

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues Against:

MARIANNE D. SULLIVAN,

and

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION  
(CALIFORNIA MEN'S COLONY),

Respondents.

Case No. 2010-0995

OAH No. 2014120657

**PROPOSED DECISION**

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 3, 2016, in San Luis Obispo. The record was closed and the matter was submitted for decision at the conclusion of the hearing.

Kevin Kreutz, Senior Staff Attorney, represented the California Public Employees' Retirement System (PERS).

Marianne D. Sullivan (respondent) was present and represented herself.

No appearance was made by or on behalf of respondent California Department of Corrections and Rehabilitation (CDCR).

**FACTUAL FINDINGS**

*Parties and Jurisdiction*

1. Anthony Suine signed the Statement of Issues in his official capacity as Chief of PERS' Benefit Services Division.

2. Respondent was formerly employed by CDCR. By virtue of her employment, respondent is a state industrial member of PERS subject to Government Code section 21150, and has the minimum service credit necessary to qualify for retirement.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED May 12, 2016  
*[Signature]*

3. On February 3, 2010, respondent signed and submitted an application for disability retirement, effective December 28, 2009. She stated her disability was "left and right arm pain from the elbow down to the fingers. Numbness, tingling." (Ex. 3, p. 2.)

4. PERS obtained medical records concerning respondent's condition from medical providers and referred her for an evaluation by an orthopedic surgeon, who thereafter submitted a report to PERS containing his findings. After review of that information, PERS concluded respondent was not permanently disabled or incapacitated for performance of her duties with CDCR.

5. By a letter dated October 5, 2010, PERS notified respondent that her application for a disability retirement had been denied.

6. On October 28, 2010, respondent timely filed an appeal, requesting an administrative hearing to contest the denial of her disability retirement application.

#### *Background Information*

7. Respondent is a 59-year-old married woman with one adult child. She worked for over 25 years with the CDCR. In her last assignment, she had a position with the California Youth Authority (CYA), a division of the CDCR now known as the Division of Juvenile Justice. After submitting her disability retirement application, respondent and her family moved to Tennessee.

8. A. Respondent testified that she had been a Correctional Case Records Analyst Supervisor assigned to the California Men's Colony, a state prison within the CDCR system located in San Luis Obispo. She subsequently was assigned as a Management Services Technician (MST) at a CYA facility not established. She was an MST at the time she last worked for CDCR, and that was the position she designated on her disability retirement application.

B. In February 2010, respondent signed a Physical Requirements of Position/Occupational Title document, which summarized the types of activity and frequency required by an MST. (Ex. 9.) Complainant also presented a Duty Statement for the MST position at the California Men's Colony. (Ex. 10.)

C. Respondent testified the aforementioned documents do not accurately reflect her duties and frequency, because she was an MST at a CYA facility, whereas the documents indicate duties for another position at the California Men's Colony. Respondent's testimony on this point is not credited. First, exhibit 9, when read in its totality, tends to show it is for an MST position. Second, respondent signed that document, after she had submitted her disability retirement application, verifying the activities of her position she was last assigned. In any event, there is substantial overlap of activities and their frequency referenced in both documents.

D. The importance of this issue is that the orthopedic surgeon to whom respondent was referred for an evaluation relied on both documents in assuming the types of activities engaged in by respondent as an MST and their frequency. Respondent testified that, in reality, she spent 80 percent of her time scanning documents to log them in and keying in information on a key-pad or board. The two documents in question do not account for that amount of scanning and keying in either position. For the reasons described above, respondent's version of how much time she spent scanning and keying is not credited. Even if it was, it was not established that the difference between the frequency of those activities stated on the documents and respondent's testimony would change the evaluating orthopedic surgeon's opinions, which are discussed in more detail below.

9. Medical records and respondent's testimony established she first began experiencing pain and discomfort in both forearms in 2006. Respondent attributes the pain and discomfort to repetitive activities required by her job. As discussed above, she testified that her assignments, especially her last, required her to spend much of her time scanning and keying in documents, which resulted in repetitive use of her arms, elbows and wrists.

10. Respondent was initially referred (in 2006) to a chiropractor, who provided her no relief. She was later referred to hand specialist Dr. Michael Berman, who confirmed a diagnosis of bilateral (both arms) medial and lateral epicondylitis, which is essentially elbow tendonitis or what is commonly known as "tennis elbow." Dr. Berman tried conservative treatments such as injections, medications and physical therapy (PT). Relief was not achieved. On December 7, 2007, Dr. Berman performed a tendon release on respondent's left elbow. Respondent continued to experience pain and discomfort in her left forearm. Dr. Berman believed the continuing pain was the result of a radial nerve impingement. On October 21, 2009, Dr. Berman performed a radial nerve release, which was followed by PT. Respondent finally experienced relief.

11. As a result of the above problems, respondent was restricted in 2007 from lifting any objects weighing more than 40 pounds. Respondent's treating physicians placed her on temporary total disability from December 2007 through May 2010. During that period, respondent was considered to be substantially incapacitated from performing her duties. However, her disability status ended in May 2010 when she was released from all medical care. By that time, respondent had submitted her disability retirement application.

#### *PERS' Determination of Respondent's Condition*

12. PERS referred respondent to orthopedic surgeon Kenneth Baldwin, M.D., for an independent medical examination. Dr. Baldwin reviewed the job descriptions for respondent's position (exhibits 9 & 10), as well as medical records from respondent's medical treatment.

13. A. On or about August 17, 2010, Dr. Baldwin conducted his examination of respondent and issued a report.

B. During Dr. Baldwin's examination, respondent reported no loss of elbow function, motion or strength. Dr. Baldwin noted no significant findings or limitations during his physical examination of respondent.

C. Based on his examination and record review, Dr. Baldwin diagnosed respondent with chronic medial and lateral epicondylitis of the right and left upper extremities.

D. In his report, Dr. Baldwin opined respondent did not demonstrate impairment that would prevent her from performing her job activities. While her condition may make performing certain tasks difficult, by causing some pain or discomfort, there were no sufficient abnormal physical findings to suggest she was unable to perform the essential functions of her job. Thus, respondent was not substantially incapacitated from performing her duties at CDCR. Dr. Baldwin indicated no restrictions were necessary.

14. At hearing, Dr. Baldwin affirmed the aforementioned findings from his report. He also clarified that respondent's remaining symptoms in her arms relate to her tolerance to perform her duties but would not prevent her from doing those duties and would not cause further injury. Dr. Baldwin testified the ulnar nerve procedure was unrelated to her tennis elbow. He believes the key to maintaining her recovery is for respondent to continue doing forearm muscle strengthening and stretching exercises.

*Evidence Presented by Respondent*

15. Respondent testified on her behalf. She has been pleased with Dr. Berman's treatment. Her left arm has improved substantially following the second surgery and she only occasionally experiences some symptoms. But she feels numbness and tingling in her right arm and Dr. Berman has told her she will need surgery in the future. Respondent does not want to undergo the same medical procedures for her right arm at this time. She ices her arm and does strength exercises and stretching; she occasionally sees a local PT in Tennessee, who is an acquaintance. The pain she experiences today limits her ability to do gardening, sewing and needlepoint. Respondent's motivation for pursuing this case is her belief that it would be unfair for her to not be compensated for the injury and pain caused by her work at CDCR.

LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.)

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2. The statutory scheme for disability retirement requires a “disability of permanent or extended and uncertain duration, as determined . . . on the basis of competent medical opinion.” (Gov. Code, § 20026.) “If the medical examination and other available information show to the satisfaction of the board that the member . . . 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.” (Gov. Code, § 21156.) The term “incapacitated for performance of duty” has been defined to mean “the substantial inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876–877.)

3. An applicant does not qualify for a disability retirement when she can perform customary duties, even though doing so may sometimes be difficult or painful. (*Mansperger, supra*, 6 Cal.App.3d 873; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) In *Hosford*, the court found that although sitting for long periods of time would probably bother the applicant’s back, which was the condition subject to his disability retirement application, that did not mean he was unable to do so, particularly since he could stop and exercise as needed. (*Hosford, supra*, 77 Cal.App.3d at p. 862.)

4. In this case, the only competent medical evidence presented established respondent is not substantially incapacitated from performing her former duties at the CDCR. Dr. Baldwin’s report and testimony were credible. Respondent submitted no medical evidence indicating she is incapacitated. As Dr. Baldwin testified, while respondent may experience pain in her arms while performing her duties, he does not believe she is unable to perform her duties. As the above-described appellate cases decided, an applicant cannot be considered substantially incapacitated when they are able to perform their duties, even when doing so would sometimes be difficult or painful.

5. Cause exists to deny respondent’s application for a disability retirement, in that she failed to meet her burden of establishing by a preponderance of the evidence that she is permanently disabled or incapacitated for performance of her duties as a Management Services Technician for the CDCR. (Factual Findings 1-15; Legal Conclusions 1-4.)

ORDER

Respondent Marianne D. Sullivan’s appeal is denied.

DATED: May 11, 2016

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ERIC SAWYER  
Administrative Law Judge  
Office of Administrative Hearings