

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 the
Industrial Disability Retirement of:

HERMINIA I. ARRAS,

Applicant/Respondent,

and

LAKE ELSINORE UNIFIED SCHOOL
DISTRICT,

Contracting Entity/Respondent.

Case No. 2015-1020

OAH No. 2016020967

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 26, 2016, in San Bernardino, California.

John Shipley, Senior Staff Attorney, represented Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS), State of California.

Herminia Arras, respondent, represented herself.

The matter was submitted on July 26, 2016.

ISSUE

Did competent medical evidence establish that Mrs. Arras was substantially disabled or incapacitated from performing the usual and customary duties of a school bus driver as a result of orthopedic (neck, back and right leg, foot and ankle) injuries at the time she filed her application for a disability retirement on September 23, 2014?

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

August 15, 2016
Ruthie E. Schuetz

SUMMARY

The competent medical evidence established that Mrs. Arras was not substantially incapacitated from performing the usual and customary duties of a school bus driver at the time she filed her application for an industrial disability retirement. Mrs. Arras's testimony was credible with respect to her claim of pain while performing her duties. However, the fact that performing one's duties is painful does not meet the substantial incapacitation standard for purposes of an industrial disability retirement.

FACTUAL FINDINGS

Jurisdictional Matters

1. Mrs. Arras was employed as a school bus driver with the Lake Elsinore Unified School District from 1995 to 2014. By virtue of her employment, respondent is a member of CalPERS subject to Government Code section 21151.
2. On June 30, 2014, Mrs. Arras signed a Service Retirement Election Application.
3. On September 23, 2014, Mrs. Arras signed a Disability Retirement Election Application claiming the right to receive an industrial disability retirement on the basis of orthopedic injuries to her neck, back, and right leg, foot, and ankle. Mrs. Arras claimed "pain on lower lumbar area cause[d] by prolonged sitting and driving over bumps."
4. CalPERS obtained and reviewed medical records and reports related to Mrs. Arras's condition. CalPERS selected an independent medical examiner to perform a disability evaluation. James Fait, M.D., examined Mrs. Arras on April 24, 2015. Dr. Fait concluded Mrs. Arras was not substantially incapacitated from performing the usual and customary duties of a school bus driver. Dr. Fait authored a report memorializing his findings.
5. After review of all relevant medical reports, including the independent medical examination completed by Dr. Fait, CalPERS determined that respondent was not permanently disabled or substantially incapacitated from performance of her usual job duties as a school bus driver at the time she filed her application for a disability retirement.
6. By letter dated June 19, 2015, CalPERS notified Mrs. Arras of its determination that she was not entitled to an industrial disability retirement. Mrs. Arras timely appealed that determination.¹

¹ Mrs. Arras noted in her appeal letter that she declined a fitness for duty examination prior to filing an application for service and industrial disability retirements because she had already undergone multiple examinations by other doctors.

7. On February 24, 2016, Anthony Suine, Chief, CalPERS Benefits Services Division, signed the Statement of Issues in his official capacity denying Mrs. Arras's application for a disability retirement. This hearing ensued.

Duties of a School Bus Driver²

8. The Lake Elsinore Unified School District's list of usual and customary job duties and essential functions of a school bus driver requires, generally, that a school bus driver be able to: Drive a school bus within prescribed routes in accordance with time schedules; escort and assist students on and off the bus when necessary; transport students and teachers on field trips; maintain cleanliness of the school bus; inspect the school bus and report any mechanical errors; assure security of the school busses; evacuate the school bus in a safe and timely manner when necessary; and maintain accurate records pertaining to school bus activities. The physical demands of the job include sitting over 70 percent of the time and the ability to lift over 50 pounds on an occasional³ basis.

Mrs. Arras's History of Injuries

9. In 1999, while working for the school district, Mrs. Arras suffered a herniated disk at C4-5 after the bus hit a ditch. She underwent surgery for this injury, received physical therapy, and according to Mrs. Arras, healed completely. She returned to full duty and worked without incident until January 19, 2012.

10. On January 19, 2012, while driving a school bus, Mrs. Arras experienced a tingling, sharp pain from the lower back, to the neck, down her shoulders, and into her right leg. Mrs. Arras reported the pain to her employer. She was placed on temporary disability due to ongoing pain. She filed a worker's compensation claim on January 31, 2012. Over the ensuing year, Mrs. Arras remained off-work but ultimately returned to work with full duties approximately one year later. She continued to perform her usual and customary duties and treat with various doctors⁴ until June 4, 2014. On that date, her employer told her that because of the 50 pound weight restriction placed on her by worker's compensation doctors, she could not evacuate a school bus in an emergency. Therefore, she could not perform her duties as a school bus driver.

² This is a summary of the essential functions that a school bus driver with the Lake Elsinore Unified School District must be able to perform.

³ The school district's job description sheet lists each duty or function and assigns a rating of occasionally, frequently, constantly, and not present/does not exist. The "occasionally" rating is the lowest rating and means that the physical activity occurs under 1/3 of the time.

⁴ Mrs. Arras provided the names or business cards of approximately twelve doctors, not including Dr. Fait, whom she claimed to have seen since 2012.

The district provided Mrs. Arras with three options: File for a service retirement; choose another open position for which she qualified within the district, subject to interview and testing requirements; or, if she desired to remain on the job, undergo a fitness for duty medical examination. Mrs. Arras did not want to undergo another medical examination and was unable to find another position within the district. She filed for a service retirement.

Dr. Fait's Independent Medical Examination

11. Dr. Fait testified at the hearing regarding his independent medical evaluation on April 25, 2015, and his report. Dr. Fait is a board certified orthopedic surgeon. He obtained his medical degree in 1996 from the University of California, Davis. Following medical school, he completed his internship in surgery and his residency in orthopedic surgery. Dr. Fait also completed post-doctoral training in hip and knee reconstruction.

12. After completing his residency, Dr. Fait worked at Kasier Permanente for approximately 11 years in the Department of Orthopedic Surgery. When he left Kasier, he worked in private practice for three years performing orthopedic surgery. Dr. Fait specializes in disorders of the joints or bones, predominantly joints and/or bones located in the back, mid-back, neck and extremities. He completes both operative and non-operative assessments of patients suffering from conditions of the joints and bones, treats fractures, performs reconstructive surgery, and treats patients for degenerative conditions.

13. Dr. Fait is familiar with the standard used by CalPERS to determine whether someone is substantially incapacitated from performing his or her usual and customary duties for purposes of an industrial disability retirement. CalPERS attached a letter describing the standard with the letter sent to Dr. Fait when it requested he perform an independent medical evaluation of Mrs. Arras.

14. On the date of her examination with Dr. Fait, Mrs. Arras reported that she was experiencing aching pain in her neck. She told Dr. Fait the pain is always present but worsens with activity. Mrs. Arras described the pain as radiating from the neck to her shoulders and into her lower back. She denied numbness, tingling, or weakness in her arms, wrists, hands, or fingers. Mrs. Arras told Dr. Fait that turning her head, looking up or down, and any movement of her head aggravate the pain. She noted that, on average, her pain rates at a level 5 on a scale from 1 to 10.

15. Mrs. Arras complained of pain in her lower back that radiates down through her right leg to her right foot. She told Dr. Fait the pain is aggravated by sitting for too long, walking for too long, pushing, pulling, squatting, and sudden movements. She noted that, on average, her lower back pain rates at a level 5 on a scale from 1 to 10.

16. Mrs. Arras also complained of pain in her right ankle and right foot. She told Dr. Fait the pain comes and goes with activity. It is aggravated by walking or standing for too long, stepping too hard, sudden movements, and walking on uneven ground.

17. During his comprehensive physical examination, Dr. Fait took Mrs. Arras's vital signs and circumferential measurements of her upper and lower extremities. He also examined her cervical spine, shoulders, elbows, wrists, and lumbar spine. Dr. Fait reviewed the essential functions of a school bus driver for the Lake Elsinore School District as well as Mrs. Arras's prior medical records, which included MRI scans from 2012. Dr. Fait interviewed Mrs. Arras in order to ascertain the mechanism of injury; history of injuries; why Mrs. Arras applied for an industrial disability retirement; what past treatments were rendered; and her occupational, social and family history.

18. Dr. Fait concluded that Mrs. Arras was not substantially incapacitated from performing the usual and customary duties of a school bus driver. Specifically, he concluded the following:

On physical examination, I note evidence of prior cervical spinal fusion with an expected reduction in range of motion. Neurological assessment in both upper extremities is normal without evidence of atrophy, symmetric reflexes, or abnormal motor or sensory function in the right or left arms. Examination of the low back reveals tenderness to palpation and evidence of nerve root irritability in the right lower extremity with positive Lasegue's test and diminished sensation to light touch and the L5 and S1 distribution as well as weakness in the right extensor hallucis, again consistent with likely L5 nerve root impingement. This does not coincident with the MRI report and multilevel degenerative disk disease that I have noted on reviewing the MRI films of June 26, 2012.

Overall, [Mrs. Arras] appeared to put forth good effort and I do not note evidence of symptom magnification.

19. Dr. Fait concluded Mrs. Arras is capable of sitting, standing, bending, kneeling, climbing, squatting, and twisting, as well as lifting and carrying up to 50 pounds on an occasional basis. Dr. Fait also found it noteworthy that Mrs. Arras informed him she was able to return to work and continue full duties in the usual and customary position of a school bus driver "without flare-up or worsening of low back pain." He explained that the 50-pound weight restriction placed on Mrs. Arras by a worker's compensation doctor was prophylactic in nature in order to reduce the intensity and frequency of flare-ups of pain. However, Dr. Fait noted that prophylactic restrictions are not a basis for a disability retirement.

Evidence Presented by Mrs. Arras

20. Mrs. Arras testified that she was a school bus driver for 19 years. She explained that she drove into a ditch in 1999 on her regular route as a school bus driver, which led to an injury to her neck. She had surgery in 2000 and recovered fully. She returned to full duties and worked until 2005.

21. In 2005, Mrs. Arras started treating with various doctors because she was experiencing aches, pain, and fatigue. She underwent testing for many things to try to uncover the source of the aches, pain, and fatigue, to no avail. She continued driving the school bus until 2012.

22. On January 19, 2012, Mrs. Arras experienced what she described as a "spasm" in her right leg. She said it occurred when she got off the school bus. She said the "sharp" pain radiated down from her shoulders and into her right leg and foot. She told the secretary she was going to go to her doctor.

23. On January 31, 2012, Mrs. Arras's supervisor called her into the office and had her fill out a worker's compensation claim. She did so, and was sent to a doctor. That doctor took her off work for some time. Over the next two and one-half years, she was "on and off work" while she was treating with various doctors. The pain would get better and resolve; then she would go back to work and it would worsen. During that period she underwent an MRI, went to physical therapy, and saw a chiropractor.

24. Mrs. Arras presented a document that appeared to be a report regarding a medical evaluation performed on April 12, 2014, in connection with her worker's compensation case. The document contained a work restriction indicating that Mrs. Arras was precluded from pushing, pulling, or lifting anything greater than 35 pounds and was not to engage in repetitive bending or stooping. Although the entire report containing this restriction was not submitted, neither Mrs. Arras nor CalPERS disputed the accuracy of this information.

25. Mrs. Arras presented an undated document entitled, "Addendum to Page 7 of Stipulations With Request For Award." That document referenced an April 22, 2014, report completed by Dr. Donald Kim, and contained various disability calculations. It appeared to be a worker's compensation award to Mrs. Arras.

26. According to Mrs. Arras, she had been working several months in her regular duties when, in June 2014, a school nurse and other school administrators met with her and gave her a summary of her job duties. The school nurse told Mrs. Arras that she could not perform the duties of her position because of the 35-pound weight restriction placed on her by the worker's compensation doctors, and the 50 pound weight requirement of her position. Mrs. Arras stated that the school told her she could retire, take another fitness for duty examination, or take a part-time position as a crossing guard, although she would have to apply and test for the position.

27. Mrs. Arras said she did follow up on the position, as well as others, but there were no openings. She said she did not want to have further MRI's because of a history of cancer in her family, so she declined any further fitness for duty examinations. Mrs. Arras stated she chose retirement because she felt she did not have a choice.

28. Mrs. Arras attempted to work as a bus driver following her service retirement in June 2014 but could not get on the bus. She has a student worker help her with cleaning the house and doing heavy lifting and pulling. Her husband also helps her with work around the house.

29. Mrs. Arras's testimony was credible and sincere.

30. Richard Arras, Mrs. Arras's husband, testified at the hearing. Mr. Arras testified that he helps his wife as much as he can. He said she cannot wash the car or clean, and she has a difficult time with housework. Mr. Arras said Mrs. Arras gets tired and fatigued and has pain and spasms.

Mr. Arras explained that the injuries Mrs. Arras suffered as a result of her job has "damaged her life." He said it is especially heartbreaking because she loved being a school bus driver and worked in that capacity for 19 years.

Mr. Arras was present at the meeting between his wife and the school district in June 2014 and corroborated Mrs. Arras's testimony that she was offered the option to retire, undergo further medical examinations, or search for another position within the district.

Mr. Arras's testimony was credible and sincere.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Applicable Statutes

2. Government Code section 20026 provides in 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.

3. Government Code section 21151, subdivision (a), provides in part:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall

be retired for disability, pursuant to this chapter, regardless of age or amount of service.

4. Government Code section 21156, subdivision (a), provides in part:

(a)(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. . . .

Appellate Authority

5. “Incapacitated” means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. The board must consider the duties actually and usually performed by the applicant, and not simply examine a job description or a list of job demands prepared by an employer, to determine if the applicant is incapacitated for the performance of duty. (*Hosford v. Bd. of Administration* (1977) 77 Cal.App.3d 854, 860-861.) Disability is not an inability to perform fully every function of a given position. When an applicant can perform his or her usual and customary job duties, even though doing so may be difficult or painful, the employee is not substantially incapacitated and does not qualify for an industrial disability retirement. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 886-887.) Mere difficulty in performing certain tasks is also not enough to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d at p. 854.) Further, the claimed disability must be presently disabling; a disability that may be aggravated with time or that is speculative does not satisfy the requirements of the Government Code. (*Id.* at 863.)

Evaluation

6. Cause does not exist to grant Mrs. Arras’s application for an industrial disability retirement. A preponderance of the evidence did not establish that she suffered from a physical or mental condition of a permanent or extended and uncertain duration that rendered her substantially incapacitated from performing the usual and customary duties of a school bus driver at the time she filed her application for an industrial disability retirement.

A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to qualify him or her as an expert on the subject to which the testimony relates. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1318-

1319.) An expert witness may give opinion testimony based on matters (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that are of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates. Uncontroverted expert opinion testimony, like any other testimony, may be rejected by the trier of fact, so long as the rejection is not arbitrary. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.)

Here, Dr. Fait qualifies as a competent medical expert. Mrs. Arras, although credible and genuine regarding her claim of pain and discomfort when performing her job duties, did not present any competent medical evidence to contradict Dr. Fait's conclusion that she was not substantially incapacitated from performing her usual and customary job duties at the time she filed her application for an industrial disability retirement. Although a worker's compensation doctor placed a prophylactic restriction of not being able to lift over 35 pounds, the job description and Mrs. Arras's testimony established that the ability to lift over 50 pounds is an occasional, and not a usual or customary, job duty of a school bus driver. Further, prophylactic restrictions such as a 35 pound weight restriction are insufficient to qualify a person for an industrial disability retirement.

Moreover, although Mrs. Arras's employer informed her she needed to retire or select another position within the district because of her inability to lift children off of a school bus in an emergency due to the weight restriction, the propriety of that decision is not at issue in this case. No evidence was submitted to show that Mrs. Arras could not perform that function, if necessary. Indeed, Dr. Fait's uncontroverted conclusion was that she could lift over 50 pounds on an occasional basis. Mrs. Arras was performing her job duties for several months before her employer told her she must make a decision to retire or undergo a fitness for duty medical examination. Thus, Mrs. Arras was performing the usual and customary duties of her position at the time she filed her application for an industrial disability retirement. Although Mrs. Arras did experience pain or discomfort during the performance of her usual and customary job duties, that does not render a person eligible for an industrial disability retirement. (*Mansperger, supra*, 6 Cal.App.3d at p. 886-887.)

Accordingly, based on the evidence presented and in consideration of applicable statutory and appellate law, Mrs. Arras's application for an industrial disability retirement must be denied.

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ORDER

The application for an industrial disability retirement filed by Herminia Arras with the California Public Employees' Retirement System is denied.

DATED: August 12, 2016

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kimberly Belvedere
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KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings