

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:

ROBIN L. ADAMS,

Respondent,

and

DEPARTMENT OF GENERAL SERVICES,

Respondent.

Case No. 2015-0078

OAH No. 2015070908

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 10, 2016, in Sacramento, California.

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

Robin L. Adams (respondent) was present throughout the hearing and represented herself.¹

Evidence was received, the record was closed, and the matter submitted for decision on May 10, 2016.

ISSUE

The following issue is before the Board of Administration for determination:

¹ There was no appearance by or on behalf of the Department of General Services.

Whether at the time of her application for disability retirement, respondent was permanently disabled or substantially incapacitated from the performance of her duties as a Management Services Technician for the Department of General Services on the basis of orthopedic (degenerative disc disease) and psychological (anxiety, depression and memory loss) conditions.

FACTUAL FINDINGS

Respondent's Disability Retirement Application

1. CalPERS received respondent's Disability Retirement Election Application on March 12, 2014. In her application, respondent described her disability, as follows: "Degenerative Disc Disease" and "secondary condition from pain causes anxiety and depression, cognitive memory loss."

Respondent described her limitations/preclusions as: "Unable to perform job duties." Respondent stated in her application that her injury or illness affects her ability to perform her job, as follows: "I am unable to sit or stand for one hour or more."

2. Respondent retired for service effective April 1, 2014, and has been receiving her service retirement allowance since that date.

Duties of a Management Services Technician

3. Respondent signed a Position Duty Statement on July 12, 2013, which describes respondent's duties as a Management Services Technician. The Position Duty Statement includes a general description of duties, as follows:

- Assembles, reviews and prepares related correspondence to issue purchase orders
- Transmittal of forms for payment under authorized purchasing authority limits
- Analyzes and researches vendor accounts
- Researches and resolves payment discrepancies and takes corrective action as necessary
- Reconciles all payables funded by scheduled reimbursements
- Provides assistance to DGS Sr. Accounting Officers with complex transactions and vendor payment issues

- Serves as the Department Facilities Coordinator with planning and coordinating furniture adjustments and office relocations
- Submits facility related service requests, as needed....
- Follows emergency protocol for calling the property manager for urgent matters
- Works cooperatively with program liaisons and the DGS Records Management Consultant
- Ensures Records Retention Schedules are up to date
- Serves as the Forms Management Coordinator completing required annual reports
- Disposes of surplus property as approved
- Develops, coordinates, maintains and performs general office support functions
- Acts as front desk receptionist to open lobby doors in morning
- Maintains all Card and Key logs/inventory.

4. On or about February 25, 2014, respondent signed a document titled Physical Requirements of Position/Occupational Title, which described the physical requirements of the job as including up to three hours per day of walking, kneeling, squatting, bending (neck and waist), reaching (above and below shoulder), power grasping, simple grasping, lifting/carrying zero to ten pounds; and up to six hours per day of sitting, standing, repetitive use of hand(s), keyboard use, and mouse use.

Respondent's Evidence

RESPONDENT'S TESTIMONY

5. Respondent gave a detailed account of her physical and psychological conditions, including the back pain and anxiety she experiences. She also testified that her physical and psychological conditions are exacerbated with work and render her substantially incapacitated from performing the tasks of a Management Services Technician. Respondent has tried to get off narcotic pain relievers, by using injections, nerve burns, non-narcotic pain relievers, and physical therapy. Despite her best efforts, she continues to experience pain and anxiety.

RESPONDENT'S DAUGHTER'S TESTIMONY

6. Respondent's daughter, Sandra Dowell, testified based on her own personal observations. She believes her mother's pain has gotten progressively worse over the past years. While her mother was still working, she would see her mother come home every day from work crying due to stress, pain and anxiety. Ms. Dowell has seen her mother attempting to move away from narcotic pain treatments by using injections and non-narcotic pain relievers. She also helps her mother with physical therapy, and they go on walks together because the more sedentary her mother is the worse her condition becomes. The activity helps prevent the pain from getting worse, but does not make it go away.

MEDICAL EVIDENCE

7. Respondent introduced into evidence a substantial volume of medical records both in hard copy and on a computer disc. The records included letters from respondent's treating internist Mark Levy, M.D., and evaluating psychiatrist Diane Wolfe, M.D. The letter from Dr. Levy is dated January 29, 2015, and is addressed To Whom It May Concern, and states as follows:

This is in regards to [respondent]. I have been treating this patient for multiple issues. [Respondent], due to her permanent medical conditions, she is no longer able to work.

My patient is permanently disabled due to degenerative joint disease, Post-Traumatic Stress Disorder, and fibromyalgia.

8. The letter from Dr. Wolf is dated October 31, 2013, and is addressed to the Department of General Services, Office of Human Resources, and was prepared at the request of her employer to determine her fitness for continued employment as a Staff Services Analyst. The letter states as follows:

Based on the evaluation performed in my office on October 29, 2013, and my review of the job duty statement, it is my opinion that at the current time [respondent] is unable to perform the essential functions of her position due to difficulties with memory, retention, concentration, cognitive tracking, frustration tolerance and self observation. Reasonable accommodations will not ameliorate the difficulties.

CalPERS's Evidence

9. CalPERS retained Herbert Perliss, M.D. (psychiatrist) and Harry Khasigian, M.D. (orthopedic surgeon) to separately conduct Independent Medical Evaluations (IME). Their respective IME findings are discussed below.

HERBERT PERLISS, M.D.'S IME FINDINGS

10. Dr. Perliss saw respondent for an extended psychiatric examination on September 11, 2014. Dr. Perliss took respondent's history and reviewed respondent's medical records. Also, respondent completed a battery of psychometric tests, which Dr. Perliss reviewed in preparing his IME report.

11. Dr. Perliss diagnosed respondent with Depressive Disorder, NOS, and moderate occupational and financial psychological stressors. Dr. Perliss discussed this diagnosis in relation to respondent's application for disability retirement, as follows:

She [respondent] submitted an application for a retirement, citing anxiety and depression, as well as degenerative arthritis in her spine. Her application is supported by her primary care physician in internal medicine at Mercy Medical Group, Mark Levy, M.D. There is also support for her application from Diana Wolf, M.D. who examined her in psychiatry in October 2013 after [respondent] was placed on an administrative leave of absence. The examination by Dr. Wolf determined that she had a level of cognitive impairment that was expected to interfere with the essential functions of her job, and for which no reasonable accommodation could be provided by the employer.

In fact, [respondent's] psychiatric disorder and her orthopedic problems have been long-standing, at least two decades, requiring the use of analgesic medication and psychotropic medication. It is apparent that her psychotropic medication has provided *reasonably good compensation* of her mood state and anxiety – she has been on a stabilizing regimen of venlafaxine, an antidepressant, alprazolam, a minor tranquilizer, and clonazepam in doses that have not changed in two years – enabling her to maintain her usual work activity. [Italics in original.]

[¶] ... [¶]

In the Clinical Assessment of her emotional/psychological state, Ms. Adams is found to have a long-standing mild depressive disorder – Depressive Disorder, NOS under the Guidelines of DSM-IV-TR – along with episodic anxiety. Her condition is *reasonably well stabilized* with her current regimen of psychotropic medication. There are, however, issues of performance and attitude, her behavior in dealing with co-workers and the public that would seem to be a factor in her

problems at work. In fact, the applicant would have returned to work had the employer not considered that she is not fit to work there.

Her current Mental Status and the results of the Psychological Tests Data reveal dysphoria and vegetative signs of depression without formulated suicidal ideation, consistent with a mild depressive disorder.

12. Dr. Perliss reviewed the usual duties of a Management Services Technician. He concluded that respondent is not substantially incapacitated for the performance of her duties as a Management Services Technician. In response to the question whether there are specific job duties that respondent is unable to perform because of physical or mental condition, Dr. Perliss wrote in his IME report as follows:

The applicant does have a psychiatric disorder, which does not appreciably interfere with her ability to perform the essential functions of her job as set forth in a duty statement for a Management Services Technician for EMS Authority/State of California.

13. In response to the question whether respondent is substantially incapacitated for the performance of her duties, Dr. Perliss wrote in his IME report as follows:

The applicant [respondent] is *not found to be substantially incapacitated* from performing her usual and customary duties as a Management Services Technician for EMS Authority/State of California. [Italics in original.]

HARRY KHASIGIAN, M.D.'S IME FINDINGS

14. Dr. Khasigian saw respondent for a comprehensive orthopedic examination and CalPERS disability retirement examination on July 9, 2014. Dr. Khasigian took respondent's history, conducted a physical examination, and reviewed respondent's medical records and diagnostic studies. In his IME report dated July 9, 2014, Dr. Khasigian gave a diagnosis, in relevant part, as follows:

Multilevel degenerative disc disease L3-4 through L5-S-1 without radiculopathy.

Bilateral neural foraminal stenosis due to facet hypertrophy and ligamentum flavum thickening L3-4 bilateral, L4-5, and L5-S1, mild-to- moderate without radiculopathy.

Cervical spondylosis without radiculopathy.

Dr. Khasigian's IME report dated April 30, 2014, discusses his diagnosis, in part, as follows:

The clinical examination reveals some voluntary reduction in flexion but otherwise normal motion, no spasm or masses, normal alignment, and normal neurological function. There is no evidence of sciatic stretch irritation or asymmetric neurological deficits. There is no subjective or objective clinical presentation of radiculopathy.

15. Dr. Khasigian reviewed the usual duties of a Management Services Technician. He concluded that respondent is not substantially incapacitated for the performance of her duties as a Management Services Technician, noting as follows:

[I]n my orthopedic opinion, the member, based on the examination and review of records performed today and in the absence of actual diagnostics test films to review is not substantially incapacitated for performance of her usual and customary duties which are described by her in examination and which are listed in the physical requirements of position/occupational title sheets.

Discussion

16. Respondent testified convincingly that she continues to experience pain and anxiety. However, the medical evidence she provided was less persuasive than the opinions provided by the CalPERS IMEs Drs. Perliss and Khasigian on the question of whether respondent is substantially incapacitated from performing the duties of a Management Services Technician. The IME reports prepared by Drs. Perliss and Khasigian are well-explained and reflect a careful examination of respondent and consideration of the available medical evidence. In contrast, the letters from Drs. Wolfe and Levy provided by respondent are less than one page each, and do not reflect the same degree of analysis on the question of substantial disability. Taking into account all of the evidence, respondent did not demonstrate that she is substantially incapacitated from performing the duties of a Management Services Technician.

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LEGAL CONCLUSIONS

1. By reason of her employment, respondent is a member of CalPERS and eligible to apply for disability retirement under Government Code section 21150.²

2. To qualify for disability retirement, respondent must prove that, at the time she applied, she was “incapacitated physically or mentally for the performance of his or her duties in the state service.” (Gov. Code, § 21156.) 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, or in the case of a local safety member by the governing body of the contracting agency employing the member, 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.) An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of the application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697 [finding that a deputy sheriff was not permanently incapacitated from the performance of his duties, because “aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the [sheriff’s] condition are dependent on his subjective symptoms”].)

4. *Mansperger*, and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date she applied for disability retirement, she was substantially unable to perform the usual duties of a Management Services Technician due to her physical condition. Respondent did not present sufficient evidence to meet this burden.

5. In sum, respondent failed to show that, when she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual

² Government Code section 21150, subdivision (a), provides:

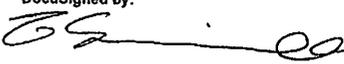
A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076 or 21077.

duties of a Management Services Technician due to her physical and psychological conditions. Her application for disability retirement must, therefore, be denied.

ORDER

The application of respondent Robin L. Adams for disability retirement is denied.

DATED: June 9, 2016

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TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings