

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:

SUSAN E. SCHMIDT,

Respondent,

and,

STATE CENTER COMMUNITY
COLLEGE DISTRICT,

Respondent.

Case No. 2014-0842

OAH No. 2016041033

PROPOSED DECISION

This matter was heard before Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, on September 15, 2016, in Sacramento, California.

Cynthia A. Rodriguez, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Neither Susan E. Schmidt (respondent) nor the State Center Community College District (District) appeared at the hearing. CalPERS established that it properly served the Notice of Hearing on both respondent and the District. Consequently, this matter proceeded as a default hearing against respondent and the District under Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for decision on September 15, 2016.

ISSUE

At the time of respondent's application for disability retirement, was respondent permanently disabled or substantially incapacitated from the performance of her duties as an

Administrative Secretary I for the District based on rheumatologic (fibromyalgia) and psychiatric conditions?

FACTUAL FINDINGS

Duties of an Administrative Secretary I

1. At the time of her application for disability retirement, respondent was employed as an Administrative Secretary I for the District. A duty statement for the Administrative Secretary I position was not submitted into the record.

2. The physical requirements of the job include: constant (over six hours) sitting, reaching above the shoulder, keyboard use, and mouse use; frequent (three to six hours) fine manipulation; occasional (up to three hours) standing, walking, climbing, squatting, bending (neck and waist), twisting (neck and waist), reaching above the shoulder, pushing and pulling, power grasping, simple grasping, repetitive use of hands, lifting/carrying up to 25 pounds, driving, and operation of foot controls or repetitive movement.

The job does not require: running; crawling; kneeling; climbing; squatting; pushing and pulling; power grasping; lifting and carrying; walking on uneven ground; driving; working with heavy equipment; being exposed to excessive noise, extreme temperature and humidity, dust, gas fumes or chemicals, working at heights; operating foot controls; using special visual or auditory protective equipment; and working with biohazards.

Respondent's Employment History

3. Respondent was employed by the District. The evidence did not establish when she was first employed. Respondent's last day on the payroll was January 8, 2013. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150. Respondent retired for service effective January 9, 2013.

Respondent's Disability Retirement Application

4. On January 24, 2013, CalPERS received respondent's Disability Retirement Election Application (application). In response to the question on the application about her specific disability, and when and how it occurred, respondent wrote: "[S]ee attachment[.]" However, there was no attachment to her application offered into evidence.

5. On May 27, 2014, Anthony Suine, Chief of the Benefit Services Division, notified respondent that her application had been denied based upon a finding that her rheumatologic (fibromyalgia) and psychiatric conditions were not disabling, and that she was not substantially incapacitated from the performance of her job duties as an Administrative Assistant I. Respondent timely filed an appeal.

CalPERS' Expert – Scott Thomas Anderson, M.D.

6. Dr. Anderson is board-certified in internal medicine and rheumatology. He is a clinical professor of medicine at the UC Davis Division of Rheumatology, Allergy and Clinical Immunology. He is also a qualified medical evaluator for the State of California. Dr. Anderson did not testify at hearing, but his examination report was admitted into the record. On April 2, 2014, Dr. Anderson conducted an independent medical examination (IME) of respondent at the request of CalPERS. Dr. Anderson reviewed respondent's medical, social, occupational and treatment history, performed a physical examination and prepared a report dated April 3, 2014. Dr. Anderson described respondent's chief complaint as "Body pain." Respondent complained of a "constellation of nonspecific symptoms including pain throughout her body." The pain was "all over." Respondent experienced stiffness and "misfiring nerves." Respondent described having arthritis, although Dr. Anderson noted no history of any specific arthritic condition such as systemic lupus or rheumatoid disease.

7. Respondent also complained of depression and a change in her personality. She reported that her symptoms began because of a "poor work environment." Respondent complained of low back pain, nervousness with periods of occasional diarrhea, and "overwhelming debilitation." Dr. Anderson noted that respondent had no history of inflammatory bowel disease, Crohn's disease, weight loss malabsorption or any other specific diagnosis relative to the intestines.

8. Respondent's medical history included an electroencephalogram (EEG) diagnostic workup, x-rays of the back and head, blood tests, magnetic resonance imaging (MRIs), nerve tests, urine tests, psychological testing, and endoscopy. Respondent's past treatment included physical therapy, nerve stimulation, shots and injections, chiropractic care, pain management, medications, and ultrasound. Respondent was also undergoing counseling for "living and dealing with death in the family."

9. Respondent's past medical history consisted of arthritis, anemia, high blood pressure, stomach problems/ulcer, sexually transmitted diseases, and fibromyalgia. Respondent had a number of surgeries, including bariatric surgery with placement of a laparoscopic band that was subsequently removed, and she had surgery on her left knee and shoulder.

10. Respondent's medications included 325 milligrams of Norco three times a day, 300 milligrams of Neurontin at bedtime, 10 milligrams of Zolpidem at bedtime, 30 milligrams of Paxil each morning, 150 milligrams of Trazodone at bedtime, and 500 milligrams of Cephalexin as needed.

11. Upon review of respondent's medical records, Dr. Anderson noted:

**The examinee is a frequent consumer of healthcare services.
She has a history of musculoskeletal injuries of a nonspecific**

nature, bilateral tubal ligation, depression, anxiety, what is described as "unstable bladder," subjective fatigue, normal EKG with sinus rhythm, normal blood pressure, essentially negative colonoscopy with the exception of internal hemorrhoids, possible fibrocystic breast changes prior to augmentation mammoplasty, gastritis, reflex esophagitis, major depressive disorder, degenerative disc disease with L5-S1 radiculopathy, report of fibromyalgia in 2006 and nonspecific abdominal discomfort[.]

12. Dr. Anderson noted that respondent presented as a "mildly anxious adult female in no acute distress ambulating without use of assistive devices." He did not note any concerns with respondent's neck, cardiovascular condition, lungs, abdomen, and extremities. Specifically, "all fibromyalgia trigger points are nontender representing a score of 0 out of 18."

Dr. Anderson noted normal curvature of the spine. His neurological examination noted that respondent was mildly anxious, and her cranial nerves were grossly intact.

13. Dr. Anderson made the following diagnoses:

- a. History of mechanical low back pain due to degenerative disc disease of the lumbar spine.
- b. Gastritis by history.
- c. Gastroesophageal reflux disease by history.
- d. History of internal hemorrhoids.
- e. History of external hemorrhoids.
- f. Status post bilateral tubal ligation.
- g. Subjective fatigue with no specific pathological findings and specifically no history of thyroid disease noted.
- h. Depression and anxiety.

OPINION

14. Dr. Anderson noted that respondent brought a "litany of complaints," but her physical examination was unremarkable, and he did not see any physical or mental obstacles to respondent performing her job duties. Although he noted a history of depression and anxiety, respondent appeared to be alert and oriented and did not manifest psychosis or

“expressive or reception aphasia that would preclude communication and performance of her duties.”

15. Dr. Anderson opined that respondent did not appear to qualify for disability retirement because she did not have anything that would constitute a “substantial incapacity” in performing her job duties. He found no evidence of inflammatory arthritis or deformity of the extremities that would preclude performing her job duties, and found no evidence of a specific back condition that would preclude sitting, standing, working in an office environment, precision gripping, power gripping, answering phones, dealing with computers, and responding to inquiries from the public.

16. Dr. Anderson noted that respondent was superficially cooperative with the examination process. Her complaints were out of proportion to the physical findings, and there was some exaggeration of complaints. He wrote, “I would simply observe that there appears to be a secondary gain issue in this examinee since her physical examination would not suggest that she has a significant medical condition requiring disability retirement.”

17. Dr. Anderson recognized that respondent had some health challenges, chief among them being depression and anxiety. However, from a medical perspective, respondent appeared to be in generally good health. Respondent had good blood pressure, her heart and lungs were clear, and there was no evidence of any significant arthritic deformity or chronic low back condition. Dr. Anderson concluded that respondent was not substantially incapacitated, and that respondent “can perform her duties without being absent from work at the current time.”

CalPERS’ Psychiatric Expert – Andrea R. Bates, M.D.

18. Dr. Bates is board-certified in psychiatry and neurology. She is the director of the Acute Unit at Sierra Vista Hospital, and a clinical instructor at the UC Davis School of Medicine. Dr. Bates did not testify at hearing, but her examination report was admitted into the record. On March 20, 2014, Dr. Bates conducted a psychiatric examination of respondent at the request of CalPERS. Dr. Bates reviewed respondent’s disability application, her job description, and medical records.

19. Respondent described her job duties as “a lot of client contacts.” Respondent described working with welfare clients that were troublesome, and she did not like that kind of atmosphere. The clients criticized everything she did, and she was micromanaged. She did not feel good, and her work environment affected her “heavily psychologically.”

20. Respondent reported that she began having physical symptoms due to her work environment. She had diarrhea in the office, and could not hold it. She reported being diagnosed with fibromyalgia and chronic fatigue. She was very depressed for years. The antidepressants prescribed to her did not work. She reported that she was in pain all of the time, and her body hurt because she had neuropathy. She stated that her “legs are the worst,” and her lower back “messed me up too.”

21. Respondent reported her mood to be "just flat, no energy, can't smile. I feel like I'm dead, like I have a bad disease that I'm dying." Respondent's sleep was poor, and she described being "beyond the level of fatigue." Respondent did not report being suicidal, but she wished she was dead. She reported having no social life. She had no energy to do anything. She had no energy to go to her job and to perform her job duties. All she could do was think about going home and laying down.

22. Regarding alcohol use, respondent stated that she had "alcohol binging weekends" as a teen. Respondent denied current consumption of alcohol, and stated that she has not consumed alcohol in years. Respondent denied a history of drinking problems in the past. Regarding drug use, respondent admitted to the use of street drugs in the past, including methamphetamine and marijuana. The last time she used marijuana was "a few years ago." She did not care for it, but she thought she would try it. Respondent last used methamphetamine in 2000, when she tried to lose weight.

23. Dr. Bates noted respondent's affect and mood as "unusual" and "blunted." Respondent looked as though she was going to cry at times. She would occasionally smile and laugh. Regarding respondent's thought content, Dr. Bates noted:

The degree of somatic focus and illness was almost to a delusional extent though there was no psychosis, no auditory or visual hallucinations, no evidence of ideas of reference. No delusions were stated.

24. Regarding respondent's cognitive functioning, Dr. Bates noted no significant evidence of "serious acute cognitive impairment on screening exam, though the screening did not rule out learning or cognitive problems of a more subtle nature." In addition, Dr. Bates noted that respondent had poor psychological insight into her somatic bias.

25. Dr. Bates' diagnoses were the following:

Axis I: Major Depressive Disorder, Recurrent, Severe,
rule out with Psychotic Features
Other Substance Use, Sustained Remission

Axis II: Deferred

Axis III: History of Fibromyalgia and Chronic Pain (and
other general medical problems not listed as
contributory to her disability as her primary
general medical physician)

Axis IV: Occupational Stressors, Social Stressors, Primary
Support Stressors

26. Dr. Bates opined that respondent "is convinced that she is more impaired than she is." Respondent lacked motivation to work and function, and had a mindset of thinking that she had "profound illness." Respondent stopped working, and her symptoms worsened. Dr. Bates opined that respondent "probably would be able to perform the job duties if she had motivation to do so." Respondent's complaints were primarily subjective. Dr. Bates pointed out that respondent's psychiatrist indicated that respondent had a severe major depressive order with psychotic features. However, Dr. Bates did not see psychotic features during her interview, "though there w [sic] is a suggestion of such."

27. Dr. Bates determined that respondent, at the time of her interview, was unable to perform the essential job duties of an Administrative Secretary, including typing, proofreading, filing, checking, drafting correspondence, tracking budget expenditures, operating a variety of office machines, answering phones, receptionist duties, scheduling and cancelling appointments, entering and retrieving data from computers, assigning work, and related duties.

28. Dr. Bates further determined that respondent was substantially incapacitated from performing her job duties. Dr. Bates reviewed CalPERS' Medical Qualifications for Disability Retirement, and found that respondent's impairment "was to the degree that the member had a substantial inability to perform the usual and customary duties of the position." However, Dr. Bates opined that respondent thought that respondent was more impaired than she was.

29. Dr. Bates' conclusion that respondent is substantially incapacitated from the performance of her duties is not supported by the summary and assessment. Dr. Bates made clear that respondent volitionally chose not to work, and that respondent would be able to perform her job duties if she had the motivation to do so. Dr. Bates noted that respondent's somatic focus was almost to a delusional extent, but Dr. Bates did not find psychosis, or auditory or visual hallucinations. Dr. Bates' conclusion is internally inconsistent with her opinion as to respondent's substantial incapacity on the basis of a psychiatric condition.

Conclusion

30. Dr. Anderson persuasively concluded that respondent was not permanently disabled or substantially incapacitated from performing the usual duties of an Administrative Secretary I with the District. Dr. Bates persuasively opined that respondent had "poor psychological insight into her somatic bias," but concluded that respondent was substantially incapacitated from performing her duties. Due to the inconsistency between Dr. Bates' analysis and her conclusion, her opinion cannot be given any weight. Respondent did not appear for the hearing. The above matters having been considered, respondent did not establish through competent medical evidence that, at the time of application, she was permanently disabled or incapacitated from performing the usual duties of her position as an Administrative Secretary I for the District.

LEGAL CONCLUSIONS

1. Respondent had the burden of proof to establish by a preponderance of evidence that she was “incapacitated for the performance of duty,”¹ which courts have interpreted to mean “the substantial inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.) Discomfort, which may make it difficult to perform one’s duties, is insufficient to establish permanent incapacity from performance of one’s position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, 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, supra*, 77 Cal.App.3d at p. 863.)

2. An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of 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 [the sheriff’s] condition are dependent on his subjective symptoms”].)

3. *Mansperger, Hosford* 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 an Administrative Secretary I on the basis of rheumatologic (fibromyalgia) and psychiatric conditions. Respondent did not present any evidence to meet this burden.

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

¹ Although no court construing CalPERS law has ruled on this issue, courts applying the County Employees’ Retirement Law have held that the applicant has the burden of proof. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691.) CalPERS may rely on decisions affecting other pension plans when the laws are similar. (*Bowman v. Board of Pension Commissioners for the City of Los Angeles* (1984) 155 Cal.App.3d 937, 947.) In this case, Government Code section 31724 (County Employees’ Retirement Law) is similar to Government Code section 21151 (California Public Employees’ Retirement Law), and the rule concerning the burden of proof is therefore applicable. Furthermore, Evidence Code section 664 creates the general presumption that a public agency has performed its official duty. Here, CalPERS has fulfilled its duty to determine respondent’s eligibility for disability retirement, and the burden falls on respondent to rebut the presumption of Evidence Code section 664 by proving incapacitating disability.

and customary duties of an Administrative Secretary I for the District. Her application for disability retirement must, therefore, be denied.

ORDER

The application for service pending disability retirement filed by respondent Susan E. Schmidt is DENIED.

DATED: October 14, 2016

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Danette C. Brown
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DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings