teacher assistant at the time the application for disability retirement was filed.
6. By letter, dated December 7, 2011, CalPERS notified respondent Pedarsani of the determination and advised of her appeal rights.
7. By letter, dated January 6, 2012, respondent Pedarsani filed a timely appeal and requested a hearing.
8. Diane Alsup filed Statement of Issues, Case No. 2012-0270, in her official capacity as Interim Chief of the Benefit Services Division of CalPERS.
9. The appeal is limited to the issue of whether, on the basis of orthopedic conditions (neck, right hip, shoulder and left arm), respondent Pedarsani is permanently disabled or incapacitated from performance of her duties as a preschool teacher assistant for respondent Newport Mesa Unified School District.

Respondent Newport Mesa Unified School District did not file a request for hearing.

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Respondent's History of Employment

10. For more than 23 years, respondent Pedarsani worked as a preschool teacher assistant. Before immigrating to the United States, respondent Pedarsani worked as a teacher in Iran. Initially, she worked for the Orange County Office of Education. On the date she filed her application for disability retirement, respondent worked for respondent Newport-Mesa Unified School District as a preschool teacher assistant.

Duties of Preschool Teacher Assistant

11. The job duties of a preschool teacher assistant employed by respondent Newport Mesa Unified School District are as follows:

- Assistance in Supervision of Children (100%) – supervises children in all activities, performs play area supervision and guides students in safe play activities, maintains discipline in a firm, consistent and positive manner, performs routine first aid and seeks assistance for non-routine illnesses and injuries, performs related supervisory duties as assigned.
- Preparation of Materials (10 – 20%) – assists in preparing materials used in instructional activities, performs related preparatory duties as assigned.
- Assistance in Activities (75 – 100%) -- leads indoor and outdoor activities that are planned by the teacher, assists children with toileting and changing those who have had toileting accidents, assists students to develop communication skills, and serves as an appropriate language model, may assist students to develop self-help skills, performs related assistance in activities duties as assigned.
- Assistance in Collection of Data (5 – 15%) – assists teachers in collecting and organizing data on student learning, follows up behavior-shaping and reinforcement strategies as directed, performs related collection of data duties as assigned.
- Attendance at Meetings/Workshops (0 – 5%) – attends meetings and participates in training workshops, conferences, courses and a variety of professional growth activities required, performs related requirements of attendance at meetings.
- Cleaning Duties (5 – 10%) – performs minor housekeeping tasks in maintaining a neat, clean, orderly and safe classroom atmosphere, performs related housekeeping duties as assigned.

- Driving (0 – 5%) – drives to meetings, workshops, conferences, professional growth activities and courses as assigned.

The schedule is 6.5 hours per day/32 hours per week, with one 15-minute break and 30 minutes for lunch.

Physical Requirements of the Position

12. Two documents were presented to establish the physical requirements of the position of preschool teacher assistant. One is Physical Requirements of Position/Occupational Title (a CalPERS document) and Newport Mesa Unified School District Essential Functions Job Analysis (a respondent Newport Mesa Unified School District document). There are some inconsistencies in the documents regarding the definitions of occasionally, frequently and constantly. Some of the physical requirements are included in one document but not the other. Evaluating the foregoing documents, the physical requirements of the position are as follows.

The preschool teacher assistant is required to frequently walk, bend neck, twist neck, simply grasp and lift zero to 10 pounds. The employee is occasionally required to lift 11 to 25 pounds and occasionally lift over 25 pounds with assistance.

History of Injury

13. On January 10, 2008, while an employee of respondent Newport-Mesa Unified School District, while respondent Pedarsani was attempting to sit in a small chair, it fell over. Presumably, respondent Pedarsani fell on the floor. Immediately thereafter, she sustained pain in her neck, right hip and mid back. She was involved in motor vehicle accidents in 2007 and 1994.

Medical Evidence

14. The medical evidence includes the testimony and report of Richard Claveria, M.D., dated October 5, 2011.

15. Dr. Claveria is an orthopedic surgeon, licensed to practice medicine in the State of California. He completed his undergraduate education at the University of California – Berkeley in 1979 and his medical education at the University of California – Davis in 1983. Dr. Claveria completed an internship in 1984 and a residency in orthopedic surgery in 1988 at the University of Colorado Health Sciences.

Dr. Claveria was certified by the American Board of Orthopedic Surgery in 1991 and recertified in 2003. He has been a fellow of the American Academy of Orthopedic Surgery and a member of the Orthopedic Trauma Association since 2011.

Since completing his residency in 1984, Dr. Claveria has practiced as an orthopedic surgeon performing surgery and treating patients. He is affiliated with Mission Regional Medical Center (Trauma Center) in Mission Viejo, Western Medical Center (Trauma Center) in Santa Ana, and Coastal Communities Hospital in Santa Ana. He was on the University of California – Irvine Medical School clinical faculty between 1992 and 1995 and again between 2006 and 2010.

In 2011 Dr. Claveria provided care and treatment (including surgeries) for 50 patients per week; he performed 15 surgeries per month.

In 2011 Dr. Claveria performed 30 CalPERS independent medical evaluations.

16. At the request of petitioner, Dr. Claveria performed an IME² of respondent Pedarsani and answered questions about (1) specific job duties respondent Pedarsani is unable to perform because of her physical condition; (2) whether respondent Pedarsani is substantially incapacitated from performance of her usual duties; and (3) if incapacitated, is the incapacity permanent or temporary. His evaluation included taking a history; performing a physical examination; ordering and interpreting x-rays; reviewing medical records; and the duties and physical requirements of preschool teacher assistant.

17. On the date of his examination, respondent Pedarsani's subjective complaints were neck pain; muscle pain, bilateral hand pain; left knee arthroplasty pain/lesser right knee pain; mild residual left foot pain; at times a neck diffuse ache; right shoulder pain³ and obesity. Respondent Pedarsani's chief complaints were her bilateral knee pain and neck pain.

18. On the date of evaluation in 2011, respondent Pedarsani was 63 years old. She reported the diffuse pain gradually came on in the workplace. She has a long history of bilateral knee pain and arthritic deformity. Respondent Pedarsani reported she stopped working in 2009 because her superiors thought she was dangerous working with children; at the time, she found it easy to drop things and, at times, was a little unsteady. She believed her superiors thought she might do something such as drop a child or drop something on a child.

19. On physical examination, Dr. Claveria made the following findings.

- *Cervical spine* had mild diffuse tenderness. Cervical range of motion was smooth but cautious and mildly decreased in all planes.

² Dr. Claveria explained that as an independent medical evaluator, no one directed, implied or instructed what his conclusion should be and almost always he was not a treating physician.

³ The word "pain" is not in Dr. Claveria's report. Presumably the word was omitted in error.

- *Thoracic spine* had a very mild kyphosis. She had mild diffuse tenderness.
- *Lumber spine* had mild diffuse tenderness. Spasm was absent. Lumbar range of motion was about 70 percent of expected in all planes.
- *Hips* have a mild diffuse external achiness. There was a caution on hip range of motion positively, but no arthritic changes were seen on the x-rays taken during this evaluation.
- *Right knee* had some varus deformity especially compared to the left knee, which was relatively straight post knee surgery. The right knee was tender mainly patello-femoral and at medial joint lines.
- Range of motion is approximately -5 to 90 degrees. Ligaments are intact on general stress testing.
- *Left knee* had a cosmetic well-healed anterior incision from past total knee replacement. She had motion 0-110 degrees.
- Knees were examined during the ambulation with weight bearing. She had some increased varus deformity on the right side. Her left knee was straighter.
- She walked with caution and seemed to favor the right knee; the left knee with the knee replacement seemed to bear weight more easily; she partially compensated for this by careful gait and use of a cane.

20. Dr. Claveria ordered x-rays. He did so because there was mention of magnetic resonance imaging in prior medical records. In addition, the new x-rays allowed him to verify documented information and confirm his findings. He interpreted the x-rays as follows.

- *Lumbar spine* film showed some mild arthritic changes from L4 to S1. Greatest disc space narrowing was at L5-S1. Pelvic film showed generally intact hips with no severe arthritic hip changes.
- *Standing bilateral knee* x-rays showed a left total knee replacement had been done. She had some poor quality pictures that seemed to be preoperative in her left knee when she had considerable arthritic changes, and it made sense that a left knee replacement had been done.
- *Standing right knee* film showed some decreased cartilage space in the medial side consistent with at least early-moderate arthritic changes. The

less affected right knee did not look as bad as the left knee did prior to its surgery years back.

- *Cervical spine* file showed seven vertebrae with generally intact disc space heights, and some minimal osteophyte formation at C6-7.

21. Dr. Claveria summarized, in part, his findings:

Ms. Pedarsani was a 63-year-old woman with diffuse aches and pains, worse at the left knee. At times, she had had aches and pains including the neck, the low back, the hands and feet; from an objective standpoint, her knees bilaterally seemed to be her biggest bother.

On exam and on x-rays, she had obvious arthritic changes on both knees. In 2010 she had left knee replacement due to severe deformity and arthritic changes, and she noted good improvement with this procedure.

She had similar but less severe pains on the right knee but had no surgery on the right knee at the time of Dr. Claveria's evaluation. Respondent Pedarsani reported she would probably have the right knee replacement. In Dr. Claveria's opinion, it was reasonable that she had considerable pain in the knee; she was in an excellent age group for knee replacement, and the procedure may well make a great increase and improvement in her comfort and function.

Respondent Pedarsani was temporarily put off work in 2009 and was never called back. She was not working before the left knee replacement in 2010 and was not allowed to return to work after the knee replacement and, for these reasons, had never returned to her usual customary employment.

22. Dr. Claveria did not dispute that respondent Pedarsani experiences pain. In addition to bilateral knee arthritis, respondent has early arthritic changes in her spine that many people her age have. For some people, he noted, this is painful. For others it is not.

23. Respondent Pedarsani's most significant medical issues are related to the arthritis in her knees. At the time of Dr. Claveria's evaluation, it had been a year since her left knee surgery, and her left knee had "improved enough to allow return to employment" at that time. Also, at that time, she had a "lesser right knee arthritis" that bothered her less than her left. "It has not been bad enough to preclude employment." Therefore, in his opinion, her right knee does not preclude employment.

24. Based on the facts in the foregoing paragraphs, Dr. Claveria made work recommendations.

On the basis of her bilateral knee arthritis, even with the improvement after total knee replacement, she should have some long-term work modifications. She should be precluded from repeated bending, twisting, squatting, climbing, or frequent lifting over 15-20 pounds. In his opinion, "most or all duties of a preschool teacher can be done within the limits of these long term recommendations."

25. Dr. Claveria was credible as an expert witness for several reasons. His opinions were objective, not biased. He had reviewed cases on behalf of petitioner previously and found some applicants to be disabled and some not. He limited his role to his expertise, orthopedic matters and refused to answer questions regarding other issues. He clearly explained his physical findings and the bases for his findings. He explained the components of the physical examination, medical reports and x-rays that supported his physical findings. He is a compassionate physician and did not dispute respondent Pedarsani's reported pain.

26. Respondent Pedarsani offered additional medical evidence, dated between 2008 and 2014⁴, but did not offer testimony of an expert witness in this case. Dr. Claveria reviewed these exhibits prior to his testimony in the hearing. This medical evidence did not change Dr. Claveria's opinion regarding whether respondent Pedarsani was able to perform her usual and customary duties on the date that she submitted her application for disability retirement. Petitioner had no objection to the admission of the exhibits as administrative hearsay. As there is no direct evidence in support of respondent's documents, no finding can be made based on these documents.

27. Respondent Pedarsani described the duties and physical requirements of the position that concerned her.

As a preschool teacher assistant, she provided supervision for children who were three to five years of age.

When she worked for the Orange County Office of Education, respondent Pedarsani was allowed breaks. While employed at respondent Newport Mesa Unified School District, she was not allowed to sit or to have breaks and sometimes worked without assistance.

Further, if one of the children was injured and required treatment, respondent Pedarsani was required to carry the child to a location for treatment. In addition, she was required to return toys (such as wagons and bikes) to the shed and presumably take the same toys from the shed. In addition, she changed diapers and cleaned up a child who vomited.

⁴ Respondent Pedarsani did not submit the documents (that included medical records) in any particular order. The documents were divided between 2008 and 2012 (Exhibit A) and from 2013 forward (Exhibit B).

28. When Dr. Claveria rendered his opinions, among other things, he considered the facts in Finding 27. These facts did not change his opinion that respondent Pedarsani is capable of performing the usual and customary duties as a preschool teacher assistant with respondent Newport Mesa Unified School District, albeit with pain.

29. Respondent Pedarsani testified that her employer is concerned about her dropping things. Respondent Pedarsani recalled that she dropped some things and was told by her supervisor that if she dropped things again she could not return to work; and, indeed, she has not returned to work.

On her application for disability retirement, respondent Pedarsani did not include problems associated with her hands as a basis for disability retirement. Dr. Claveria did not focus on medical issues associated with respondent Pedarsani's hands because she had no complaints about her hands; there is no reference to complaints about her hands in prior medical records. During the hearing, Dr. Claveria testified that although respondent Pedarsani has concerns about her supervisor not allowing her to return to work because she has dropped things, this is not an orthopedic issue but a human resources issue. For the same reason, respondent's Pedarsani's concern about her employer's concern is not relevant to this case.

LEGAL CONCLUSIONS

Relevant Statutes

1. On the date that she filed her application for industrial disability retirement respondent Pedarsani, was a local miscellaneous member of CalPERS, seeking disability retirement pursuant to Government Code section 21150.⁵

2. Section 20026 states, in part:

“Disability” and “incapacity for performance of duty” as a basis for retirement, mean disability of permanent or extended and uncertain duration, as determined by the board, ... on the basis of competent medical opinion.

3. Section 21150 states:

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 . . .

⁵ Hereinafter all reference is to Government Code.

4. Section 21152 states, in part:

Application to the board for retirement of a member for disability may be made by:

- (a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

[¶] ... [¶]

- (c) The governing body, or an official designated by the governing body, or the contracting agency, if the member is an employee of a contracting agency.

- (d) The member or any person in his or her behalf.

5. Section 21153 states:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

6. Section 21154 states in part:

The application shall be made only (a) while the member is in state service, ... On receipt of the application for disability retirement of a member ... the board shall, or of its own motion it 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 . . .

7. Section 21156 states in part:

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, . . .

Case Law

8. In 1970, the Court of Appeal held that to be “incapacitated for the performance of duty” within Government Code section 21022 (now section 21151) means “the substantial inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.)

In *Mansperger*, the appellate court found that while a game warden’s disability incapacitated him from lifting or carrying heavy objects, which was sometimes a remote occurrence, the game warden was not entitled to a disability retirement because he could substantially perform most of his usual duties. (*Ibid.*, at pp. 876-877.) The appellate court drew a crucial distinction between a person who suffers some impairment that does not impact his performance of his customary and usual duties, and one who suffers the substantial impairment that prevents him from performing those duties.

9. Substantial inability to perform one’s usual duties must be measured by considering the applicant’s present abilities; disability cannot be prospective or speculative. (*Hosford v. Board of Administration of the Public Employees’ Retirement System* (1978) 77 Cal.App.3d 854, 863.) The fact that an activity might bother a person does not mean, in fact, he cannot do that activity. In *Hosford*, the Court of Appeal reasoned that the fact that Hosford testified to having to perform several of the duties described as only “occasional” and did those tasks without reporting any injury represented further evidence of Hosford’s ability to perform the more strenuous aspects of his work. (*Ibid.*)

10. Neither risk of injury nor risk of aggravation of an injury is sufficient basis to award a disability pension. Many injuries or medical conditions create an increased risk that the person will suffer a further injury or aggravation at a later time. For example, a person with a back injury or a heart problem is sometimes advised by doctors to avoid heavy lifting in order to prevent further injury. Although the person is presently capable of performing a certain task, the task should be avoided on a prophylactic basis.

In *Hosford v. Board of Administration* (1978), 77 Cal.App.3d 854, the disability applicant argued that his back injuries created increased risk of further injury. The Court rejected his contention that the increased risk constituted a present disability and stated that Hosford’s assertion did “little more than demonstrate his claimed disability is only prospective (and speculative), not presently in existence.” (*Id.* at p. 863.)

As evidenced by *Mansperger* and *Hosford*, and numerous subsequent cases that followed, mere difficulty in performing certain tasks is not enough to support a finding of disability. (See, e.g., *Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689; *Cransdale v. Board of Administration* (1976) 59 Cal.App.3d 656; *Bowman v. Board of Administration* (1984) 155 Cal.App.3d 937.) A person must be substantially incapacitated from performing her duties.

Burden of Proof

11. Respondent Pedarsani has the burden of proving entitlement to disability retirement by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Evaluation

12. Having considered the actual and usual duties of a preschool teacher's assistant employed by respondent Newport Mesa Unified School District, insufficient medical evidence was offered to establish that respondent Pedarsani's orthopedic (neck, right hip, shoulder and left knee) conditions prevent her from performing the usual and customary duties of a preschool teacher assistant employed by respondent Newport Mesa Unified School District.

13. Respondent Pedarsani is not substantially incapacitated from performing her usual and customary duties as a preschool teacher assistant employed by respondent Newport Mesa Unified School District on the basis of orthopedic (neck, right hip, shoulder and left knee) conditions.

ORDER

The application for disability retirement of Nasrin Pedarsani is denied.

DATED: March 17, 2016

DocuSigned by:
Vallera J. Johnson
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VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings