

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

LORI L. GRAFFIOUS, and LOS
ANGELES COUNTY SCHOOLS,

Respondents.

Case No. 2014-0089

OAH No. 2015021144

PROPOSED DECISION

Administrative Law Judge Thomas Heller, State of California, Office of Administrative Hearings, heard this matter in Glendale, California on March 16, 2016.

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

Respondent Lori L. Graffious represented herself. David Graffious, her husband, was also present and assisted her in questioning a witness.

No appearance was made by or on behalf of respondent Los Angeles County Schools.

During the hearing, CalPERS and Graffious both offered exhibits into evidence containing private medical information. Graffious requested the exhibits be sealed, and there is good cause to do so. Therefore, concurrently with this Proposed Decision, the Administrative Law Judge is issuing an order to the parties sealing Exhibits 4, 7, 8, A, and D.

At the end of the hearing, the Administrative Law Judge ordered CalPERS to file a brief in support of its relevance objection to two letters to Graffious from the Social Security Administration (SSA). One letter (Exhibit C) states the SSA found Graffious to be disabled under its rules as of January 2011, and the other (Exhibit B) states the disability was continuing as of November 2015. CalPERS filed its brief on March 29, 2016. Graffious was given until April 11, 2016 to file a response, but did not.

The matter was submitted on April 11, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED May 16 20 16

Thomas Heller

RULING ON ADMISSIBILITY

CalPERS' relevance objection to Exhibits B and C is overruled. While CalPERS is correct it is not bound by the SSA's disability determination, the determination does not have to be binding to be relevant. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1055 [county's stipulations in Workers' Compensation Appeal Board action that employee's disability was service-connected, while non-binding, were relevant in later case against retirement board for service-connected disability retirement]; see also *Traub v. Bd. of Retirement* (1983) 34 Cal.3d 793, 798-799.) "Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

For the SSA, "an individual shall be considered to be disabled . . . if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." (42 U.S.C. § 1382c(a)(3)(A).) For CalPERS, retirement for disability requires an applicant to be "incapacitated for the performance of duty," and "[d]isability' and 'incapacity for performance of duty' . . . mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion." (Gov. Code, §§ 20026, 21150.) Though not identical, these definitions are similar enough for the SSA's determination to have a "tendency in reason" to prove Graffious' disputed assertion she should be retired for disability. (Evid. Code, § 210.)

In its brief, CalPERS also asserts the SSA letters are hearsay. Although not raised at the hearing, a hearsay objection "is timely if made before submission of the case or on reconsideration." (Gov. Code, § 11513, subd. (d).) The SSA letters are out-of-court statements, offered for the truth of the matters stated, making them hearsay. (Evid. Code, § 1200.) But CalPERS' objection only makes the letters insufficient by themselves to support a finding, not inadmissible. (Gov. Code, § 11513, subd. (d).) In administrative cases, "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence . . ." (*Ibid.*) The letters supplement Graffious' testimony about the SSA's disability determination. Accordingly, Exhibits B and C are admitted as administrative hearsay.¹

¹ Graffious has not asserted the letters "would be admissible over [a hearsay] objection in civil actions." (Gov. Code, § 11513, subd. (d).)

FACTUAL FINDINGS

Parties and Jurisdiction

1. On June 25, 2012, a Deputy Superintendent for Las Virgenes Unified School District filed an application for disability retirement on behalf of Graffious, who was a Special Education Instructional Aide. By virtue of that employment, she is a “[l]ocal miscellaneous member” of CalPERS. (Gov. Code, § 20383.) The basis for the application was an allegedly disabling mental health condition.

2. On October 3, 2013, CalPERS denied the application.

3. Graffious timely appealed the denial on October 27, 2013.

4. On March 12, 2014, CalPERS filed a Statement of Issues, requesting a ruling on whether Graffious was permanently disabled or substantially incapacitated from the performance of her usual and customary duties at the time of the application.

5. On February 27, 2015, CalPERS asked the Office of Administrative Hearings to schedule a hearing. The hearing was originally scheduled for November 2015, but was continued at Graffious’ request.

Background

6. Graffious worked as an instructional aide for about seven years. In 2010, there was a large fire at her home. Although she and her family avoided injury, the fire triggered anxiety, difficulty concentrating and functioning, panic attacks, depression, and other mental health issues. She sought professional assistance, and stopped working in January 2011. Her employer applied for disability retirement for her, and her therapist and doctor provided reports to CalPERS about her condition. Those reports were not offered into evidence.

Independent Medical Examination

7. In response to the application, CalPERS scheduled an independent medical examination for Graffious with Stephan Simonian, M.D., a psychiatrist. Dr. Simonian examined her on July 8, 2013, and also reviewed her medical records and a description of her job. During the examination, Graffious said her doctor had diagnosed her with posttraumatic stress disorder due to the fire. She also said she was seeing a therapist regularly, and was taking medication for depression.

8. Dr. Simonian’s examination lasted about 45 minutes. He interviewed Graffious about her mental health history and treatment, her family and work history, and her current symptoms. At times, she appeared “mildly anxious,” but her mental status was otherwise unremarkable.

9. Based on the examination, Dr. Simonian diagnosed Graffious with “Generalized Anxiety Disorder, in Partial Remission.” Overall, her anxiety symptoms were “mild,” and did not prevent her from performing any special job duties of an instructional aide. In Dr. Simonian’s opinion, she was not substantially incapacitated for the performance of her usual duties. Dr. Simonian credibly testified as to the examination and this opinion at the hearing.

Graffious’ Evidence

10. Graffious asserts several doctors have determined she cannot work, and that Dr. Simonian’s examination was too short to yield a credible diagnosis. But no doctor or other professional testified on her behalf, and her only evidence from a professional was a brief “Summary of Clinical Progress Notes” from her therapist, Lisa E. White, a Licensed Marriage and Family Therapist. The March 14, 2016 summary, admitted as administrative hearsay,² states Graffious has “Post-Traumatic Stress Disorder . . . and Generalized Anxiety Disorder” It also describes Graffious’ therapy history, symptoms, and “difficult[y] . . . leav[ing] her house without being fearful.” But the summary is silent on whether her diagnoses and symptoms prevent her from working, or prevented her from working when her employer applied to CalPERS on her behalf.

11. In 2012, the SSA determined Graffious was disabled under its rules, a determination that is still in effect. Two SSA letters, admitted as administrative hearsay, supplement Graffious’ testimony to these facts. (See *supra* at p. 2.) But no evidence from the SSA identifies the disability, or the information upon which the SSA relied to make the determination.

12. Graffious is now 44 years old, and considers her mental health about the same now as it was when she stopped working. She still sees Ms. White for weekly therapy. Her husband observes her still acting differently than she did before the fire, and accomplishing much less around the house.

Essential Duties and Functions of an Instructional Aide

13. There are eleven essential duties of a Special Education Instructional Aide: (1) behavior modification/supervisory assistance, (2) instructional/lesson plan assistance, (3) student play/interaction/demonstration, (4) physical care/hygiene needs, (5) nutrition/food service assistance, (6) trainings and meetings, (7) playgrounds set up/maintenance/clean up, (8) general clerical duties/logs/records, (9) classroom environment maintenance, (10) cash/money handling, and (11) field trips. The job is not normally physically demanding, and involves few environmental hazards.

² CalPERS’ hearsay objection to the summary was sustained. (See Gov. Code, § 11513, subd. (d).)

LEGAL CONCLUSIONS

1. Under the Public Employees' Retirement Law (PERL), a member of CalPERS who is "incapacitated for the performance of duty shall be retired for disability," if he or she has sufficient years of "state service" credit. (Gov. Code, § 21150.) As described previously, "[d]isability" and "incapacity for performance of duty" mean "disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion." (Gov. Code, § 20026.) "State service" includes service rendered as an employee of a school employer or contracting agency of CalPERS. (Gov. Code, § 20069, subd. (a).) CalPERS does not dispute Graffious has enough years of state service credit, but does dispute she is "incapacitated for the performance of duty." (Gov. Code, § 21150.)

2. To be retired for disability, a CalPERS member must be substantially unable to perform his or her usual duties. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854, 859-860; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Graffious has the burden of proving she meets this standard by a preponderance of the evidence. (See *McCoy v. Bd. of Retirement, supra*, 183 Cal.App.3d at p. 1051, fn. 5; *Harmon v. Bd. of Retirement* (1976) 62 Cal.App.3d 689, 691; Evid. Code, §§ 115, 500.)

3. Graffious did not prove by "competent medical opinion" she has a "disability of permanent or extended and uncertain duration." (Gov. Code, § 20026.) The only medical opinion Graffious offered was Ms. White's summary, which does not say she cannot work, or could not work at the time of her retirement application. (Factual Finding 10.) Moreover, as hearsay evidence to which CalPERS objected, the summary by itself is insufficient to support a disability finding. (Gov. Code, § 11513, subd. (d).) Dr. Simonian provided the only other medical opinion, and opined Graffious was not substantially incapacitated for the performance of her usual duties. (Factual Finding 9.)

4. Graffious asserts the SSA's disability determination proves she should be retired for disability, but the determination is not medical evidence, much less "competent medical opinion" evidence. (Gov. Code, § 20026.) Graffious also offered no evidence from the SSA identifying the disability, or the information upon which the SSA relied to make the determination. (Factual Finding 11.) Moreover, the determination is not binding in this case, because the SSA is a federal agency independent of CalPERS, and CalPERS was not a party to the determination. Therefore, "the privity requisite to application of collateral estoppel principles does not exist." (*Traub v. Bd. of Retirement, supra*, 34 Cal.3d at pp. 798-799.)

5. The record includes passing references to other doctors, medical opinions, and reports, and Graffious presumably gave the SSA medical opinion evidence to support her disability claim to that agency. But she did not provide adequate medical opinion evidence in this case, and CalPERS' medical opinion evidence suggests she is not entitled to retire for disability under PERL. Accordingly, she did not meet her burden of proof.

ORDER

The application for disability retirement for Lori L. Graffious is denied.

DATED: May 6, 2016

DocuSigned by:

Thomas Heller

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THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings