

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:

VALERIE B. CARTER,

Respondent,

and

EMPLOYMENT DEVELOPMENT
DEPARTMENT,

Respondent.

Case No. 2015-0075

OAH No. 2015110903

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on July 14, 2016, in Sacramento, California.

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

Respondent Valerie B. Carter did not appear at hearing, and no one appeared on her behalf. No one appeared for or on behalf of respondent Employment Development Department. Each respondent's default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for decision on July 14, 2016.

SUMMARY

The sole issue on appeal is whether Ms. Carter is permanently and substantially incapacitated for the performance of the usual duties of a Staff Services Analyst with the Employment Development Department as a result of rheumatologic (Lupus and

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RETIREMENT SYSTEM
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C. B. Coffey

fibromyalgia) and orthopedic (cervical disc disease) conditions. The persuasive medical evidence admitted at hearing did not establish that she is substantially incapacitated. Therefore, her application for disability retirement benefits should be denied.

FACTUAL FINDINGS

Procedural Background

1. Ms. Carter is a state miscellaneous member of CalPERS subject to Government Code section 21150, subdivision (a),¹ by virtue of her employment as a Staff Services Analyst with the Employment Development Department. She has the minimum service credit necessary to qualify for disability retirement.

2. Ms. Carter signed, and CalPERS received, a Disability Retirement Election Application seeking disability retirement benefits on February 28, 2014. She described her specific disability as “Lupus, Fibromyalgia, and Cervical Disc Disease,” and identified her work limitations/preclusions as “Dr. has recommended a 65% work reduction restriction due to illness.” She also described her injury as affecting her ability to perform her job, but failed to describe how. Nonetheless, she stated she continues to work full time, and described her job duties as “Perform Budget Analyst Functions.”

3. CalPERS denied Ms. Carter’s application for disability retirement by correspondence dated December 15, 2014. Ms. Carter timely appealed the denial. Anthony Suine, Chief of CalPERS’s Benefit Services Division, signed the Statement of Issues in this matter solely in his official capacity on November 20, 2015.

Usual Duties of a Staff Services Analyst

4. A Position Statement for Staff Services Analyst signed by Ms. Carter’s supervisor on February 21, 2014, and by Ms. Carter the following week provides the following description of the position:

Under the supervision of a Tax Administrator I, the Staff Services Analyst serves as a generalist analyst providing programmatic support for the Division. As an analyst, the incumbent monitors and evaluates the Personnel and Operating Expenses and Equipment budgets, and acts as the Division liaison between Field Audit and Compliance Division (FACD) and the Tax Support Division (TSD). The incumbent is required

¹ That statute 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, 21076.5, or 21077.”

to analyze information to identify problems and their causes, and develop logical recommendations on a variety of miscellaneous topics.

The SSA will also, on an as needed basis, assist the FACD Personnel Analyst.

The Position Statement identifies the following as the essential duties of the position:

Analyze and monitor the Personnel and Operating Expenses and Equipment budgets

- Works with Division management and TSD to ensure that the Division stays within its allocations
- Prepares budget change proposals
- Prepares budget argumentation requests

Develop and prepare various worksheets and reports for management based on data warehoused in existing systems or processes as well as information obtained from FACDs field offices. This function requires data-gathering from multiple locations and sources, and analysis of information, preparing worksheets and reports to meet the needs of the target audience, and communicating effectively with staff and management. Examples may include, but are not limited to the following:

- Division's weekly activity reports
- In-state travel reports
- Out of State Audit Program

Coordinates/facilitates the collection and summarization of data for various mandated activities, i.e., Financial Integrity and State Managers Accountability review process, Security and Risk management audit.

The Position Statement does not describe the physical requirements of the position. However, Douglas M. Haselwood, M.D., one of the physicians whose opinion CalPERS relied upon, wrote in his report that he reviewed a listing of the physical demands of Ms. Carter's position with her, and she agreed with the document's description of "the general sedentary physical demands of her office/workstation based work."

Joseph Serra, M.D., the other physician whose opinion CalPERS relied upon, wrote the following in his report:

Physical requirements of position staff services analyst. This has been reviewed. This reveals the following requirements to be constant over six hours per day: Sitting, bending, twisting neck, fine manipulation, repetitive use of hands for keyboard and mouse.

Medical Evidence

Dr. Serra

5. At CalPERS's request, Dr. Serra, a board-certified orthopedic surgeon, performed an independent medical examination (IME) of Ms. Carter on October 6, 2014. He prepared a report documenting his IME, and that report was admitted into evidence. He also testified at hearing.

6. On the date of the IME, Ms. Carter complained of constant, aching pain in her cervical spine, which she described as a burning sensation. She further described the pain as radiating to her left trapezium and her left scapula and superior aspect of the left shoulder girdle. She explained that the pain is aggravated when she writes and when she holds a book while reading, and applying heat and cold compresses and exercising provides relief. She described reaching forward as producing a sensation like "electricity" in her upper arms, which goes away when she relaxes her arms. She rated the pain as a 5 to 8 on a scale of 10.

7. Ms. Carter reported that she was still working full-time as of the date of the IME, but explained she misses work often due to her disability. She stated she goes to work and works as long as she can, but then goes home when the pain becomes intolerable. At hearing, Dr. Serra stated Ms. Carter told him she sometimes works up to 70 hours per week.

8. Dr. Serra described Ms. Carter's physical examination as "interesting." She complained of "total pain" throughout her body, which Dr. Serra explained is not often heard because most patients are able to specify the part of their body from which the pain generates. Additionally, she complained of pain when Dr. Serra put the blood pressure cuff on her arm, but before he inflated it. She also wiggled her left foot from side to side very rapidly while sitting on the examining table, explaining that such maneuver was supposed to relieve pain during the examination.

9. Ms. Carter had some reduction in the range of motion of her cervical spine, but had a normal lordotic curvature and showed no evidence of spasm, guarding, or crepitus with motion. She had normal range of motion in her shoulders, elbows, forearms, wrists, and hands. Dr. Serra described Ms. Carter as having "a very strange and unusual gait pattern," describing her as hanging onto the wall with one hand as she walked down the hall and losing her balance when she walked pass the opening of a doorway until she reached the other side. He also described her as having "a significant toe in gait pattern." When asked why she walks in that manner, she stated the bottom of her feet hurt so she turns them inward

to take the pressure off the underside of her feet. Both of Ms. Carter's feet were normal in appearance, with no evidence of swelling.

10. At hearing, Dr. Serra discussed his review of Ms. Carter's medical records. On July 27, 2013, x-rays of her cervical spine were taken, and they showed degenerative changes mainly at C5-6 and C6-7. Additionally, there was neuroforaminal narrowing at the C6-7, bilaterally. He described the x-rays as being "very consistent" with his own findings, explaining the findings to be consistent with the type of wear and tear one would expect in a person of Ms. Carter's age. He further explained that the radiologist would have talked about finding a "bulging disc" or seeing "pressure on a nerve root" if there were radiologically significant findings with Ms. Carter's cervical spine.

11. A September 4, 2013 exam note from Paul Lambie, M.D., indicated Ms. Carter was seen as a follow-up for fibromyalgia. She was complaining of total body pain, with multiple symptoms but minimal objective findings. Dr. Serra described Dr. Lambie's findings as "very consistent" with his own.

12. Based on his examination of Ms. Carter on October 6, 2014, and review of pertinent records, Dr. Serra opined "it would be very difficult for her to sit at a computer logic terminal and be required to twist and bend her neck in the process of typing data." Therefore, he concluded she is substantially incapacitated for the performance of her usual duties as a Staff Services Analyst, but such substantial incapacity would only be temporary.

13. After Dr. Serra submitted his IME report to CalPERS, he was asked to clarify his opinions. He subsequently prepared a supplemental report in which he concluded that while Ms. Carter may have trouble performing the job duties identified in his original report, "there are no specific job duties that Ms. Carter would be unable to perform" due to a physical condition. Therefore, Dr. Serra concluded Ms. Carter is not substantially incapacitated for the performance of her usual duties.

At hearing, Doctor Serra explained he gave Ms. Carter the benefit of the doubt when he originally opined she is substantially incapacitated because of her subjective complaints of pain. But he reconsidered his opinion after receiving CalPERS's request for clarification, and concluded she is not substantially incapacitated because she stated she was still working at the time of the IME, sometimes as many as 70 hours per week.

Dr. Haselwood

14. Ms. Carter also underwent an IME with Dr. Haselwood, a physician board-certified in internal medicine and rheumatology, on August 20, 2014. He prepared a report documenting his IME, and that report was admitted into evidence. He did not testify at hearing.

15. Dr. Haselwood documented Ms. Carter's complaints of "a syndrome of constant widespread musculoskeletal pain, fatigue, and dysfunction" at the IME. She described the pain level as varying between a 5 and a 10, on a scale of 10, with it being a 7 at the time of the IME. She explained she deferred most of the homemaking and independent living activities to her grandchildren, who live with her. When she is not working, she spends most of her time "in bed."

16. With the exception of some relatively minor and age-appropriate osteoarthritic changes, Dr. Haselwood found Ms. Carter's joint examination to be unremarkable in terms of joint tenderness or evidence of chronic or active synovitis. He described her complaints of pain, withdrawal, and guarding mechanisms throughout the examination as "inconsistent and nonphysiologic." She declined a significant portion of Dr. Haselwood's examination of her neck or low back in accordance with his instructions to decline those portions of the examination that may cause her more hardship.

17. Based on his IME of Ms. Carter, Dr. Haselwood concluded she possesses the physical ability to perform her sedentary work duties on a full-time basis. Therefore, he opined she is not substantially incapacitated for the performance of her usual duties as a Staff Services Analyst.

Ms. Carter's evidence

18. As previously discussed, Ms. Carter did not appear at hearing, and no medical evidence contradicting Drs. Serra's or Haselwood's opinions was introduced.

Discussion

19. The sole medical evidence established Ms. Carter is not permanently and substantially incapacitated for the performance of the usual duties of a Staff Services Analyst with the Employment Development Department. Therefore, her application for disability retirement benefits should be denied.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Ms. Carter has the burden of proving she qualifies for disability retirement, and she must do so by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

Applicable Statutes

2. Government Code section 20026 provides, in pertinent part:

“Disability” and “incapacity for performance of duty” as the 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. Government Code section 21156, subdivision (a), provides, in pertinent part:

(1) 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

(2) In determining whether a member is eligible to retire for disability, the board ... shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

4. The courts have interpreted the phrase “incapacitated for the performance of duty” to mean “the substantial inability of the applicant to perform [her] usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.) It is not necessary that the person be able to perform any and all duties since public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County Employees’ Retirement Association* (1983) 142 Cal.App.3d 957, 961.) Instead, the frequency with which the duties she cannot perform are usually performed as well as the general composition of duties she can perform must be considered. (*Mansperger v. Public Employees’ Retirement System, supra*, 6 Cal.App.3d at pp. 876-877 [while applicant was unable to lift or carry heavy objects due to his disability, “the necessity that a fish and game warden carry a heavy object alone is a remote occurrence”].)

5. Discomfort, which may make it difficult for one to perform her duties, is insufficient to establish permanent incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207 [mere discomfort which makes it difficult to perform one’s job does not constitute a permanent incapacity]; citing, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

Conclusion

8. Ms. Carter did not meet her burden of producing competent medical evidence demonstrating she is permanently and substantially incapacitated for the performance of her usual duties as a Staff Services Analyst with the Employment Development Department due to rheumatologic (lupus and fibromyalgia) and orthopedic (cervical disc disease) conditions. Therefore, her Disability Retirement Election Application seeking disability retirement benefits should be denied.

ORDER

Respondent Valerie B. Carter's Disability Retirement Election Application dated February 28, 2014 is DENIED.

DATED: July 28, 2016

DocuSigned by:
Coren D. Wong
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COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings