

ATTACHMENT E
THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

In the Matter of the Application for Industrial
Disability Retirement of:

NICOLE D. COLLINS,

Respondent,

and

SACRAMENTO METROPOLITAN FIRE
DISTRICT,

Respondent.

Case No. 2015-0026

OAH No. 2015031290

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on July 5, 2016, in Sacramento, California.

Preet Kaur, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Nicole D. Collins did not appear at hearing, and no one appeared on her behalf. No one appeared for or on behalf of respondent Sacramento Metropolitan Fire District. 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 5, 2016.

SUMMARY

The sole issue on appeal is whether Ms. Collins is permanently and substantially incapacitated for the performance of her usual job duties as an Accounting Technician for Sacramento Metropolitan Fire District on the basis of an orthopedic (upper extremities, back,

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FILED

July 27, 2016
Marilyn Martinez

and neck) condition. The only medical evidence admitted into evidence established she is not substantially incapacitated. Therefore, Ms. Collins's application for industrial disability retirement should be denied.

FACTUAL FINDINGS

Procedural Background

1. Ms. Collins is a local miscellaneous member of CalPERS subject to Government Code section 21151¹ by virtue of her employment as an Accounting Technician with Sacramento Metropolitan Fire District. She signed, and CalPERS received, a Disability Retirement Election Application seeking industrial disability retirement benefits on January 21, 2014.

2. Ms. Collins described her specific disability as carpal tunnel syndrome and chronic pain, and explained it occurred May 6, 2013, as the result of "prolonged hand and shoulder pain, back pain, upper and lower arm pains." She claimed she could not use her hands for prolonged periods of time and could not lift, pull, type, or write because she "can't use hands most of the time." Her last day of work was October 29, 2013.

3. CalPERS denied Ms. Collins's application for industrial disability retirement by correspondence dated October 6, 2014. Ms. Collins timely appealed the denial. Diane Alsup, Interim Chief of CalPERS's Benefit Services Division, signed the Statement of Issues in this matter solely in her official capacity on February 24, 2015.

Physical Requirements of an Accounting Technician

4. A document entitled "Physical Requirements of Position/Occupational Title" signed by the human resources manager for Sacramento Metropolitan Fire District indicates an Accounting Technician must be able to perform the following physical tasks for the following durations:

¹ That statute provides:

(a) 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.

(b) This section also applies to local miscellaneous members if the contracting agency employing those members elects to be subject to this section by amendment to its contract.

Sitting, Constantly²

Standing, Occasionally

[] ... []

Kneeling, Never

Climbing, Occasionally and Never

Squatting, Frequently

Bending (neck), Occasionally

Bending (waist), Never

[] ... []

Reaching (above shoulder), Occasionally

[] ... []

Pushing & Pulling, Occasionally

[] ... []

Repetitive Use of Hand(s), Constantly

Keyboard Use, Constantly

Mouse Use, Occasionally

Lifting Carrying

- 0 – 10 lbs, Constantly**
- 11 -25 lbs, Occasionally**
- 26-50 lbs, Never**
- 51 – 75 lbs, Never**
- 76 – 100 lbs, Never**
- 100 + lbs, Never**

² “Occasionally” is defined as up to three hours, and “frequently” is defined as three to six hours.

Medical Evidence

5. At CalPERS's request, Harry A. Khasigian, M.D., a board-certified orthopedic surgeon with a subspecialty in orthopedic sports medicine, performed an independent medical examination (IME) of Ms. Collins on August 19, 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. Collins's chief complaints consisted of intermittent pain in her cervical spine when bending upward and downward, as well as when looking straight. She stated the pain radiated from her cervical spine to her shoulders and arms. She further claimed that bending and lifting produced global symptoms in her upper extremities. She also reported that her hands fall asleep at night and got stiff, but denied that they went numb with driving. Finally, she reported pain in her lumbar spine, which radiated down her thighs and occasionally into her calves. She also stated the pain sometimes goes down to all her toes in both feet.

7. Ms. Collins's claimed painful activities included bending, stooping, squatting, kneeling, lifting, climbing, pushing, pulling, and reaching above the shoulder. She stated she could not lift any item weighing 10 pounds, and could not mow the lawn, wash her car, or vacuum her house. Her symptoms were worse in the morning. No activities relieved her pain.

8. Upon physical examination, Ms. Collins showed a reduced range of motion in her lumbar spine, cervical spine, and shoulders. She claimed to feel pain upon light touch to her lumbar spine, but had no spasm, guarding, erythema, or tissue abnormalities. She reported pain in her right PSIC upon light touch, but there was no redness, swelling, or deformity. There was a normal thoracic kyphosis, and there was no winging scapula. When Dr. Khasigian held Ms. Collins' shoulders level, the acromioclavicular joints were not prominent, there was no evidence of atrophy, and the tissues were stable and without deformity. Dr. Khasigian opined that her complaints of pain in her shoulders upon movement were "completely inconsistent with the amount of movement and energy involved." Tinel's sign was negative in the wrist and elbow. Phalen's test produced an ache in the dorsal wrist joint that was "completely inconsistent with Phalen's test."

9. Dr. Khasigian reviewed an MRI of Ms. Collins's cervical spine taken June 18, 2014. There were signs of mild degenerative disc disease and "almost imperceptible bulging at C6-7." There were no signs of cord compression or any other measurable abnormality.

10. An MRI taken of Ms. Collins's lumbar spine on the same date also showed degenerative disc disease at L3-4 and L5-S1. But the nerve roots were clear, visible next to the neural canal, and did not appear compromised. There was no central protrusion or spinal stenosis.

11. **Dr. Khasigian summarized the IME in his report as follows:**

Ms. Collins presents with a myriad of symptoms from head to toe at a level 10/10 pain which is unresolved by removal of her work activities and extensive treatment. She has on clinical examination and history an extensive amount of nonphysiological behavior and many Waddell's findings. Her presentation shows voluntary restriction of function and multiple inconsistencies accountable to psychosocial overlay and nonphysiological behavior. She does not have any because of her significant overriding nonphysiological findings clinical evidence of true abnormality with regard to radiculopathy, but again there is significant overlay which is precluding a reasonable attempt of examination.

With regard to the Phoenix records and reviewing the MRIs directly, there is no significant disc protrusion. There is degenerative disc disease and narrowing of the disc space at L5-S1, but there is no significant compromise of the nerve roots. Again, her clinical examination is so distorted that it is difficult to correlate, but it would appear that an independent electromyogram (EMG) outside the confines of the current treaters would be a more appropriate way to evaluate her. Without electrodiagnostic confirmation, there would appear to be just based upon a clinical presentation no neurological deficits. It would appear in this current situation given the manner of presentation from the latest treaters than [*sic*] an independent EMG outside would be a more appropriate way to approach an evaluation of her nerve function.

12. **Dr. Khasigian concluded Ms. Collins was unable to lift more than 50 pounds or to bend and lift 50 pounds or less for more than three hours in an eight-hour shift. He found no need to place any restrictions on her cervical spine, shoulders, or upper extremities, and concluded she was able to walk, drive, and stand, without restriction. Therefore, he concluded she was not substantially incapacitated for the performance of her usual duties as an Accounting Technician.**

13. **After preparing his IME report, Dr. Khasigian was provided additional medical records to review. After reviewing those records, he produced a supplemental report which included the following discussion:**

Ms. Collins continues to have elaborative subjective complaints, unconfirmed by appropriate clinical findings. She has "minimal-to-mild" carpal tunnel syndrome bilaterally, per nerve

conduction study with a normal EMG and no evidence of cervical radiculopathy.

Dr. Khasigian concluded that the additional medical records did not cause him to change his opinion that Ms. Collins was not substantially incapacitated.

14. Dr. Khasigian was provided additional medical records to review after he submitted his supplemental report. After reviewing those records, he produced a supplemental report which included the following conclusions:

1. With respect to the diagnosis of carpal tunnel syndrome, Ms. Collins has eliminated that diagnosis via her normal nerve conduction studies. This is no longer a viable diagnosis with respect to her complaints.

2. Cervical spine. Ms. Collins has some mild degenerative change in multiple levels. She has a negative EMG indicating no radiculopathy. This condition of minor degenerative changes in her cervical spine does not produce limitations or restrictions from her usual and customary occupation.

3. Lumbar spine. Based on the various studies, she has degenerative disc disease at L5-S1 only. Her multiple clinical examinations do not show radiculopathy. She has been recalcitrant to any type of treatment including RFA and epidural steroids indicating it is unlikely a physiological condition. Due to her normal clinical presentation other than elaborative subjective complaints, this is not a disabling condition, particularly for her occupation which involves sitting six hours, standing three hours, and walking three hours with no lifting up to 25 pounds [sic] three hours.

15. No evidence rebutting Dr. Khasigian's opinions was presented by or on behalf of Ms. Collins.

Discussion

16. The sole medical evidenced established Ms. Collins is not permanently and substantially incapacitated for the performance of the usual duties of an Accounting Technician with Sacramento Metropolitan Fire District. Therefore, her application of industrial disability retirement should be denied.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Ms. Collins has the burden of proving she qualifies for industrial 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

6. Ms. Collins did not meet her burden of producing competent medical evidence demonstrating she is substantially incapacitated for the performance of her usual duties as an Accounting Technician with Sacramento Metropolitan Fire District due to an orthopedic (upper extremities, back, and neck) condition. Therefore, her Disability Retirement Election Application seeking industrial disability retirement benefits should be denied.

ORDER

The application of Nicole D. Collins for industrial disability retirement benefits is DENIED.

DATED: July 22, 2016

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