

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:

ANGELEE MARTIN,

Respondent,

and

HUGHSON UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. 2015-0133

OAH No. 2015061101

PROPOSED DECISION

Administrative Law Judge Gene K. Cheever, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California on April 21, 2016.

John Shipley, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Patrick J. Kelly, Esq., represented Angelee Martin (respondent), who was present.

There was no appearance by or on behalf of the Hughson Unified School District (HUSD).

Evidence was received, the record was closed, and the matter was submitted for decision on April 21, 2016.

FACTUAL FINDINGS

Issue

1. Respondent contended both prior to and at the hearing that she was incapacitated from performing her duties as a Receptionist/Health Clerk for HUSD based on her orthopedic neck, right arm and shoulder, and back conditions at the time of her

application for disability retirement. She submitted evidence regarding her disability in relation to her neck, right arm and shoulder, and back conditions. While CalPERS evaluated respondent's application for disability retirement based on respondent's orthopedic neck condition, CalPERS' independent medical examiner, Joseph B. Serra, M.D., evaluated at respondent's independent medical examination (IME) and testified at hearing regarding respondent's orthopedic neck condition and her orthopedic right arm and shoulder and back conditions.

2. The issue for determination is as follows: was respondent permanently disabled or substantially incapacitated from performing her usual duties as a Receptionist/Health Clerk for HUSD on the basis of her orthopedic neck, arm, shoulder and back conditions at the time she submitted her application for disability retirement.

Respondent's Disability Retirement Application

3. Respondent is 54 years old. She worked for HUSD for over 16 years. She worked as a Receptionist/Health Clerk for HUSD for the last seven years until she stopped working on December 19, 2013.

4. On April 18, 2014, respondent signed her CalPERS Disability Retirement Election Application (Application), which CalPERS received on April 22, 2014. Respondent applied for disability retirement. In her Application, respondent described how her disability occurred as, "Just woke up one day and my right neck and arm started hurting extremely. Right hand also went numb." She described her disability as, "Cervical spinal stenosis, severe." She described her limitations/preclusions as, "Can not [sic] do housework, drive long distances, fly, do anything that I have to bend, walk to [sic] much or sit to [sic] long." In response to the question about how her injury has affected her ability to perform her job, respondent answered, "Not able to do any type of work. My Doctor took me off work since January 3, 2014."

5. Paula Tremayne, D.O., is respondent's treating physician. In support of respondent's Application, Dr. Tremayne responded to questions asked in a CalPERS Physician's Report on Disability (Physician's Report).¹ Dr. Tremayne described respondent's injury and diagnosis as "cervical spinal stenosis." She described respondent as having "severe chronic pain, decreased ROM." She confirmed that she had reviewed respondent's duties description and physical requirements forms. She believed respondent was "substantially incapacitated from performance of the usual duties of the position for" her employer because she was "unable to perform any bending, stooping, squatting, climbing, reaching, or turning of her head repetitively due to her condition of cervical spinal stenosis." Dr. Tremayne believed the incapacity was permanent.

¹ Respondent submitted three versions of the same report signed by Dr. Tremayne on March 24, 2014, May 2, 2014, and May 20, 2014. Although signed on different dates, all three reports show the same information in support of respondent's Application.

Duties and Physical Requirements for a Receptionist/Health Clerk

6. Respondent's job duties as a Receptionist/Health Clerk are, as described in the HUSD Job Description (Duties Description), as follows. Her essential functions are to: (1) greet visitors courteously, determine their needs, check appointments, and direct or escort them to the proper person; (2) answer the office telephone and respond appropriately to requests for information; (3) maintain an attractive reception area; (4) perform clerical work as directed by the Principal; (5) operate copy machines; (6) prepare reports; (7) assist substitutes; (8) translate and interpret Spanish/English, English/Spanish; (9) maintain health records, assist in medical screening, keep medical records, and provide first aid for students.

The physical requirements for carrying out her essential job functions as identified on the Duties Description include: (1) exert 10 to 20 pounds of force to lift, carry, push, pull, or otherwise move objects; (2) sit a lot, but walk or stand for brief periods; (3) perceive sound, have near and far vision, have depth perception, provide oral information, have manual dexterity to operate business related equipment, and handle work with various materials and objects. HUSD also states in the Duties Description that reasonable accommodation may be made to enable a person with a disability to perform the essential functions of respondent's job.

7. The physical requirements for respondent's job duties are, as identified on the CalPERS "Physical Requirements of Position/Occupational Title" form (Physical Requirements), for respondent to frequently (three to six hours in a day) sit, stand, bend her neck and waist, twist her neck and waist, do simple grasping, use her hands repetitively, use a keyboard and mouse, lift up to 10 pounds, and be exposed to excessive noise. She is required to occasionally (up to three hours in a day) walk, crawl, kneel, climb, squat, reach above and below shoulder, push and pull, do fine manipulation, power grasp, lift from 11 to 75 pounds, walk on uneven ground, and work with bio hazards. She is never required to run, lift over 76 pounds, drive, work with heavy equipment, be exposed to extreme temperature, humidity or wetness, be exposed to dust, gas, fumes, or chemicals, work at heights, or operate foot controls or repetitive movement. The Physical Requirement form was signed by an assistant superintendent on March 19, 2014, but was not signed by respondent.

Respondent's Testimony and Supporting Medical History Documents

8. While working at HUSD during the school year as a Receptionist/Health Clerk, respondent generally worked five days per week for six work hours per day (generally between 8:30 a.m. and 3:30 p.m.). In 2013, she experienced a "lot of pain" in her neck and right arm while working and, as a result, was often absent from work or left early. She states she stopped working altogether in December 2013 because of her pain.

9. Respondent testified her job duties required her to, among other things, answer the phone a lot, greet visitors, see students who got hurt on school property or needed assistance with their asthma inhalers, order supplies, put away supplies (sometimes in high or low locations), lift paper, lift or hold children on occasion who needed assistance, lift objects

on occasion that weighed between 10 to 75 pounds, get up and down from a sitting position on a regular basis, type and write. She asserted she is not able to lift 75 pounds. She feels pain in her neck and lower back most of the time even when taking her pain medications.

10. Respondent has seen various doctors from 2013 to the present to address and treat the pain in her neck, right arm and shoulder, and lower back. She saw a spine specialist who advised her to have neck surgery. She has taken injections in her neck and recently in her lower back to help alleviate the pain. She sees a pain management doctor who prescribes her pain medications. To alleviate her pain, she was taking four to five 30 mg oxycodone tablets per day but is currently taking five to six 30 mg oxycodone tablets per day. Respondent has not had neck surgery yet because one of her doctors wants her to get her lower back pain under control before doing neck surgery. She plans to do neck surgery in the future to address the neck pain. She cannot do much yard work, house work, and grocery shopping. She can drive a car. She testified she loved her job at HUSD, but she has not been able to work since December 2013 because of her neck and lower back pain.

11. Respondent's husband of 35 years testified. He corroborated respondent's testimony that she has experienced a lot of pain in her neck and right arm and shoulder and lower back since 2013. He testified she missed a lot of work in 2013 because of the pain, and she cannot do much shopping, cooking, yard work, or much of anything else due to the pain. He believes she loved her job at HUSD, but she cannot go back to work because of her pain.

12. Respondent did not call any other witnesses to testify on her behalf. She did not call any medical experts to testify on her behalf. Respondent submitted written medical reports as follows: (1) December 10, 2013, letter from James Barnett, M.D. to Paula Tremayne, D.O., and June 30, 2014, Follow-Up Visit report from Dr. Barnett; (2) February 19, 2014, letter from Benjamin J. Remington, M.D. to Dr. Tremayne with attachment; (3) Physician's Reports signed by Dr. Tremayne (discussed above); (4) Operative Report dated December 22, 2014, from Dr. Barnett; (5) Modesto Radiology Imaging reports dated August 26, 2015, (MRI lumbar spine), February 20, 2015, (esophagus barium swallow), February 13, 2013, (MRI cervical spine), November 14, 2014, (chest x-rays PA and lateral), February 19, 2014, (MRI lumbar spine), January 22, 2014, (MRI thoracic spine), and January 22, 2014, (MRI cervical spine); and (6) June 15, 2015, Initial Consultation report, September 14, 2015, Progress Note, and March 17, 2016, Progress Note from Elvert Nelson, M.D. These reports have been considered to the extent permitted under Government Code section 11513, subdivision (d).²

² Government Code section 11513, subdivision (d), in relevant part states:

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.

13. These records include the following history concerning respondent's neck, right arm and shoulder, and back pain during the 2013 and 2014 time period. On December 10, 2013, Dr. Barnett examined respondent regarding her complaints of right sided neck pain radiating to her shoulder, arm, and chest wall. Respondent described her pain as averaging a 5 on a 10- point scale. Radiology reports suggested "some mild degenerative disc disease and some mild endplate spurring at the affected mid spine levels" of her cervical spine and "some mild discopathy and mild arthritic changes with normal alignment" of her lumbar spine. Respondent had "restricted" range of motion in her head, neck, right arm and right shoulder, normal grip strength, and normal pulses in the upper extremities. Respondent's January 22, 2014 MRI cervical spine report showed "severe central stenosis and mild ventral cord flattening at C5-C6, as well as moderate left and severe right-sided neural foraminal stenosis. Proximal right foraminal orifice shows uncovertebral spurring and possibly a tiny disc spur, involving the right C6 nerve root." Respondent's January 22, 2014, MRI thoracic spine report showed "severe midthoracic disc degeneration associated with small protrusions minimally impacting the ventral cord. There is no significant central stenosis, high-grade foraminal stenosis, or compression of the thoracic spinal cord." Respondent's February 19, 2014, MRI lumbar spine report showed "disc protrusion at L5-S1 slightly eccentric to the left which contacts the transiting left S1 nerve root. There is moderate facet arthropathy at L4-L5 and L5-S1. Minimal disc protrusions are seen from T11-T12 through L2-L3."

14. Dr. Remington saw respondent on February 19, 2014. Respondent's neck and right shoulder pain had improved slightly since September 2013, and she did not have fine motor control problems. She had good range of motion (with some pain) and good strength in her upper extremities.

15. Dr. Barnett examined respondent again on June 30, 2014, and believed respondent should try to get authorization from her insurance company for a cervical epidural steroid injection. Respondent's November 14, 2014, x-ray showed, "mild bronchial cuffing suspect tracheobronchitis. No gross consolidations." On December 22, 2014, Dr. Barnett provided respondent with a C7-T1 translaminar cervical epidural steroid injection.

Dr. Serra's Independent Medical Examination (IME) and Testimony

16. Orthopedic surgeon Joseph B. Serra, M.D. saw respondent on September 17, 2014, for an IME. Dr. Serra is board certified in orthopedic surgery and has practiced over 40 years in the field. He has performed IMEs for CalPERS for over 10 years. Dr. Serra testified as an expert witness on behalf of CalPERS. His testimony was consistent with the IME report he prepared concerning respondent.

17. Respondent told Dr. Serra at the time of her IME that she woke one morning in November 2013 with neck pain that extended toward her right shoulder and right upper back. She believed that working on the computer resulted in the pain. She saw Dr. Tremayne who prescribed medications and obtained x-rays and MRIs. She was referred to Dr. Remington, a neurosurgeon, who referred her to Dr. Barnett, who gave her an epidural steroid injection which was helpful. She was waiting for insurance approval of cervical

epidural steroid injections. She had prior history of lower back pain. She complained of sharp pain in the cervical spine which radiated to the right scapula and right shoulder. She stated the pain was intermittent but occurred frequently. She rated her pain as a 7/10. She also complained of thoracic pain at the level of her bra strap which was a dull pain, but occasionally sharp. She rated this pain as a 4/10. She complained of a sharp pain in the lower back, especially in the morning. She also felt it at night. She rated the pain as a 5-6/10. She complained that her lower back symptoms were aggravated by activities which required bending forward. She stated she had been advised to walk and she walked one mile three to four times per week, but she had significant lower back pain by the end of the walks. She stated her daily living activities were limited. She was unable to vacuum, carry groceries, wash a car, or do yard work, but she could make a bed. She took her son to the grocery store and he would carry the groceries for her and put them away at home. She had significant difficulty cooking.

18. Dr. Serra's physical examination of respondent at the IME found that she was not in acute distress, but she complained of pain in the neck, thorax, and lumbosacral spine. His examination of her cervical spine revealed normal lordotic curvature. He did not find spasm, guarding, or crepitus present. He found no actual tenderness to palpation of the paravertebral musculature in the cervical area. She complained of sensation of tightness in the right trapezium, superior aspect of the shoulder, and extending to the mid portion of the right scapula. She also complained of tenderness in the upper thoracic paravertebral musculature.

19. Dr. Serra measured respondent's range of motion. He found her range of motion of the cervical spine showed flexion of 75 percent of normal and extension of 75 percent. Her lateral bending was 50 percent bilaterally with a complaint of pain. Her rotation was also 50 percent bilaterally, again with a complaint of pain and tightness.

20. Dr. Serra's neurologic examination of respondent's upper extremities showed motor function to be intact. She complained of hypesthesia to light touch and pinwheel testing over the thenar aspect of the right thumb. The dorsal and lateral aspects of her thumb were within normal limits. Her reflexes reveal biceps, triceps and brachioradials were found to be 1+ bilaterally. The neurologic examination of her lower extremities showed motor and sensory function to be intact. Her patellar and achilles reflexes were 2+ bilaterally. Her straight leg raise in the sitting posture was negative to 90 degrees bilaterally. Straight leg raise in the supine posture was positive at 75 degrees on the right with complaint of low back pain in the lumbar spine. Straight leg raise on the left was negative to 90 degrees. Her squatting was 75 percent of normal. The Lasegue and Trendelenburg tests were negative. Her heel and toe standing were done well. She walked with a normal gait pattern.

21. Dr. Serra reviewed respondent's Duties Description and Physical Requirements for her job as a Receptionist/Health Clerk, and her Application, Dr. Tremayne's May 20, 2014 report on disability, and Dr. Remington's February 19, 2014, and May 28, 2014, reports. He also evaluated five studies from Modesto Radiology for a June

10, 2013, lumbosacral spine, November 18, 2013 follow-up x-rays for her lumbar spine, her cervical spine, and her thoracic spine, and January 22, 2014 MRI for thoracic spine.

22. Based on his IME of respondent, Dr. Serra opined that respondent was capable of performing her usual and customary job duties and was not substantially incapacitated.

23. Dr. Serra also opined that respondent made “moderate exaggeration of complaints” and that her “subjective complaints far outweigh objective findings.”

Discussion

24. In order to obtain disability retirement, respondent must submit sufficient “competent medical evidence” to establish that she was permanently disabled or substantially incapacitated from performing her usual duties as a Receptionist/Health Clerk at the time she submitted her Application. (Gov. Code, § 20026.)

25. At the hearing, respondent did not have a medical doctor testify to address her medical records, Application, or otherwise opine whether she is permanently disabled or substantially incapacitated from performing her usual duties as a Receptionist/Health Clerk for HUSD. Respondent and respondent’s husband’s testimony, while establishing respondent does suffer pain and is limited in her activities, do not qualify as “competent medical evidence.” Respondent instead identified Dr. Tremayne’s Physician’s Report and the January 22, 2014 MRI cervical spine report as the competent medical evidence supporting her argument. She did not point to other specific notes in the other medical records she submitted to support her argument.

26. Dr. Serra’s IME report and testimony were persuasive that respondent was not permanently disabled or substantially incapacitated from performing her usual duties as a Receptionist/Health Clerk at the time she submitted her Application. Dr. Serra’s medical opinions were well supported by the medical record, his examination of respondent, his review of respondent’s Duties Description and Physical Requirements, and other medical records provided to him. Respondent did not otherwise demonstrate that she was permanently disabled or substantially incapacitated from performing her job duties.

27. In sum, while respondent certainly may suffer neck, arm, shoulder and back pain and have limitations to her activities, it was her burden to offer competent medical evidence to establish the permanent disability or substantial inability to perform her job duties. Respondent failed to meet this burden, and her request for disability retirement must be denied.

LEGAL CONCLUSIONS

1. By virtue of her employment with the HUSD as a Receptionist/Health Clerk, respondent is a local miscellaneous member of CalPERS subject to Government Code

section 21150. Respondent has the minimum service credit necessary to qualify for retirement.

2. To qualify for disability retirement, respondent must prove that she was “incapacitated physically or mentally for the performance of his or her duties....” (Gov. Code, § 21156.) In this case, respondent claims physical incapacity for the performance of her duties. 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. In *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term “incapacity for performance of duty” as used in Government Code section 20026 (formerly section 21022) to mean “the *substantial* inability of the applicant to perform his usual duties.” (Italics in original.) The employee in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and apprehend and arrest violators. He suffered an injury to his right arm while arresting a suspect. He could not lift heavy weights or carry a prisoner away. The court noted that “although the need for physical arrests do occur in petitioner’s job, they are not a common occurrence for a fish and game warden.” (*Mansperger, supra*, 6 Cal.App.3d at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding that the game warden was not incapacitated for the performance of his duties, the *Mansperger* court noted that the activities he was unable to perform were not common occurrences and that he could otherwise “substantially carry out the normal duties of a fish and game warden.” (*Id.* at p. 876.)

4. The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, reached a similar conclusion with respect to a state traffic sergeant employed by the CHP. The applicant in *Hosford* had suffered injuries to his left ankle and knee, and had strained his back. The court found that, while a sergeant should be physically able to make arrests and subdue prisoners, given the supervisory nature of the sergeant’s position, such physical demands on him would be much less frequent than on traffic officers. The court noted that the sergeant “could sit for long periods of time but it would ‘probably bother his back;’ that he could run but not very adequately and that he would probably limp if he had to run because he had a bad ankle; that he could apprehend persons escaping on foot over rough terrain or around and over obstacles but he would have difficulty and he might hurt his back; and that he could make physical effort from the sedentary state but he would have to limber up a bit.” (*Id.* at p. 862.) Following *Mansperger*, the court in *Hosford* found that the sergeant:

is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of

time in a patrol car would “probably hurt his back,” does not mean that in fact he cannot so sit; ... [¶] As for the more strenuous activities, [a doctor] testified that Hosford could run, and could apprehend a person escaping over rough terrain. Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function, renders [the doctor’s conclusion that Hosford was not disabled] well within reason. (*Ibid.*)

5. Respondent has the burden of proving entitlement to disability retirement. (*Harmon, supra*, 62 Cal.App.3d at 697; *Rau v. Sacramento County Retirement Board* (1966) 247 Cal.App.3d 234, 238.) It is well accepted that CalPERS may rely on decisions affecting other pension plans when the laws are similar, and since Government Code section 31724 (County Employees’ Retirement Law) is similar to Government Code section 21151 (California Public Employees’ Retirement Law), the rule concerning burden of proof shall be applied to cases under CalPERS law. (*Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal.App.3d 937, 947.

6. The matters set forth in Findings 3 through 27 have been considered. Dr. Serra’s report and testimony were persuasive that respondent was capable of performing her usual and customary job duties and was not substantially incapacitated. Respondent did not otherwise establish through competent medical evidence that her orthopedic neck, right arm and shoulder, and back conditions permanently disabled her or substantially incapacitated her from the performance of her usual duties as a Receptionist/Health Clerk with the HUSD at the time of her Application.

ORDER

The application of Angelee Martin for disability retirement is DENIED.

DATED: May 9, 2016

DocuSigned by:
Gene Cheever
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GENE K. CHEEVER
Administrative Law Judge
Office of Administrative Hearings