

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:

FRANCINE VALENTINE,

Respondent.

and

SAN JOAQUIN COUNTY SCHOOLS.

Respondent.

Case No. 2015-0513

OAH No. 2015070821

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on February 23, 2016, in Sacramento, California.

Elizabeth Yelland, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Francine Valentine represented herself. She was assisted by her daughter, Kelly Valentine.

No one appeared for or on behalf of respondent San Joaquin County Schools, its default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to that respondent only.

Evidence was received, and the record was left open to allow respondent to submit a written closing argument. Respondent filed her closing argument, which is marked as Exhibit H. The record was closed and the matter was submitted for decision on March 1, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 28 Mar 2016
Ally M. Mc

SUMMARY

There are two issues to be decided on appeal: 1) is Ms. Valentine permanently and substantially incapacitated for the performance of her usual job duties as an Instructional Assistant with the San Joaquin County Schools due to a neurological condition; and 2) if so, was the filing of her application for disability retirement delayed by an error or omission correctable by Government Code section 20160 such that she is entitled to have the effective date of her disability retirement made retroactive to March 5, 2008. The persuasive evidence established that Ms. Valentine is permanently and substantially incapacitated for the performance of her usual job duties due to a neurological condition. The persuasive evidence further established that she is entitled to have the effective date of her retirement made retroactive to March 5, 2008, as a matter of law because the San Joaquin County Schools failed to perform its statutory duty of applying for a disability retirement on her behalf when she ceased working. Therefore, Ms. Valentine's application for disability retirement must be granted, retroactive to March 5, 2008.

FACTUAL FINDINGS

Procedural Background

1. Ms. Valentine is a local miscellaneous member of CalPERS subject to Government Code section 21150, subdivision (a),¹ by virtue of her employment as an Instructional Assistant with San Joaquin County Schools. She has the minimum service credit necessary to qualify for disability retirement.² Her last day on payroll was March 5, 2008.
2. Ms. Valentine signed, and CalPERS received, a Disability Retirement Election Application seeking disability retirement benefits on May 30, 2014. She described her specific disability as "Nuerological [*sic*] Disorder," and described the limitations and preclusions due to her disability as "severe pain, balance loss, eye sight [*sic*], memory, muscle loss, eating and swallowing trouble." She checked the box for "No" in response to the question "Are you currently working in any capacity?"
3. CalPERS denied Ms. Valentine's application for disability retirement by correspondence dated February 10, 2015. Ms. Valentine timely appealed the denial.

¹ That statute provides: "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, 21076.5, or 21077." "State service" includes "service rendered as an employee ... of ... a contracting agency" (Gov. Code, § 20069, subd. (a).)

² A July 8, 2013 note in CalPERS's Customer Touch Point Report reads: "Member is vested with 8.382 years of service credit."

Anthony Suine, Chief of CalPERS's Benefit Services Division, signed the Statement of Issues in this matter solely in his official capacity on June 17, 2015.

Issue No. 1 – Substantial Incapacity Due to a Physical or Mental Disability

Ms. Valentine's disability

4. Ms. Valentine described her disability in a letter she submitted at hearing as follows:

Trying to remembering [sic] back when I was at work and would be the first one to be there to set up the classroom, making sure I would have all of my things ready for when the kids would come off the bus, [sic] Monday's [sic] were my favorite day of the week, [sic] I would have a lot of energy to make sure my kids, as I would call them [sic] would have a great day. It's been a long time since I had the joy of doing that.

I have been having trouble for a very long time. It started out with me twitching, I would get really tired. Bad headaches, sharp pain would shoot down my arm, leg, hand or in my back. These things that I thought would just go away didn't, but they got worse and would come more often and bring along more problems. I had gotten so bad a few times that I would be in the hospital. I had a Dr.'s appointment one time and was told that the Dr. wheeled me a crossed [sic] the street to the hospital because I had an episode, [sic] I was in the hospital for a week, was unable to walk and was in severe pain [sic] I couldn't eat. I had a walker for a while to help me get around. I am on medication to help me.

Some days I am capable of feeding our animals, taking out the trash, putting away a dish or help fold some cloths [sic], preparing [sic] light dinners and drive to the store for a little shopping. I usually have help. These would be considered to be good days.

My pain is always with me and I rest quite often during my day. Everyday [sic] is different. I am very cold, my limbs go numb, I can't sit for longer periods of time, I walk down the hallway and bump into something or fall for no reason, I never know why I have so many bruises. I have day's [sic] where I can't hold a cup to get a drink without my hand dropping [sic] for no reason. Taking a shower is not something I do everyday [sic] because of how hard it is but also I get so tired I have to take a nap for a

few hours after. I have needle sharp pains all over my body from my head to my feet. I get stabbing pain in my eyes and have a hard time seeing. I can't focus on things and it really takes a very long time to process things. I have to be told things over and over again because I forget things. I have difficulty standing for a long while, sometimes as I walk I feel like I am falling over. Laying down for to [sic] long also causes twitching and sharp pains, when I go to stand it feels like I have landed on a bed of nails. The pain in my spine is so excruciating I feel like passing out sometimes. My chest feels like there is an elephant sitting on me and to take a deep breath is one of the hardest things do to [sic]. I have a very hard time swallowing [sic] everything gets caught in my throat and then sometimes it comes back up and that burns like there is a fire I can't put out. These things happen to me so often I have [sic] and for so long I can't remember what it is to not have these problems.

5. Ms. Valentine described her disability at hearing in a manner consistent with her letter. Additionally, she reiterated that she has some "good days," and some "bad days." She also described days which start off "good," but then progressively worsen as time goes on. Ms. Valentine's description of her disability and its episodic and progressive nature was corroborated by the testimony of her daughter, Kelly, as well as multiple letters written by friends and family.

Physical requirements of an instructional assistant

6. A Job Description for the position of "Instructional Assistant" with the San Joaquin County Schools identifies the following physical requirements:

1. Sit and stand for extended periods of time
2. Exhibit manual dexterity to dial a telephone, to enter data into a computer, and to perform assigned classroom tasks using both hands
3. See and read a computer screen and printed matter with or without vision aids
4. Hear and understand speech at normal classroom levels and outdoors and on the telephone
5. Speak in audible tones so that others may understand clearly in normal classrooms, outdoors, and on the telephone
6. Physical agility to lift up to 25 pounds to shoulder height and 50 pounds to waist height and to bend, to stoop, to sit on the floor, to climb stairs, to walk, and to reach overhead

7. Physical capacity to lift, move, and position disabled persons up to age 22 whom [sic] may weigh 150 pounds or more

A document entitled "Physical Requirements of Position/Occupational Title" indicates that an Instructional Assistant must be able to perform the following physical tasks for the following durations:

Sitting, Occasionally³

Standing, Occasionally

Reaching (above shoulder), Occasionally

[¶] ... [¶]

Fine Manipulation, Occasionally

[¶] ... [¶]

Keyboard Use, Occasionally

Mouse Use, Occasionally

[¶] ... [¶]

Lifting Carrying

0 – 10 lbs, Frequently

11 -25 lbs, Frequently

26-50 lbs, Occasionally

51 – 75 lbs, Occasionally

76 – 100 lbs, Occasionally

100 + lbs, Never⁴

³ "Occasionally" is defined as up to three hours, and "frequently" is defined as three to six hours.

⁴ Evidence that Ms. Valentine was "never" required to lift or carry an item weighing 100 pounds or more was not credible, given that her job description provides, in part, "Physical capacity to lift, move, and position disabled persons up to age 22 whom [sic] may weigh 150 pounds or more." But there was no evidence of the frequency with which she was required to perform that particular task.

Medical evidence

Ms. Valentine's evidence

7. Ms. Valentine did not call any medical experts to testify at hearing. However, she introduced medical records from Ronald F. Dugger, M.D., a board-certified neurologist in Stockton, California. Dr. Dugger's report of Ms. Valentine's January 19, 2012 visit contains the following assessment:

Francine continues to present with essentially the same symptoms and findings on physical examination that she has since I first began treating her a number of years ago. Her present diagnosis continues to be a neurodegenerative disorder of uncertain etiology, nonmalignant chronic pain syndrome, chronic daily headaches, and depression. In view of her new complaints of bilateral foot numbness, I do believe that exploring the possibility of a peripheral neuropathy as a contributing cause to her symptoms is indicated.

8. On December 15, 2009, Dr. Dugger completed a Residual Functional Capacity Questionnaire on behalf of Ms. Valentine, on which he wrote he has been treating her since 2004 for a neurodegenerative disorder with memory loss, myoclonic jerks, a movement disorder, and a gait disorder. He identified her symptoms as including tremors, chronic fatigue, muscle jerks, frequent, severe headaches, impaired gait, dizziness, depression, memory problems, postural instability, and chronic pain syndrome.

9. Dr. Dugger opined that Ms. Valentine is not a malingerer, and that she would "frequently" experience her symptoms with sufficient severity to interfere with the attention and concentration she needs to perform simple work tasks during a typical workday. He further opined that her impairments prevent her from being able to stand continuously for more than 15 to 20 minutes or two hours or longer during an eight-hour shift. She can "rarely" lift and carry an item weighing less than 10 pounds or twist her body. She can "never" lift or carry an item weighing 10 pounds or more, stoop (bend), crouch, climb ladders, or climb stairs. She is incapable of performing fine manipulations with her fingers, and she can use her arms to reach overhead for only 20 percent of an eight-hour shift.

10. Dr. Dugger's report of Ms. Valentine's April 18, 2013 visit provides the following:

Francine returns after a 13-month absence for evaluation of her neurodegenerative disorder and chronic pain syndrome, the latter of which has been particularly severe recently in the radial aspect of the wrist and dorsolateral aspect of the hand on the right and over the right and left greater trochanter. She is obviously suffering from de Quervain's syndrome and probably

bilaterally subtrochanteric bursitis. She also continues to suffer from chronic migraine-type headaches and her physical examination is dominated by nonphysiologic findings of total body hyperalgesia, give-way weakness on the right more than left, nonphysiologic speech pattern, and astasia-abasia during gait.⁵ Regarding her possible neurodegenerative disorder, that seems to be static at this point in time.

11. On July 2, 2014, Dr. Dugger signed a Physician's Report on Disability, on which he opined that Ms. Valentine is permanently and substantially incapacitated from performance of her usual duties as an Instructional Assistant. He identified her disability as "mentation difficulties, inability to handle stress, decreased concentration, great imbalance with involuntary limb movements."

CalPERS's evidence

12. CalPERS called Michael M. Bronshvag, M.D., a board-certified neurologist and internist, as its medical expert at hearing. He performed an independent medical examination (IME) of Ms. Valentine on November 4, 2014. Dr. Bronshvag prepared a report documenting his IME, and that report was admitted into evidence.

13. As of the date of the IME, Ms. Valentine complained of difficulty with prolonged periods of lying down, sitting, standing, and walking. She also complained about having difficulty with climbing, lifting, bending, reaching, crouching, stooping, kneeling, and balancing. Her current medications included Lyrica, Seroquel, Neurontin, omeprazole, duloxetine, topiramate, and clonazepam.

14. Ms. Valentine's "mental status was limited and tangential" during Dr. Bronshvag's physical examination. Her eye movements were "slowed and incomplete," and she frequently displayed repetitive and rapid, jerky, involuntary body movements. She was "slightly weak throughout the body." Dr. Bronshvag's physical examination was otherwise unremarkable.

15. Dr. Bronshvag's IME included his review of Ms. Valentine's medical records. He wrote the following about Dr. Dugger's diagnosis that Ms. Valentine suffers from a neurodegenerative disorder:

⁵ "Hyperalgesia" is an increased pain response to a noxious stimulus, "give-way weakness" refers to the symptom where a patient's arm or leg can provide resistance to an examiner's touch but then suddenly gives way and provides no further muscular resistance, "nonphysiologic speech pattern" refers to a staccato speech pattern, and "astasia-abasia" refers to the inability to stand or walk unassisted.

Dr. Dugger described the claimant's difficulties in several notes, but does not mention a specific diagnosis. In summary, over and above any 2009 vehicle accident difficulties and nerve entrapment issues, this claimant has medical records documenting a somewhat unusual and perhaps variable encephalopathy. It is even possible that the diagnosis is known but not provided to me (?) In any event, whatever the diagnosis, unless there are surveillance data demonstrating the claimant performing vigorous physical activities (and I rather doubt that such evidence exists), it can be stated that this claimant has been in bad shape for quite some time and is not getting any better.

16. Dr. Bronshvag included the following discussion in his IME report:

As noted above, unless a psychiatric disease or diagnosis can be made and treated, it appears that this claimant is totally disabled. It is possible that one or more of this lady's doctors know the diagnosis. Unfortunately, the most likely explanation is some sort of genetically determined neurodegenerative disorder. Since some of the neurodegenerative disorders under consideration are familial, genetic testing may be required for a definitive diagnosis. It must be noted that there are inflammatory autoimmune brain disorders that are rare (but do exist), and are sometimes treated rather dramatically with corticosteroids and other medications. Some sort of psychiatric disorder is a consideration, and a detailed M.D. psychiatric examination might provide useful information.

The issue of genetic disorder (like Huntington's disease) either already has been considered or should be considered because there are family members to be thought of.

A workup (assuming one has not already been done) for autoimmune encephalopathy (which sometimes really responds well to corticosteroids) is indicated. If it has not already been done, a detailed psychiatric evaluation might provide important information (but probably will not provide cheerful information).

In a case of this type, a possibility that the claimant looks entirely differently outside the doctor's office should always been considered, but that does not seem likely. If I had to name one possible disease that was treatable, I would state anti-NMDA antibody encephalopathy. If I had to name one

nontreatable disorder, I would name genetically determined encephalopathy or Huntington [*sic*] disease.

In any event, relevant to CalPERS the questions are (unfortunately) rather easy to answer.

17. Dr. Bronshvag's IME report continues with his opinion that Ms. Valentine is permanently and substantially incapacitated for the performance of her usual duties as an Instructional Assistant due to a neurologic condition. He explained:

Ms. Valentine is substantially incapacitated for the performance of her usual duties. These difficulties have been present at least since 2004 in disabling form and probably existed for years prior to that as well (2000 would be a reasonable estimate). The records are not clear of the date she last worked, and Ms. Valentine cannot recall, so a more specific date that her disability began is difficult to determine.

Dr. Bronshvag identified the following specific duties as those Ms. Valentine could not perform at all due to her disability: "sitting and standing for extended periods of time, lifting up to 25 pounds to shoulder height and 50 pounds to waist height, bending, stooping, sitting on the floor, climbing stairs, or lifting, moving and positioning disabled persons up to age 22 weighing 150 pounds or more."

18. On December 22, 2014, Dr. Bronshvag prepared a Supplemental Report after reviewing a report and video of a CalPERS's investigator's sub rosa investigation of Ms. Valentine on December 5 and 8, 2014, which is discussed further below. Based on the sub rosa investigation, Dr. Bronshvag amended his opinion and concluded that Ms. Valentine is not substantially incapacitated for the performance of her usual duties as an Instructional Assistant due to a neurologic condition. He provided the following discussion in his Supplemental Report:

I also note that the claimant, in my office, was unable to fill out a questionnaire. Based on my observations of her on the video employing the cell phone, and flipping through magazines, reading them, and choosing things, I think she is capable of filling out a questionnaire (assuming that the person in the film is Francine Valentine).

If the video accurately represents how this claimant looks now, and how she looked ever since she stopped working (2000), and either she or other responsible parties have verified that the film is of her, I would be happy to see the claimant back again (if the parties so wish). Medically speaking, I think that this film should be shared with her treating doctors, who are giving her

potentially toxic medications that she might not need. If indeed this is Francine Valentine, I am happy that her son (who seems like a very nice young man) is not at any real risk of a neurodegenerative disorder.

19. Dr. Bronshvag testified at hearing in a manner consistent with his IME Report and Supplemental Report. Additionally, he explained that he concluded after reviewing the video of CalPERS's sub rosa investigation of Ms. Valentine that she is not substantially incapacitated because he "couldn't identify any specific job she could not do." In other words, Dr. Bronshvag explained he had no factual basis for concluding she was substantially incapacitated. He described Ms. Valentine as looking "impaired and pathetic" at the IME, but "looked fine" on the video. He found this contradiction "very upsetting," and explained that maybe "something dreadful will turn up" on further examination that would cause him to conclude she is substantially incapacitated. Dr. Bronshvag was visibly upset when he learned at hearing that Ms. Valentine was never informed of his offer to conduct a further examination of her.

CalPERS's sub rosa investigation

20. After receiving Dr. Bronshvag's IME report, CalPERS initiated a sub rosa investigation into Ms. Valentine's physical activities. On December 5 and 8, 2014, Troy Shinpaugh, an investigator employed by CalPERS, conducted video surveillance of Ms. Valentine as she walked between her vehicle and her residence multiple times carrying various small items, threw items into her garbage can, wheeled the garbage cans from the curb to her house, drove to various businesses, shopped, and drove home. The video of the first day of surveillance is less than three and one half minutes, and the video of the second day is less than 15 minutes. There was no evidence of the weight of any of the items Ms. Valentine was seen handling or of the garbage cans she wheeled from the curb to her house.

Ms. Valentine's hearing evidence

21. In addition to the testimony previously discussed, Ms. Valentine explained that she was approved for Social Security disability benefits. While she could not recall the specific date of the approval, she estimated it was when her daughter was still in high school. Her daughter was 24 years old as of the day of hearing. Ms. Valentine identified Mary Braun's and Rachel Castillo's December 14, 2009 correspondence as having been written in support of her claim for Social Security disability benefits. A reasonable inference is drawn from the evidence that her claim for Social Security disability benefits was approved in late 2009 or early 2010.

22. But Ms. Valentine's demeanor throughout the hearing was more compelling evidence of her substantial incapacity than the substance of her testimony or any of the letters written in support of her application. CalPERS presented its case-in-chief first, and Ms. Valentine was physically and mentally capable of stating whether she objected to any of CalPERS's evidence throughout its presentation of evidence. Additionally, she was capable

of cross-examining Dr. Bronshvag. When it was Ms. Valentine's turn to testify shortly thereafter, however, she struggled to hold her right hand up while being administered the oath and had difficulty spelling her name. She testified at times with a staccato speech pattern. Other times, she stopped her testimony mid-sentence or stared off into space for several seconds. Towards the end of Ms. Valentine's testimony, it was unclear how much of it was her own, as opposed to her parroting information that was given to her by her daughter. At the conclusion of her testimony, Ms. Valentine was largely unresponsive, and had to be helped to her feet and stabilized as she left the courtroom.⁶

Discussion

23. When all the evidence is considered, the persuasive evidence established that Ms. Valentine is substantially incapacitated for the performance of her usual duties as an Instructional Assistant with the San Joaquin County Schools due to a neurologic condition. Dr. Bronshvag's initial opinion that Ms. Valentine is substantially incapacitated is more persuasive than the one he formed after reviewing the video and investigation report of CalPERS's sub rosa investigation and he articulated in his supplemental report. Dr. Bronshvag's original opinion is bolstered by Dr. Duggar's (whom Dr. Bronshvag described as a "well-respected" neurologist) opinion. Additionally, the symptoms of Ms. Valentine's disability observed at hearing were genuine, and constitute credible evidence of her substantial incapacity, as acknowledged by CalPERS's counsel.

CalPERS's sub rosa investigation is not persuasive evidence of Ms. Valentine's physical capabilities given its short duration and the lack of evidence of the weight of any of the items she was seen carrying or of the garbage cans she wheeled from the curb to her house. The video did not depict her on either day "performing vigorous physical activities," the evidence Dr. Bronshvag noted in his IME report that would cause him to change his opinion that Ms. Valentine is permanently and substantially incapacitated.

Issue No. 2 – Effective Date of Disability Retirement

24. Prior to denying Ms. Valentine's application for disability retirement, CalPERS sent her correspondence asking the following questions, among others, and she responded by providing the following responses:

1. Did any physician instruct you to stop working as an Instructional Assistant because of permanent disability? If no, when did your doctor determine that you were incapacitated for your former job duties?

1. Yes, the physician and also my work place [*sic*] did not want me to work because of the difficulty that I was having with

⁶ Dr. Bronshvag left after he testified, and was not present during Ms. Valentine's testimony.

walking, sitting, standing [*sic*] and at times talking, and I was not able to do my job duty's [*sic*] anymore.

2. Did you advise the San Joaquin County School you had to retire because of a disability? If no, why not? Did you believe that you were unable to perform your duties at that time because of incapacity?

2. Yes, my workplace was very aware of how much trouble I was having. I had to rest alot [*sic*] though [*sic*] out my work day [*sic*] and the staff had to help me out with my job duty's [*sic*].

3. Did you contact CalPERS for information regarding disability retirement before you ceased working? If no, why not? If yes, what assistance did you receive?

3. I did not contact CalPERS before I stopped working. I did not want to stop working, but I could not continue and everyone said it was best that I did not work. I did not know that I had to contact CalPERS at the time and they did not know anything about CalPERS. I was going through a very hard time.

(Emphasis original.)

Additionally, CalPERS sent correspondence to the San Joaquin County Schools asking the following questions, which the San Joaquin County Schools returned with the following handwritten answers:

1. Did the member indicate that she was retiring because she was too disabled to continue working? The member had been on an extended medical leave.

2. What did the member state as the reason for stopping work? Medical reason, specifics unknown.

3. At the time the member stopped working, was an Industrial Injury/illness claim pending or filed within the preceding three years? If so, what is the complete name and address of the workers' compensation insurer and what is the claim number? No.

4. What information or counseling was the member given regarding disability retirement? We met with Francine on 4/2/08 to go over the disability retirement application. We met

again on 11/7/12 as she contacted us [*sic*] she was trying to apply again.

25. The San Joaquin County Schools never applied for disability retirement on behalf of Ms. Valentine, and she never waived her right to retire for disability.

Discussion

26. The persuasive evidence established that the San Joaquin County Schools was aware Ms. Valentine's disability prevented her from performing her usual job duties at the time she stopped working, but failed to apply for a disability retirement on her behalf. But it had a mandatory duty to do so. (*Riverside Sheriffs' Association v. County of Riverside* (2011) 193 Cal.App.4th 20, 29 ["Section 21153 imposes a ministerial duty on an employer to apply for disability retirement on behalf of an employee if the employer 'believes' the employee is disabled and the employee is 'otherwise eligible to retire for disability.' (*Lazan v. County of Riverside* (2006) 140 Cal.App. 4th, 453, 459-460)⁷].) The San Joaquin County Schools's failure to comply with its statutory obligation entitles Ms. Valentine to have the effective date of her retirement made retroactive to March 5, 2008, as a matter of law. (Gov. Code, § 20160, subd. (b) ["[T]he board *shall* correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system"], italics added.)

Summary

27. For the reasons discussed above, Ms. Valentine's application for disability retirement must be granted with an effective date of March 5, 2008.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Ms. Valentine has the burden of proving she qualifies for disability retirement, and she must do so by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) She also has the burden of demonstrating she is entitled to relief pursuant to Government Code section 20160, subdivision (b). (Gov. Code, § 20160, subd. (d).) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

⁷ In *Lazan*, the appellate court defined a ministerial act as one which a public officer is required by statute to perform in a specified manner when a given state of facts exist, regardless of his personal opinion about the propriety or impropriety of the act to be performed. (*Id.*, at p. 460.)

Applicable Statutes

2. Government Code section 20026 provides, in pertinent part:

“Disability” and “incapacity for performance of duty” as the 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. Government Code section 21150, subdivision (a), provides: “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, 21076.5, or 21077.” And the employer of such a member may not terminate the member’s employment based on her disability, but instead must apply for disability retirement on the member’s behalf. (Gov. Code, § 21153 [“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 ...”].)

4. Government Code section 21156, subdivision (a), provides, in pertinent part:

(1) 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

(2) In determining whether a member is eligible to retire for disability, the board ... shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

5. The courts have interpreted the phrase “incapacitated for the performance of duty” to mean “the substantial inability of the applicant to perform [her] usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.) An increased risk of further injury is insufficient to constitute a present disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d. 854, 863.)

6. Government Code section 21252, subdivision (a), provides the following regarding the effective date of retirement:

A member’s written application for retirement, if submitted to the board within nine months after the date the member discontinued his or her state service, and, in the case of

retirement for disability, if the member was physically or mentally incapacitated to perform his or her duties from the date the member discontinued state service to the time the written application for retirement was submitted to the board, shall be deemed to have been submitted on the last day for which salary was payable. The effective date of the written application for retirement submitted to the board more than nine months after the member's discontinuance of state service shall be the first day of the month in which the member's application is received at an office of the board or by an employee of this system designated by the board.

7. Government Code section 20160 provides for the correction of errors or omissions as follows:

(b) Subject to subdivisions (c) and (d), the board *shall* correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system.

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

(Emphasis added.)

Conclusion

8. Ms. Valentine met her burden of producing competent medical evidence demonstrating she is substantially incapacitated for the performance of her usual duties as an Instructional Assistant with the San Joaquin County Schools due to a neurologic condition. She further met her burden of demonstrating that the San Joaquin County Schools failed to perform its statutory duty to apply for a disability retirement on her behalf when she stopped working. Had it done so, the effective date of her retirement would have been March 5, 2008. Therefore, her application for disability retirement must be granted with an effective date of March 5, 2008.

ORDER

Respondent Francine Valentine's application for disability retirement with an effective date of March 5, 2008, is GRANTED.

DATED: March 24, 2016

DocuSigned by:
Coren D. Wong
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COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings