ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Disability Retirement of: MARILYN STRASBURG-LANGFORD, Respondent, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, CALIFONRNIA CORRECTIONAL CENTER, Respondent.	Case No. 2014-1001 OAH No. 2016040824

PROPOSED DECISION

This matter was heard before Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings, State of California, on September 8, 2016, in Sacramento, California.

John Shipley, Staff Counsel, represented petitioner California Public Employees' Retirement System (CalPERS).

Respondent Marilyn Strasburg-Langford (respondent) was present and represented herself.

There was no appearance by or on behalf of respondent California Department of Corrections and Rehabilitation (CDCR), and the matter proceeded as a default against CDCR, pursuant to Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for decision on September 8, 2016.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FILED Oct. 12, 2016
Summer Hazlett

ISSUE

On the basis of orthopedic (back problems, bulging discs, pinched nerves, intense pain, occasional numbness) conditions, is respondent permanently disabled or substantially incapacitated from performing her usual and customary duties as an Office Technician for CDCR?

PROCEDURAL FINDINGS

1. Respondent was employed by CDCR from approximately 2001 to February 2011. On April 13, 2014, respondent signed and thereafter filed with CalPERS an application for industrial disability retirement (application) on the basis of orthopedic conditions. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150. She has the minimum service credit necessary to qualify for retirement.

2. After reviewing the application, CalPERS retained Robert Henrichsen, M.D., to conduct an independent medical examination (IME) of respondent's orthopedic conditions and write a report. After reviewing Dr. Henrichsen's IME report, CalPERS determined that respondent was not permanently and substantially incapacitated from the performance of her duties as an Office Technician.

3. By letter dated September 4, 2014, CalPERS notified respondent of its determination and advised her of her appeal rights. On September 15, 2014, respondent filed an appeal and request for hearing. On October 20, 2014, Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, made and filed the Statement of Issues.

4. Subsequently, respondent submitted additional medical records to CalPERS, which CalPERS forwarded to Dr. Henrichsen for his review. Dr. Henrichsen prepared a supplemental IME report, dated January 19, 2016. By letter dated January 29, 2016, CalPERS informed respondent that, after reviewing the supplemental IME report, CalPERS's determination of respondent's disability application remained unchanged.

FACTUAL FINDINGS

Employment History and Duties of an Office Technician

5. In 2001, respondent was hired by CDCR as a Correctional Officer at the California Correctional Center. She was off from work from 2003 to 2007, due to a back injury. In 2007, respondent returned to work and medically demoted to Office Technician, which is the position she held at the time she applied for disability retirement.

6. As set forth in the Essential Functions statement, an Office Technician must be able to perform the following relevant functions:

- Must be able to sit and/or stand for extended periods of time depending on assigned tasks for the day, which may include computer work, data input, filing, etc.
- Must be able to bend, twist, reach and lift in order to receive/put away/retrieve office supplies weighing up to 25 pounds, supply shelving ranges up to … approximately 4 feet. Office supplies can include boxes of paper, ink cartridges/toner, lamination cards, and other basic office supplies.
- Maintain and update files and records of inmate work status and assignments in a neat and organized manner, and purge files when appropriate.
- Retrieve and deliver requested files to appropriate staff, document and maintain track of files.
- Generate and maintain inmate gate passes and work exchange passes.
- Operate various office machines such as copy machines, fax machines, printers, scanners, postage machine, folder/inserter/sealer machine, paper cutters, and calculators.
- Monitor supply levels and complete/submit new supply orders as needed.

7. On September 11, 2013, respondent signed a "Physical Requirements of Position/Occupational Title" form (Physical Requirements form), which was submitted to CalPERS. According to the Physical Requirements form, an Office Technician is expected to: (1) constantly (over six hours a day) sit, bend and twist at the neck, engage in fine manipulation and repetitive use of the hands, and use a keyboard and mouse; (2) frequently (three to six hours a day) stand, walk, bend and twist at the waist, reach above and below the shoulder, and carry up to 10 pounds; and, (3) occasionally (up to three hours a day) run, crawl, kneel, climb, squat, push and pull, simple and power grasp, lift and carry up to 75 pounds, walk on uneven ground, drive, be exposed to excessive noise, extreme temperature, humidity and wetness, dust, fumes and chemicals, work at heights, operate foot controls or engage in repetitive movement, use special visual or auditory protective equipment, and work with bio-hazards.

Respondent's Application and Testimony

8. In her application, respondent described her specific disability as, "problems with back, [bulged disc], pinched nerves, intense pain, numbness on occasion." She asserted the disability began in approximately September 2003. Respondent further stated that, though she was uncertain as to the cause of her disability, she experienced "ongoing back

pain and problems" that worsened over time. Regarding how the disability affects her ability to perform her job as an Office Technician, respondent wrote:

> I can't stand or sit for too long, can't hardly lift and can't handle a lot of bending, sometimes get pinched nerve so bad I have trouble walking, can't handle simple touch to the lower back, sometimes can't stand straight.
>
> [¶] ... [¶]
>
> ... At times, when the pain is extreme, I can't perform my job duties effectively. I can't stand and bend for filing. [I] had to medically demote because I couldn't perform officer duties. Now I can't even do all the duties required of an Office Tech[nician].

9. Respondent is 38 years old. She is married and has six children, ranging in age from 4 to 13. At hearing, she testified to having back issues prior to 2003. As a Correctional Officer, she was required to wear a heavy duty belt with equipment. She took Ibuprofen to alleviate the back pain, but it was not helpful and she went off work from 2003 to 2007. During this time, respondent attended physical therapy, which was unsuccessful. She considered back surgery, but her surgeon recommended against it. Her primary care doctor, Hal Meadows, M.D., asked her about medical retirement. However, respondent felt too young to retire and wanted to continue working. Ultimately, she agreed to medically demote to an Office Technician in order to return to CDCR. She worked in that position for four years. However, the constant sitting and bending made her back pain unbearable. In February 2011, she went out on medical leave.

10. Respondent described being unable to sit on hardwood floors or during long car rides. She cannot sit at a table and play with her children, or do dishes or laundry for a prolonged time. She often walks with a limp and has experienced several falls after her leg "gives out." She takes Ibuprofen for back pain and uses a heating pad for her pinched nerve. Physical exercise is difficult. She often feels depressed about being off from work, as she liked her job and wants to set a good example for her children.

Medical Evidence

11. Respondent did not call any medical experts to testify at hearing, but she introduced medical records from Dr. Meadows, dating from July 31, 2012 to August 29, 2016. Dr. Henrichsen's IME report and supplemental IME report summarized additional medical records from Dr. Meadows, dating from September 2003 to October 2015, which respondent previously had provided to CalPERS. All of this evidence was received as

administrative hearsay, and has been considered to the extent permitted under Government Code section 11513, subdivision (d).[1]

12. Hal Meadows, M.D. Dr. Meadows began treating respondent for low back pain as early as 2003, when she first went off from work. He continued to treat her and kept her off from work until 2007. In January 2011, respondent saw Dr. Meadows and reported increased back pain. She was pregnant at this time. Dr. Meadows diagnosed respondent with back pain and sciatica, and recommended she take Ibuprofen and Tylenol. On June 7, 2011, six weeks after giving birth, respondent continued to experience back pain, tenderness, reduced range of motion, and mild spasms. Dr. Meadows recommended she stay off from work. On August 29, 2011, he diagnosed respondent with lumbosacral disc disease. On November 21, 2011, Dr. Meadows noted respondent still experienced back pain and her back was soft. In addition, respondent had tenderness, 90 degrees of flexion, and a slow gait. Respondent was pregnant again at this time. Dr. Meadows ordered she remain off work.

13. On February 11, 2013, Dr. Meadows noted respondent had no new injuries. Her soft back, reduced range of motion, and tenderness persisted. Her last MRI was in 2003. Dr. Meadows diagnosed respondent with lumbosacral disc disease. Dr. Meadows treated respondent again on April 10, 2013, and noted persistent tenderness and reduced range of motion in her back. He diagnosed her with chronic low back pain, and recommended she consider different employment in the future.

14. On July 8, 2013, respondent had a follow-up appointment with Dr. Meadows and complained of continued pain in her back and feet. Dr. Meadows stated she is a probable candidate for medical retirement.

15. On September 3, 2013, Dr. Meadows completed a physician's report on disabilities[2] wherein he noted respondent's examination findings were low back pain, sciatic symptoms, and the inability to stand. He opined her diagnosis was lumbosacral disc disease and that she had permanent incapacity.

16. In a referral note dated August 29, 2016, Dr. Meadows wrote that respondent was unable to return to work and that her condition had reached maximum improvement "at this time." He further wrote that respondent was considered to be permanent and stationary.

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[1] Government Code section 11513, subdivision (d), in relevant part, provides:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

[2] A copy of Dr. Meadows's report was not offered into evidence, however Dr. Henrichsen summarized it in his May 13, 2014 IME report.

17. <u>IME by Dr. Henrichsen.</u> CalPERS retained Dr. Henrichsen to conduct an IME of respondent. Dr. Henrichsen is a board-certified orthopedic surgeon. He testified at hearing. On May 13, 2014, he physically examined respondent, reviewed her history, medical records, and job duties, and issued an IME report. At the time of the IME, respondent was 36 years old. Respondent told Dr. Henrichsen her chief complaint was low back pain, especially if she must be partially bent forward. She had a "constant bruised feeling in her low back," she had reduced walking and could not run. She expressed sometimes having "pain down toward or to the popliteal area on the right more than the left side. Respondent estimated her pain level between 7.5 to 9, on a 10 scale, with "constant aching in the midline of the low back with increased sensitivity in the low back and then sharp pains with twinges in both buttocks into the upper thighs about not quite halfway to her knees."

18. Upon physical examination, Dr. Henrichsen noted respondent was "an alert, delightful lady." She walked with a normal gait without the aid of a cane, crutch, or orthosis. She had normal muscle strength to stand on her heels and toes, and did not exhibit hip muscle weakness. She was able to squat to 70 percent normal and rise with good strength. Her femoral nerve test was 8/12 centimeters without eliciting lower extremity symptoms. When standing, her lumbar lordosis increased.

19. Measuring respondent's lumbar range of motion Dr. Henrichsen noted:

> After a suitable warm up, active lumbar range of motion. Flexion 90, 90, and 90 degrees, extension 10, 12, and 15 degrees, lateral bending 20/25, 20/25, and 20/25 degrees, active rotation 25/25 degrees. She has some pain with those motions. Pain is more on extension of her spine than flexion. She does reverse and re attain (sic) her lumbar lordosis with spine motion.

20. A prone examination also demonstrated an increase in respondent's lumbar lordosis. She had additional weight centered around her low back and hips generally. She had no specific muscle spasms or trigger points. Dr. Henrichsen further noted:

> She has some tenderness in the midline from L3 to S2, the paraspinal muscles generally are not symptomatic to palpation. She does not have tenderness over the sacrococcygeal junction today, but actually is in the level of S2 which is her tailbone area of pain. Abnormal skin markings are not seen. Her trochanters have minimal tenderness and her buttocks are a little tender at most without reproduction of sciatic radicular like syndrome.

21. A supine examination found respondent's active straight leg raising 60/65 degrees. In the straight leg position, ankle flexion and extension did not reproduce radicular symptoms, though caused respondent low back pain. Testing of her hip range of motion was

normal when straightening, but less than normal when bending. Range of motion in her knees and ankles was normal.

22. A sitting evaluation had no abnormal findings. Respondent was not tender over the peroneal nerve at the fibular neck, and she had no evidence of a Baker's cyst. She had no ankle clonus. Her right reflexes were obtained only with reinforcement. A sensory evaluation was normal. Respondent had "no edema of either lower extremity and her strength [was] grade 5 in both lower extremities." She had no Babinski sign.

23. Dr. Henrichsen diagnosed respondent with: (1) history of degenerative disc disease, lumbar spine, and (2) unfavorable power to weight ratio. He further noted:

> [Respondent] needs standing x-rays, AP and lateral of her lumbar spine, and it would be appropriate for me to review the last MRI scan summary, which my understanding was approximately in the year 2013 or 2014.

24. Dr. Henrichsen opined that, at the time of the IME, respondent was unable to perform specific job duties of an Office Technician as follows: (1) unable to sit constantly over six hours due to degenerative disc disease; (2) unable to bend at the waist on a frequent basis; and, (3) unable to lift more than 50 pounds. Dr. Henrichsen further opined that respondent was substantially incapacitated from the performance of her duties since February 2011, when she last worked. However, he noted that said incapacity was temporary with an expected duration of less than six months. During this temporary time, Dr. Henrichsen recommended respondent have a "standing x-ray, AP and lateral, of the lumbar spine and her treating physicians' visual review of the last lumbar spine MRI scan." He explained that a 2003 MRI scan[3] was inappropriate to review in order to determine the permanency of respondent's incapacity, and that the additional information would allow Dr. Meadows to identify an effective treatment program.

25. <u>Supplemental IME report.</u> After he submitted his May 13, 2014 IME report, CalPERS asked Dr. Henrichsen to review additional medical records submitted by respondent. Dr. Henrichsen reviewed the additional information and submitted a supplemental IME report dated January 19, 2016.

26. The additional records included a review of a lumbar spine MRI scan ordered by Dr. Meadows and interpreted by Randall Pierce, M.D. on January 3, 2014. Dr. Henrichsen summarized the record as follows:

> [Dr. Pierce] reports she had lumbosacral degenerative disease, and a history of coccygeal pain since childbirth. He found some atrophy of the soft tissues. The overall alignment was normal. There was degenerative disc disease at L4-5 and L5-S1 with

[3] The 2003 MRI scan was not made part of the record.

> mild disc space narrowing at L4-5. More specifically, at L5-S1 there was a small disc bulge without central or foraminal stenosis. At L4-5 there was a tiny area of high signal on the posterior part of the disc that could represent a tiny annular tear. The proximal three levels were normal of the lumbar spine. The sacroiliac joints looked normal.

27. The remaining medical records consisted of summaries of Dr. Meadows's continued treatment of respondent through October 27, 2015. During this time, respondent had continued tenderness and reduced range of motion in her back. On October 27, 2015, Dr. Meadows noted that respondent had tenderness in the mid-part of her lumbar spine with minimal possible spasm, and that she had limited range of motion of 90 degrees. He diagnosed respondent with chronic lumbosacral degenerative joint disease. He concluded she could not return to work at CDCR and that she was considered to be permanent and stationary.

28. In his supplemental IME report, Dr. Henrichsen noted that the new information did not alter or change any of his previous opinions or conclusions. He explained:

> It remains my opinion that she had a temporary disability at the time, additional studies were undertaken to get up-to-date and determine a better understanding of her low back pain generator. This new MRI scan demonstrates she had typical degenerative disease of a slight amount and of no great significance, based on the MRI scan reviewed by Dr. Pierce.
>
> My understanding of her treatment in the interim is that she had the new MRI scan, she did not have any significant active treatment except to take some ibuprofen, and this information demonstrates that the less than six months of temporary disability, which I previously opined, is appropriate. The new information does not demonstrate that she has permanent substantial incapacity for occupational work as [an Office Technician.] There are not sufficient objective abnormal findings based on Dr. Meadows's additional examinations or the scan for her to be off work on a permanent basis, because of her low back.

Discussion

29. When all the evidence is considered, respondent did not meet her burden to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of an Office Technician. Respondent may suffer from back pain and that pain may make it more difficult for her to

perform her job duties, however, as discussed in the Legal Conclusions below, discomfort by itself is insufficient to establish a substantial incapacity, even if said discomfort makes it difficult to perform one's job duties.

30. To meet her burden, respondent was required to produce a competent medical opinion to establish her substantial incapacity. (Gov. Code, § 21156, subd. (a)(2).) She offered no expert medical testimony at hearing, and none of the medical records introduced contained a physician's opinion that respondent is permanently and substantially incapacitated for the performance of his usual duties. Dr. Meadows's notes, as summarized in the IME report, that respondent should consider disability retirement and should not return to CDCR are not useful without additional explanation. (See, *People v. Bassett* (1968) 69 Cal.2d 122, 144 [the value of an expert witness's opinion lies with his explanation of the factual predicate for his opinion]; *People v. Williams* (1962) 200 Cal.App.2d 838, 845 ["[T]he opinion of an expert is no better than the reasons upon which it is based"].) For the same reasons, Dr. Meadows's conclusion that respondent had reached maximal improvement and was considered to be permanent and stationary is insufficient to establish permanent substantial incapacity for purposes of qualifying for disability retirement.

31. In contrast, Dr. Henrichsen, in reaching his opinion that respondent was not permanently substantially incapacitated from performing the usual duties of an Office Technician, applied the standards applicable in disability retirement proceedings. His opinion that respondent's substantial incapacity was temporary only was persuasive.

32. In sum, when all the evidence is considered, respondent failed to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of an Office Technician. Consequently, her disability retirement application must be denied.

LEGAL CONCLUSIONS

1. Respondent has the burden of proving she is eligible for disability retirement benefits 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.) 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.)

2. To meet her burden, respondent had to prove that, at the time she applied she was "incapacitated physically or mentally for the performance of [her] duties in the state service." (Gov. Code, § 21156.) 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. An application for disability retirement of a member may be made by the member's employer, the governing body of the contracting agency with whom a member is employed, or the member herself. (Gov. Code, § 21152, subds. (a), (c), and (d).) The application must be made while the member is still in state service or within four months after the discontinuance of her state service. Upon receiving the application, the Board shall order a medical evaluation of the member to determine if he is incapacitated for the performance of duty. (Gov. Code, § 21154.) If the medical examination and other available information show, to the satisfaction of the Board, that the member is physically or mentally incapacitated for the performance of her duties and is eligible to retire for disability, the Board shall immediately retire her for disability. (Gov. Code, § 21156, subd. (a)(1).)

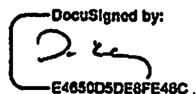
4. The courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform [her] usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) Discomfort, which may make it difficult to perform one's duties, is insufficient to establish permanent incapacity for the performance of her 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.)

5. As set forth in Factual Findings 29 through 32, respondent did not meet her burden. There was insufficient evidence based upon competent medical opinion that she is permanently and substantially incapacitated from performing the usual duties of an Office Technician due to an orthopedic conditions. Consequently, her disability retirement application must be denied.

ORDER

The application of Marilyn Strasburg-Langford for disability retirement is DENIED.

DATED: October 10, 2016



Tiffany L. King
Administrative Law Judge
Office of Administrative Hearings