

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:

BERTHA M. SMITH,

and

DEPARTMENT OF STATE HOSPITALS –
METROPOLITAN LA,

Respondents.

Case No. 2015-0785

OAH No. 2015101082

PROPOSED DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on June 30, 2016, in Glendale, California. The California Public Employees' Retirement System (CalPERS) was represented by Senior Staff Counsel Austa Wakily. Bertha M. Smith (Respondent) was present and represented herself. Although it was properly served with the notice of hearing, no appearance was made on behalf of Respondent Department of State Hospitals – Metropolitan LA.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on June 30, 2016.

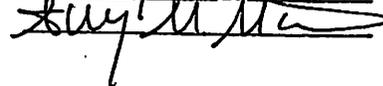
FACTUAL FINDINGS

1. Anthony Suine, Chief of the Benefits Services Division of CalPERS, filed the Statement of Issues while acting in his official capacity.
2. At the time she filed her application for retirement, Respondent was employed as a Food Service Technician I with the Department of State Hospitals, Metropolitan LA (hospital). By virtue of her employment, Respondent is a "state miscellaneous member" of CalPERS.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

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3. On October 14, 2014, Respondent signed, and subsequently filed, an application for service retirement pending industrial disability retirement (application), claiming disability on the basis of an orthopedic condition (left hand and left wrist).

4. The Statement of Issues, paragraph IV, page 2, lines 10-11, alleged that "Respondent retired for service effective October 31, 2014, and has been receiving her retirement allowance since that date." There was no evidence submitted to establish this allegation. However, the totality of the evidence indicated that Respondent had retired for service sometime in or after October 2014.

5. After review of medical reports submitted by Respondent in support of her application, CalPERS determined that Respondent was not substantially incapacitated for performance of her duties as a Food Service Technician I at the time the application was filed.

6. In a letter dated April 27, 2015, CalPERS notified Respondent of its determination that she was not substantially incapacitated for the performance of her duties as a Food Service Technician I and that her application was denied.

7. In a letter dated May 14, 2015, Respondent timely appealed the denial and requested a hearing.

8. The issue on appeal is whether, on the basis of an orthopedic condition (left hand and left wrist), Respondent is substantially incapacitated for performance of her duties as a Food Service Technician I for the hospital.

9. Respondent is 61 years old. She worked as a Food Service Technician I at the hospital from about 2001. Her duties included: loading, transporting, and unloading food and equipment from large push carts several times per day to serve patients' meals (breakfast, lunch, and dinner) in several dining areas; sweeping and mopping; and washing a large quantity of dishes. According to Respondent's written job description, the physical requirements of a Food Service Technician I at the hospital included: constant use of her hands, including grasping, pushing and pulling; constant lifting of objects up to 10 pounds; and frequent lifting of objects from 11 to 50 pounds.

10. On July 26, 2011, while Respondent was working at the hospital as a Food Service Technician I, she sustained an injury to her left wrist and hand. On that date, as Respondent was removing trays from inside a food warmer cart, a coworker slammed the heavy door of the cart onto Respondent's left wrist and hand. Respondent experienced immediate pain and swelling of her left wrist.

11. Respondent began treatment at Kaiser Permanente. She eventually underwent an EMG and nerve condition studies and was diagnosed with traumatic carpal tunnel syndrome, hand contusion, and nerve injury. She declined surgery and was treated with steroid injections and oral steroids and pain medications.

12. Respondent was initially instructed to return to work on light duty with restrictions including no pushing, pulling, grasping, or lifting. However, when she reported to work, she was advised by her supervisors that they could not accommodate her restrictions. Respondent returned to work and continued her full duties, which included lifting crates of foods, lifting dirty dish carts, pushing a 100-pound food cart, pulling and lifting food trays weighting 15 to 20 pounds, mopping, sweeping, and washing dishes. As of April 2016, the prophylactic restrictions recommended by the Qualified Medical Evaluator included no forceful gripping and grasping with her left hand.

13. Respondent continues to experience pain and swelling in her left hand and wrist, which is aggravated by using her left hand. Respondent has difficulty performing activities of daily living (ADL's), including dressing (pulling up pants, zipping, buttoning, tying shoes), washing her hair, cooking, cutting food, and gripping the steering wheel with her left hand. She is right hand dominant and mainly uses her right hand to perform ADL's.

14(a). On April 19, 2015, orthopedic surgeon, John D. Kaufman, M.D., conducted an Independent Medical Evaluation (IME) of Respondent at the request of CalPERS. The evaluation included a medical records review, a review of Respondent's job description, a patient medical history, and a clinical examination. On the evaluation date, Respondent complained of: pain in her left wrist and hand; numbness and tingling in her left hand and fingers; spasm and swelling of her left hand; and loss of left hand grip.

14(b). On physical examination of Respondent's left hand and wrist, Dr. Kaufman noted full range of motion with no swelling or deformity. Sensory testing showed decreased sensation in the flexor aspect of all five fingers. Respondent's grip strength was measured several times by a Jamar dynamometer, showing that her left hand strength was weaker than her right. For her right hand (her dominant hand), grip strength was measured at 50, 40, 45, and 55. For her left hand, grip strength was measured at 25, 25, 25, and 30.

14(c). Based on his evaluation, Dr. Kaufman opined that, "Although [Respondent] may have some difficulty with power grasping with her left hand, she is able to perform the essential functions of her actual and present job duties." (Exhibit 7.) Dr. Kaufman concluded that Respondent "is not substantially incapacitated for performance of her usual duties." (*Id.*)

14(d). Dr. Kaufman explained his conclusion, stating:

Looking at objective evidence of disability there are very few objective findings regarding [Respondent's] hand problem. In fact the only true objective finding is the [prior] abnormal nerve conduction velocity test. All the other findings on physical exam are subjective. Although she does have carpal tunnel syndrome[,] her functional ability is good. She is therefore not disabled for CalPERS retirement purposes. (*Id.*)

15. At the administrative hearing, Dr. Kaufman testified credibly and reaffirmed the findings and opinions in his 2015 report. He noted that, on examination, Respondent did not have disuse atrophy (indicating the loss of use) in either hand. Given the totality of his findings and observations, Dr. Kaufman opined, as he did in his 2015 report, that Respondent was able to return to performing her usual and customary duties of a Food Service Technician I, and that she was not substantially incapacitated for the performance of her usual duties.

16. Dr. Kaufman's finding that Respondent's left hand "functional ability is good," was supported by the findings of orthopedic surgeon, Gregg R. Sobeck, M.D., whose Agreed Medical Evaluation (AME) report Respondent submitted as evidence. In that report, Dr. Sobeck noted that Respondent's range of motion and grip strength was normal and was the same in both hands.

17. As set forth more fully below, the totality of the evidence did not establish that Respondent was substantially incapacitated for performance of her duties as a Food Service Technician I with the hospital based on an orthopedic condition (left hand and left wrist),.

LEGAL CONCLUSIONS

1. Respondent has not established that she is entitled to retirement for disability, as set forth in Factual Findings 2 through 17, and Legal Conclusions 2 through 7.

2. Respondent has the burden of proof regarding her entitlement to the retirement benefits for which she has applied. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) She has not met that burden.

3. Government Code section 21150 provides, in pertinent part:

Any 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

4. Government Code section 20026, states, in pertinent part:

"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.

5. "Incapacitated for the performance of duty," means the "substantial inability of the applicant to perform her usual duties," as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) The increased risk of

further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future or further injury are insufficient to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d 854, 862 - 863.)

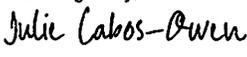
6. The totality of the evidence did not establish that Respondent's medical condition in her left hand and wrist rendered her substantially unable to perform her usual duties, as opposed to performing the duties with discomfort and difficulty. No physician provided any opinion that Respondent was unable to perform her usual work duties. Instead, Respondent was given recommended work restrictions to avoid pain and aggravation of her condition. While these work restrictions included avoiding movements which were part her duties, the restrictions were prophylactic to avoid exacerbation of her injury, and the holdings in *Mansperger* and *Hosford* preclude a finding in this case of current incapacity to perform her usual duties.

7. Given the foregoing, the evidence did not establish that Respondent was substantially incapacitated to perform her usual duties as a Food Service Technician I with the hospital based on an orthopedic condition (left hand and wrist).

ORDER

The appeal of Respondent Bertha M. Smith, seeking retirement for disability as a state miscellaneous member of CalPERS, is denied.

DATED: July 8, 2016

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JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings