

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:

Case No. 2016-0069

GWYNDOLYN HARSHAW,

OAH No. 2016031362

Respondent,

and

FRESNO UNIFIED SCHOOL DISTRICT,

Respondent.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on September 20, 2016, in Fresno, California.

The California Public Employees' Retirement System (CalPERS) was represented by Kevin Kreutz, Senior Staff Attorney.

There was no appearance by or on behalf of Gwendolyn Harshaw (respondent) or the Fresno Unified School District (District). Respondent and the District were duly served with Notices of Hearing. The matter proceeded as a default against respondent and the District, pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on September 20, 2016.

ISSUE

The issue on appeal is whether, on the basis of right and left arms and shoulders conditions (orthopedic conditions), respondent is permanently disabled or substantially incapacitated from the performance of her usual and customary duties as a Custodian for the District?

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED Sept. 27 2016
Summer Kuyfott

PROCEDURAL FINDINGS

1. Respondent was employed with District from approximately 1987 until 2013. As of June 2013, respondent worked as a Custodian for the District. On December 4, 2013, respondent signed and thereafter filed an application for disability retirement (application) with CalPERS. By virtue of her employment respondent is a local miscellaneous member of CalPERS pursuant to Government Code section 21150. Respondent was approximately 56 years old when she filed her application.

2. In filing the application, respondent claimed disability on the basis of "weakness" in her right and left arms and shoulder. Respondent also listed "depression." Respondent indicated that she was not able to "lift" because she was "not stable."

3. CalPERS obtained medical records and reports, including records prepared by Pam Janda, M.D., Loveneet Singh, M.D. and Joseph Serra, M.D., who conducted an Independent Medical Evaluation (IME) of respondent's orthopedic conditions. After reviewing the records, CalPERS determined that respondent was not substantially incapacitated from the performance of her job duties as a Custodian for the District.

4. On September 8, 2015, CalPERS notified respondent that her application was denied. Respondent was advised of her appeal rights. Respondent filed an appeal and request for hearing by letter dated October 1, 2015.

5. On March 11, 2016, Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, made and thereafter filed the Statement of Issues.

FACTUAL FINDINGS

Respondent's Employment History and Duties of a Custodian

1. From approximately 1987 until April 2013, respondent worked as a Bus Driver for the District. In April 2013, respondent's treating physician, Dr. Janda, took respondent off work. Respondent returned to work in June 2013. The District placed respondent in a Custodian position. Respondent worked as a Custodian until August 2013.

2. As set forth in the District's Position Description, a Custodian for the District must:

clean and maintain an assigned school facility, group of buildings, or office space in a sanitary, orderly and reasonable timely manner to provide a safe and high quality learning environment for students and staff.

The specific duties of a Custodian include interior floor care, carpet care, furniture and woodwork care, upkeep of restrooms, cleaning windows, walls, chalkboards and dry erase boards, moving furniture and equipment, performing basic yardwork, locking and securing doors and gates, and performing basic maintenance.

3. On December 12, 2013, respondent signed a "Physical Requirements of Position/Occupational Title" form (Physical Requirements form). The Physical Requirements form was submitted to CalPERS. According to the Physical Requirements, when working as a Custodian, respondent: (1) constantly (over 6 hours) stood, walked, bent at the waist, twisted at her neck and waist, reached above and below the shoulders, pushed and pulled, engaged in fine manipulation, power and simple grasped, and repetitively used her hands; (2) frequently (three to six hours a day) squatted, bent her neck, lifted from 0 to 25 pounds, walked on uneven ground, worked with heavy equipment, was exposed to excessive noise, extreme temperature, humidity, wetness, dust, gas, fumes or chemicals, and operated foot controls or repetitive movement; (3) occasionally (up to three hours), sat, crawled, kneeled, climbed, lifted from 26 to 50 pounds, drove and worked with bio hazards; and (4) never ran, worked at heights, or used special visual or auditory protective equipment.

Independent Medical Evaluation by Joseph Serra, M.D.

4. On April 20, 2015, at the request of CalPERS, Dr. Serra conducted an IME of respondent. Dr. Serra is a board-certified orthopedic surgeon. Dr. Serra operated a private practice from 1966 until 2002, where he treated orthopedic patients. Since approximately 2002, Dr. Serra has performed IMEs for CalPERS. Dr. Serra prepared a report dated April 27, 2015, concerning his IME of respondent.

5. As part of the IME of respondent, Dr. Serra asked respondent to complete an extensive questionnaire, which she did with the assistance of her daughter who accompanied her to the IME. Dr. Serra interviewed respondent, obtained a medical and work history, and conducted a physical examination. He also reviewed respondent's job description, the physical requirements of a Custodian and her medical records related to her orthopedic conditions, including records from Dr. Janda and Dr. Singh, a neurologist.

BACKGROUND AND COMPLAINTS

6. During the evaluation, Dr. Serra obtained a background and history of complaints from respondent related to her orthopedic conditions. Respondent informed Dr. Serra that she initially started having "some symptoms" in 2012, when she was working as a Bus Driver for the District. Respondent did not clarify what type of symptoms she had in 2012. Respondent reported that in 2013, she developed dizziness, confusion and an inability to function. She was taken off work by Dr. Janda from April 2013 until June 2013. Respondent returned to work in June 2013 and worked as a Custodian for the District until August 2013, when she was no longer able to work.

7. Respondent's current complaints were that she had dizziness and weakness. Respondent reported that she was not able to hold her grandchildren in her arms because of her arm weakness. Respondent also reported that she had "intermittent cramps in the abdomen." If she moved too quickly, she developed cramps in her arms and legs, which she described as an "8" out of a 10 on a 10-point pain scale. Respondent also reported that her weakness was so severe that she was not able to get out of a chair without assistance. Respondent arrived at the IME using a walker, which she told Dr. Serra she used regularly for walking. She also reported being unsteady on her feet and afraid of falling.

8. Respondent reported that she was not able to do most household chores. She could not vacuum, carry groceries, wash a car, do lawn work or make a bed. Her daily activities included going outside to sit. She could walk a short half-block with her walker and the assistance of someone. She also wore gloves on both hands when she used her walker due to pain in her hands from gripping and putting weight on the walker.

PHYSICAL EXAMINATION

9. Dr. Serra conducted a physical examination of respondent. Dr. Serra noted that respondent had her eyes closed during most of the examination. She also frequently moaned as she was "ambulating with her walker." Respondent's daughter informed Dr. Serra that a person must walk with respondent, otherwise she would "lose her balance and fall forward." Dr. Serra also noted that it was "apparent" that respondent "would be capable of getting up and moving on her own if she chose to do so."

10. An examination of respondent's upper extremities revealed "no evidence of atrophy and no tremors." Dr. Serra testified that if respondent had problems with motor function, there would typically be a loss of muscle mass, which he did not observe when conducting respondent's examination. Respondent had weakness with grip in both of her hands and she complained of "sudden cramps in the left upper arm when making a fist with the left hand." She was also "resistant to abduction of digits and extension of her wrists with the complaint of pain and cramps in both arms." She had full range of motion in the digits of both of her hands.

11. Dr. Serra also conducted a neurologic examination of the upper extremities. Respondent's motor function was "intact in spite of the subjective complaint of weakness." During the sensory examination respondent reported that she had diminished sensation in the upper extremities bilaterally in a "stocking type distribution." Dr. Serra testified that "stocking type" diminished sensation only typically occurs in severe cases such as muscular dystrophy or in cases where all three nerves of the upper extremities have sustained a significant injury to the spinal cord. Dr. Serra found no evidence during the physical examination or in reviewing respondent's medical records that she was diagnosed with any condition that would explain her report of stocking type distribution of diminished sensation.

12. Respondent's reflexes revealed "biceps, triceps, and brachioradialis are 3+ bilaterally." Her peripheral pulses were "intact."

13. The examination of respondent's back was difficult to perform due to respondent's report of dizziness and weakness. She complained of tenderness to palpation over the paravertebral musculature and the lower lumbar spine. Dr. Serra did not find any evidence of spasm which may have indicated a disc injury. Respondent also complained of tenderness to palpation over the sacroiliac joints and the sciatic notch bilaterally, however upon compression administered by Dr. Serra, the sciatic notch did not elicit radiating pain to the lower extremities.

14. Respondent informed Dr. Serra that she could not perform range of motion testing on the lumbar spine because she experienced dizziness as she tried to flex forward. She also complained of pain with extension. Respondent's daughter held respondent as she attempted to flex her lumbar spine. Respondent's daughter also helped her in and out of the chair during the examination.

15. The neurologic examination of respondent's lower extremities revealed motor weakness bilaterally. Respondent complained of cramps on dorsiflexion of her feet. She also reported symptoms of "hip esthesia to light touch and pinwheel in both lower extremities in a stocking type distribution." She also complained of pain with light stroking of the skin. Seated, respondent was able to elevate her knees through full extension with no complaints of pain, which demonstrated to Dr. Serra that respondent's other complaints of pain in her lower extremities were subjective.

16. Dr. Serra described respondent's physical examination as "bizarre." He stated that respondent's "subjective complaints make it difficult to evaluate her objectively, also occasionally there would be an outburst of shouting during the exam."

REVIEW OF MEDICAL RECORDS

17. Dr. Serra reviewed respondent's medical records and diagnostic studies from July 2007 through October 2014. Dr. Serra testified that an MRI conducted of respondent's cervical spine demonstrated some arthritis in her neck and narrowing where nerves exit from the spine. However, the arthritis and narrowing was not to such an extent that would explain her degree of subjective complaints. Additionally, in April 2013, respondent was evaluated by Dr. Singh, a neurologist, who opined that respondent's symptoms were "unlikely neurogenic but consistent with conversion and mood disorder."

IMPRESSION

18. Dr. Serra opined that respondent had:

1. Subjective complaint of weakness in upper and lower extremities. Etiology undetermined. Neurologic evaluations within normal limits.
2. Significant functional overlay.

19. Dr. Serra opined that there are no specific job duties that respondent is unable to perform because of her orthopedic conditions. He opined that there was "significant exaggeration of complaints." Specifically he stated:

Her subjective complaints include all part of her body with numbness and weakness. No specific neurologic diagnosis has been suggested. There is gross exaggeration of complaints. Her subjective complaints far outweigh objective findings.

20. Dr. Serra opined that based on his evaluation, review of medical records and review of respondent's job duties, respondent can perform all the functions of a Custodian for the District. He further opined that respondent was not disabled or substantially incapacitated from the performance of her usual and customary duties as a Custodian as a result of any orthopedic condition.

Discussion

21. When all the evidence is considered, Dr. Serra's opinion that respondent is not permanently disabled or substantially incapacitated from performance of the usual and customary duties of a Custodian for the District, was persuasive. Respondent's physical examination and the medical records reviewed by Dr. Serra revealed that there are no objective findings to support respondent's subjective complaints of pain and weakness in her upper and lower extremities. Dr. Serra persuasively opined that respondent does not have any orthopedic condition which would prevent her from performing the usual and customary duties of a Custodian for the District.

Respondent did not present any medical evidence to support her application. In the absence of supporting medical evidence, respondent's application for disability retirement must be denied.

LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21150, subdivision (a), which provides in pertinent part, "[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..."

2. To qualify for disability retirement, respondent must prove that, at the time she applied, she was "incapacitated physically or mentally for the performance of his or her duties..." (Gov. Code, § 21156, subd. (a)(1).) As defined in Government Code section 20026,

"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. Incapacity for the performance of duty” under Government Code section 21022 [now section 21151] “means the substantial inability of the applicant to perform his usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876.) Substantial inability to perform usual duties must be measured by considering applicant’s abilities. Discomfort, which makes 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.) A condition or injury that may increase the likelihood of further injury, as well as a fear of future injury, do not establish a present “substantial inability” for the purpose of receiving disability retirement. (*Hosford v. Board of Administration of the Public Employees’ Retirement System, supra*, 77 Cal.App.3d at 863-864.) As the court explained in *Hosford*, prophylactic restrictions imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature.

4. An applicant for disability retirement must submit competent, objective medical evidence to establish that at the time of application, she was permanently disabled or incapacitated from performing the usual duties of her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.) In *Harmon*, the court found 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 sheriff’s] condition are dependent on his subjective symptoms.

5. The burden of proof was on respondent to demonstrate that she is permanently and substantially unable to perform her usual duties such that she is permanently disabled. (*Harmon v. Board of Retirement of San Mateo County, supra*, 62 Cal. App. 3d at 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) Although respondent asserted subjective complaints of disability during her IME, she did not appear at hearing and did not present competent, objective medical evidence to establish that she was permanently disabled or incapacitated from performance of her duties as a Custodian for the District at the time she filed her disability retirement application. Therefore, based on the Factual Findings and Legal Conclusions as a whole, respondent is not entitled to retire for disability pursuant to Government Code section 21150.

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ORDER

Respondent Gwyndolyn Harshaw's application for disability retirement is DENIED.

DATED: September 26, 2016

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Marcie Larson
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MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings