

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

BEFORE THE  
PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Of:

CYNTHIA S. SIMMONS-COTLEDGE,

Respondent,

and

EMPLOYMENT DEVELOPMENT  
DEPARTMENT,

Respondent.

Case No. 2015-0125

OAH No. 2015090323

**PROPOSED DECISION**

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Santa Barbara, California, on April 27, 2016.

Terri Popkes, Senior Staff Counsel, represented Complainant Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

David T. Holzman, Attorney at Law, represented Cynthia A. Simmons-Cotledge (Respondent).

Respondent Employment Development Department (Department) did not appear at the hearing.

Complainant seeks to deny Respondent's disability retirement application on grounds that the medical evidence does not support her claim of disability based on her neurological condition (mild traumatic brain injury, dizziness, vestibular disruption, neck strain). Respondent asserts that she is disabled for the performance of her duties.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED June 6, 2016  
Kady Pasla

## FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in his official capacity.
2. At the time Respondent filed her application for disability retirement, June 4, 2013, she was employed by the Department as an employment program representative. By virtue of her employment, Respondent is a state miscellaneous member of CalPERS.
3. Respondent started her employment with the Department in 2001. As an employment program representative, Respondent was responsible for providing employment and customer services to employers and job seekers. Her duties included assisting customers with job applications, coaching customers in the job seeking process, making referrals as appropriate, assisting customers to utilize the computers and other resources, and receiving and processing information from customers. Physical activities of the position include frequent sitting, occasional standing, occasional walking, rare to occasional looking down and up, and frequent but intermittent use of the hands for using a keyboard or handling paperwork. Visual acuity is necessary when performing most job tasks.
4. On August 24, 2011, while walking at work, Respondent caught her foot under a carpet. She fell forward, but was able to grab the side of a table to avoid hitting the ground. As she fell, Respondent twisted her neck and subsequently experienced stiffness. She was seen the same day by David Wyatt, M.D. (Wyatt), of Sensum Clinic, an occupational medicine clinic. Dr. Wyatt diagnosed a cervical strain and fitted Respondent with a cervical brace.
5. Since the August 24, 2011 incident Respondent has experienced pain in the back of her neck, dizziness, headaches, blurred and double vision, and problems with depth perception. Looking at objects directly or moving her head to look at something leads to dizziness, or vertigo. The dizziness worsens if she makes sudden moves of her eyes, head, or body. Symptoms increase in severity three to four times per day. In extreme and occasional situations the vertigo causes her to lose awareness or consciousness. If she feels the onset of dizziness, Respondent sits still and avoids focusing on any particular object to prevent escalation of symptoms.
6. Respondent continued to receive treatment from Dr. Wyatt or his colleague at Sansum Clinic, Mark Musicant, M.D., at least through October 2015.
7. Respondent was released to return to work two hours per day for the period of October 10 to November 21, 2012. She typically took a bus to work and had someone drive her home. Once at work, she could not fix her eyes on the computer or on documents, without experiencing vision difficulties. Her work consisted of speaking to people and making phone calls. She positioned her chair so she could look up while at work. Changing her gaze to look at people who came to her office brought on the vertigo. She missed some work days due to medical appointments and dizziness, and was unable to work through November 21, 2012. She did not return to work after this period.

8. In a letter dated January 7, 2013, Dr. Wyatt wrote, in part: “Pain with movement of her neck [in] almost any direction, and when she does move the neck in addition to this pain she gets the severe dizziness. She has been through multiple different types of conservative care. Nothing seems to have been able to identify the problem nor make it go away. She is extraordinarily frustrated. She is extremely anxious to get back to work, but unable to do so due to her ongoing symptoms. [¶] Her specific limitations are she needs to be lying down most of the time. If she stands and walks very slowly and very carefully, she is able to cover some distance, but if she tries to move her head to the left or right, she gets very dizzy and sometimes falls down. She has difficulty with any kind of daily activities. She is unable to cook. She is unable to travel in a car where her husband drives and she pretty well keeps her eyes closed and her head very still. So, she does not experience dizziness. These conditions are what keeps [sic] her from being able to work. I do not feel at this point, she has any work modifications that would be able to allow her to get back to work. [¶] Hopefully, the doctors at [the University of California, Los Angeles (UCLA)] will be able to figure out what is wrong, and get it fixed and we will get her back to work as soon as possible after that.” (Exh. 11, at pp. 1-2.)

9. a. On December 17, 2013, Respondent was examined by Ezekiel Fink, M.D. (Fink), Panel Qualified Medical Examiner in her still-pending workers’ compensation matter, who is board-certified in neurology and pain management. On physical examination, the patient had torsional nystagmus (involuntary eye movement) with sclera injection with right lateral gaze and right upper quadrant gaze. Dr. Fink recommended further evaluation by specialists at the UCLA.

b. Recommended specialists at UCLA and other institutions did not see patients with industrial injuries, and Respondent returned to Dr. Fink on July 9, 2014, for reexamination. Respondent reported continuing symptoms, and described her efforts to cope with them, such as sitting down if the dizziness started to increase in intensity. Dr. Fink found no nystagmus on examination. His differential diagnoses at the time were vertiginous syndrome versus Meniere Disease versus vertiginous migraine. Dr. Fink recommended several tests, including neurological testing, Electronystagmography (ENG)/Videonystagmography (VNG), which tests her balance, and electroencephalogram.

10. a. On September 8, 2014, at CalPERS’s request, Martin Krell, M.D. (Krell), a board-certified neurological surgeon, examined Respondent. Cervical range of motion was normal. The neurological examination of cranial nerves was normal, with no nystagmus or double vision. In response to requests to move in various directions with her eyes closed (Romberg testing), Respondent subjectively indicated lack of balance in all directions, which Dr. Krell concluded was not consistent with any legitimate medical condition. In his opinion, those suffering from certain neurologic conditions have a positive Romberg sign in specific directions. Dr. Krell also reviewed several medical reports, which he summarized in his report.

b. In Dr. Krell’s opinion, Respondent is not disabled for the performance of her duties. The reported injury is rather minor and not likely to have caused the impairment claimed by Respondent. A cervical MRI in 2011 was normal, and there is no evidence of

nystagmus or other physical evidence to support the symptoms. The neurological examination his was normal.

11. Dr. Fink reevaluated Respondent on January 21, 2015. She reported continuing vertigo, which impacted her vision (her depth perception was off and items within her field of vision moved around), which could be followed by loss of consciousness. To stop the progression, she closed her eyes and held on to something to wait for the episode to pass. If she was successful, the episodes were limited to 30 seconds. No nystagmus was observed on physical examination. Dr. Fink's plan was to request approval of an examination by the House Ear Clinic.

12. On January 21, 2016, Respondent started seeing Carl Garbus, O.D. (Garbus), who found binocular vision deficits and visual-vestibular deficits. Respondent was prescribed special glasses that she expects will help with her perception issues and decrease dizziness and incidents of passing out.

13. On March 3, 2016, Respondent underwent an ENG/VNG, a more comprehensive balance test involving the eyes and the vestibular system. After reviewing the results, Michael Merrin, M.D. (Merrin) concluded that Respondent had right peripheral vestibular weakness.

14. On March 14, 2016, Dr. Fink reviewed the findings of Dr. Merrin and issued a Supplemental Report. In Dr. Fink's opinion, the results of the ENG/VNG established objective evidence of vestibular pathology, which supported his prior diagnosis. In a March 17, 2016 deposition received in evidence, Dr. Fink explained the mechanism through which the type of injury suffered by Respondent on August 14, 2011, can result in the symptoms she experiences.

15. The testimony presented at the hearing, including Respondent's testimony and the medical evidence and opinion which explains and corroborates it, establishes that Respondent is incapacitated for the performance of duty by reason of a neurologic condition that impacts her vision and her balance. Respondent's testimony was graphic and her demeanor was consistent with her testimony. Respondent's symptoms and her reporting of them have remained consistent through the years. Despite the fact that she did not actually fall, she did twist her neck, as confirmed by her contemporaneous report to Dr. Wyatt and the physician's diagnosis and treatment plan. She has recently undergone a more comprehensive test, the ENG/VNG, which objectively confirms her condition. The findings of the ENG/VNG are consistent with Dr. Garbus's findings, which were also made early this year. During his December 17, 2013 examination, Dr. Fink observed nystagmus, which is further objective evidence of the vestibular pathology. While Dr. Fink did not observe the nystagmus in his other two examinations of the patient and Dr. Krell did not observe it during his examination, as Dr. Krell testified, the nystagmus is not always observed in patients experiencing dizziness. Dr. Krell's opinions have been considered, but he did not have the benefit of the results of the ENG/VNG or of Dr. Garbus's findings.

16. Dr. Krell testified that inner ear conditions that cause dizziness are typically transient. Consistently, Dr. Fink testified in his deposition that most people with vestibular

disorder recover from the condition. Respondent may ultimately recover from her condition, but it has been in existence for almost five years and its duration is uncertain at present.

### LEGAL CONCLUSIONS

1. Government Code section 20026 defines the following relevant terms: “‘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.”

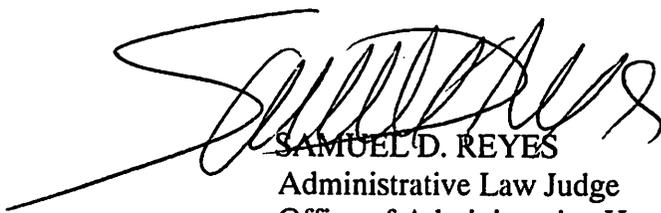
2. Government Code section 21156 provides, in pertinent part: “If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability. . . .”

3. By reason of factual finding numbers 3 through 16, Respondent has established, on the basis of competent medical opinion, that she is physically incapacitated for the performance of duty within the meaning of Government Code sections 20026 and 21156.

### ORDER

The application for disability retirement of Cynthia S. Simmons-Cotledge is granted.

DATED: 5/27/16

  
SAMUEL D. REYES  
Administrative Law Judge  
Office of Administrative Hearings