

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:

LORIMARIE ORTEGA,

Respondent,

and

EMPLOYMENT DEVELOPMENT
DEPARTMENT,

Respondent.

Case No. 2015-1196

OAH No. 2016050574

PROPOSED DECISION

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on September 27, 2016.

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

Lorimarie Ortega, respondent, represented herself.

No appearance was made by or on behalf of respondent Employment Development Department (EDD).

The matter was submitted on September 27, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 27 Oct 20 16
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FACTUAL FINDINGS

Application for Disability Retirement

1. Ms. Ortega was employed by EDD as an Office Assistant. By virtue of her employment, Ms. Ortega is a state miscellaneous member of CalPERS subject to Government Code section 21150.

2. On April 29, 2015, Ms. Ortega signed a Disability Retirement Election Application¹ and submitted it to CalPERS. Ms. Ortega sought a disability retirement with a retirement date of September 16, 2014; she said her last day on EDD's payroll was September 15, 2014.

In her application, Ms. Ortega claimed a disability on the basis of "thoracic disc herniation T7-8. My disc is rupture[d] and dislocated." She said she had two surgeries on her lower back and has a disc bulge on her upper and mid back. She stated she requires a third surgery, but that surgery is more dangerous, and she has decided, upon her doctor's recommendation, to "live with the pain" for now. Ms. Ortega explained she sustained her injuries in 2011 when her vehicle was stopped behind a school bus and was hit from behind by a vehicle traveling at 60 miles per hour. She said she suffered a concussion, three torn discs, and two broken ribs in the accident. Ms. Ortega's two-year-old daughter and one-year-old son were with her in the vehicle; her daughter suffered substantial injuries to her chin and a fractured leg and ankle, and her son had no physical injuries but suffers from nightmares since the accident.

Ms. Ortega stated on the application that her injuries impact her ability to do her job because she "can't sit or stand for long period[s]. It's hard to bend [or] move. Sitting to type is hard because it hurts to reach for [the] keyboard. Chronic back pain." She said it was difficult for her to drive and she cannot walk for long periods. She cannot perform mail or filing duties she is expected to perform. Additionally, the pain medication she takes makes her drowsy. Ms. Ortega represented that she "tried to return to work after [her] first back surgery, but then [she] needed to have a second back surgery." She stated that she also suffers from Post Traumatic Stress Disorder as a result of the accident. She noted she tried to return to work after her second surgery for six hours a day but had to reduce it to four hours a day and then four hours every other day because of her physical limitations.

3. By letter dated August 5, 2015, CalPERS informed Ms. Ortega that, after review of her medical records, it had determined that her "orthopedic (back) condition is not disabling" and therefore, she was not "substantially incapacitated from the performance of [her] job duties as an Office Assistant (Typing). . . ." CalPERS denied her application for disability retirement. CalPERS advised Ms. Ortega she could return to work for EDD as an

¹ The application is signed by Ms. Ortega using her married name, Lorimarie Barringer. All other documents received in evidence refer to respondent as "Lorimarie Ortega," and she will be referred to as "Ms. Ortega" in this Proposed Decision.

office assistant, seek a different job with EDD or other CalPERS employer, stop working for a CalPERS employer and keep her retirement funds in her CalPERS account, or stop working for a CalPERS employer and request a refund of her CalPERS contributions.

4. Ms. Ortega appealed CalPERS's denial of her disability retirement. In her appeal letter, Ms. Ortega stated the results of a recent CT scan revealed that she had bone spurs on her upper and lower back. She represented that her physician believed the bone spurs to be the source of her continuing pain. She also stated that her primary physician had not released her to work.

5. Petitioner filed Statement of Issues No. 2015-1196 on February 1, 2016. The Statement of Issues stated that the "issue on appeal is limited to whether at the time of the application, on the basis of an orthopedic (back) condition, respondent Ortega is permanently disabled or substantially incapacitated from the performance of her duties as an Office Assistant for [EDD]."

Independent Medical Evaluation

6. Pierre S. Hendricks, M.D., is a board certified diplomate of the American Board of Orthopaedic Surgery and a Qualified Medical Examiner. He obtained his undergraduate degree from University of California, San Diego, and his medical degree from University of Southern California in 1977 and 1982, respectively. He has been board-certified since 1992. Dr. Hendricks retired in November 2015.

7. On June 8, 2015, Dr. Hendricks performed an independent medical evaluation of Ms. Ortega for CalPERS, and he wrote a report. Dr. Hendricks evaluated Ms. Ortega to determine her then-current status and whether she was able to perform the essential functions of her job. Dr. Hendricks reviewed and summarized medical records provided to him, and he conducted a physical examination. He also testified at the hearing. His testimony at the hearing was substantially consistent with his report.

REVIEW OF MEDICAL RECORDS

8. In October 2014, Ms. Ortega and her supervisor completed a CalPERS document "Physical Requirements of Position/Occupation" by reviewing a list of work tasks and determining the frequency Ms. Ortega was required to perform each task in her position as Office Assistant (Typing). Dr. Hendricks testified that he typically looks at the CalPERS document when conducting evaluations, but he did not list the document in his report, and he did not recall specifically reviewing it. However, Dr. Hendricks's report included a list of all of the work tasks described in the CalPERS document and the frequency assigned to each task by Ms. Ortega and her supervisor. Dr. Hendricks candidly stated that he did not recall discussing Ms. Ortega's specific job duties with her.

9. Ms. Ortega reported to Dr. Hendricks that the automobile accident in which she was injured occurred on March 4, 2011. She lost consciousness and was taken to an emergency room. She was told she suffered a concussion and two broken ribs.

10. A cervical MRI performed in April 2011, showed that Ms. Ortega had “mild disc desiccation in the cervical spine with no gross impingement of the nerve root.” A lumbar MRI performed the same day indicated that Ms. Ortega had “an annular tear with sub ligamentous disc protrusion of 3-4 MM with bilateral lateral recess involvement.” She was diagnosed with “contusion with laceration, residual dizziness; posttraumatic cervical spine injury; posttraumatic lumbar spine injury with L5 radiculopathy, annular tear and disc herniation L4-5 per MRI.” According to Dr. Hendricks, Ms. Ortega continued to have back pain and, in July 2011, her orthopedic surgeon, Dr. Stepan Kasimian, performed a L4-5 laminectomy². Ms. Ortega returned to work part time after her surgery. The surgery did not relieve her symptoms and she developed additional symptoms of numbness and weakness in her right leg. In November and December 2012, Dr. Kasimian determined Ms. Ortega’s symptoms were due to post laminectomy syndrome.

11. On February 2013, Ms. Ortega was examined by John Steinman, M.D. Dr. Steinman diagnosed “severe discogenic low back pain likely emanating from L4-5. Status post L4-5 laminectomy by Dr. Kasimian 7/21/11 . . . with minimal improvement.” Ms. Ortega stopped working on February 14, 2013. She reported continued back pain and leg numbness through June 2013.

12. On June 26, 2013, Ms. Ortega had her second back surgery – “anterior fusion L4-5, posterior lumbar fusion L4-5 with posterior lumbar instrumentation L4-5 and structural allograft L4-5.” Ms. Ortega continued to report low back pain and numbness and weakness in her legs following this surgery. Dr. Steinman diagnosed Ms. Ortega with “thoracic disc herniation T7-8 with persistent incapacitating pain.” In his notes of September 11, 2014, as summarized by Dr. Hendricks, Dr. Steinman stated “I have all along told [Ms. Ortega] to do the very best to live with the pain coming from her thoracic disc herniation. An absolute last result would be to undergo a fusion. She is experiencing significant pain from this but believe she will continue to try to live with this.” Dr. Steinman stated that Ms. Ortega “could work only sedentary type of jobs.” He described her incapacity as permanent. However, in a January 2015 letter, Dr. Steinman stated that Ms. Ortega’s job limitations as an office assistant included “No prolonged sitting, no pushing, pulling or lifting greater than 15 pounds, no repetitive bending or stooping, recommend adjustable height desk.”

13. In April 2015, Ms. Ortega reported to Dr. Steinman that her pain had gotten worse and that she experienced constant mid-back pain. Dr. Steinman diagnosed thoracic disc herniation T7-8 and rupture. He recommended a T7-8 posterior lateral fusion with T7-8

² No entry is made for July 11, 2011, in Dr. Hendricks’s summary of medical records he reviewed. The first entry relating to a laminectomy is dated August 14, 2012, which notes Dr. Kasimian’s assessment that Ms. Ortega has “post laminectomy syndrome.” In fact, there are no entries between May 5, 2011 and May 21, 2012.

posterior instrumentation with bone graft. He placed Ms. Ortega on total temporary disability in May 2015, but stated her disability was not permanent and was expected to resolve in less than six months. This is the last entry in Dr. Hendricks's summarization of medical records.

DR. HENDRICKS'S EXAMINATION AND EVALUATION

14. Dr. Hendricks examined Ms. Ortega's cervical spine, shoulders, elbows, wrists and hands, thoracolumbar spine, lower extremities, hips, knees, and ankles and feet. Dr. Hendricks found that Ms. Ortega did not appear to be in acute distress. He observed that she "move[d] about the examining room in a fluid comfortable manner without sign of distress. She does guard the motion of her back on standing from a sitting position." He found her gait to be normal. He did not find any areas in which Ms. Ortega showed objective signs of pain, tenderness or difficulty with a given task or movement. In one test, Dr. Hendricks stated Ms. Ortega's responses suggested "symptom amplification."

15. Dr. Hendricks discounted Ms. Ortega's suggestion that she did not evidence pain during his examination because she was taking strong pain medications. Dr. Hendricks stated Ms. Ortega's position could be accurate if she had just begun taking pain medications. He explained that, because she had been regularly taking pain medications, her body would have adapted to that level of medication, and there would not be a change in her performance of the tests he administered based upon the effects of those medications.

16. Dr. Hendricks opined that there were "no specific job duties that [Ms. Ortega] is unable to perform because of physical or mental condition." Dr. Hendricks disagreed with Dr. Steinman's opinion that Ms. Ortega was temporarily totally disabled. Dr. Hendricks stated "there was no documented complaint of mid back pain from 5/5/11 until sometime after 10/14/13. Based on her current examination, her current level of pain is not 'severe' and does not preclude sitting, typing or light lifting and carrying activities." As a result, Dr. Hendricks opined that Ms. Ortega was "not substantially incapacitated for the performance of her usual duties."

17. Dr. Hendricks's testimony was clear, and supported by objective findings. His demeanor was calm, and he explained his findings and opinions in a way that a layperson could understand them. He did not embellish his responses or demonstrate bias. His testimony was trustworthy and credible.

Essential Job Duties of an Office Assistant (Typing)

18. A Position Statement prepared by the EDD lists the essential job functions of an Office Assistant. The Position Statement provides that 30 percent of an Office Assistant's job involves processing incoming and outgoing mail; filling received orders for forms, pamphlets and other EDD materials; screening documents and claims received electronically; data entry; reviewing documents for completeness; and updating claims. Another 30 percent of the job duties involve typing forms, documents and correspondence

produced by field office staff; maintaining office correspondence and office files; and abiding by office confidentiality rules. Fifteen percent of an Office Assistant's job duties involve operating various office machines. Another 15 percent involves communicating with the public and co-workers. The remaining ten percent of job duties are categorized as "Marginal Duties" and include assisting in the management of special projects, and "[o]ther duties appropriate for the position/classification."

19. On October 13, 2014, Ms. Ortega signed the "Physical Requirements of Position/Occupational Title." document related to her position as Office Assistant (Typing). The document details the frequency with which Ms. Ortega was required to perform specific physical tasks. It provided that an Office Assistant is expected to be able to sit for over six hours per day. He or she uses a keyboard and mouse for three to six hours a day. An Office Assistant "Occasionally – up to 3 hours" must reach below the shoulder, push or pull, grasp, use his or her hands repetitively, and lift or carry light items. An Office Assistant is "Never" expected to stand, run, kneel, climb, squat, bend or twist his or her neck, bend or twist his or her waist, reach above the shoulder, use fine manipulation or power grasping, drive or walk on uneven pavement.

Ms. Ortega's Testimony at the Hearing

20. Ms. Ortega testified about the automobile accident that caused her serious injury. She testified emotionally about how she loved her job and how she was held in high regard by her superiors and coworkers prior to the accident. Ms. Ortega described herself as a competent "multitasker." She stated that before the accident, she would organize events for the office like pajama day, and she organized the March of Dimes campaign. She could, and did, rotate into any position needed at the job. She did not want to be disabled or to let go of her job, but after the accident and surgeries, she could not perform the job duties.

21. In 2012, Ms. Ortega felt she was recovered enough to return to her job. She started working six hours a day for five days a week. She found she could not keep up with the work load. She tried switching to the mail room but could not lift the mail container. She tried working in the workers' compensation and independent medical examinations sections of EDD, but could not perform the jobs required. Her employers were required to take other people from their jobs to help her complete her tasks. She was unable to file documents because the file drawers were too heavy and the files were kept up high, and she became tired of standing. Ms. Ortega testified that the medications she took made her sleepy and she was found asleep at her desk on one occasion.

After her second surgery, Ms. Ortega again tried to return to work. When she was unable to perform her job at six hours a day, she reduced her time to four hours a day. She was still unable to perform the job duties and reduced her time to four hours every other day. Ms. Ortega stated she was not financially able to work only four every other day as she was paying more in gas than she was receiving in pay. Ms. Ortega stated she felt compelled to resign her position because her supervisor was becoming frustrated by Ms. Ortega's inability to perform her job and told her she needed to quit.

22. Ms. Ortega testified that she is continuing to lose feeling in her legs and her fingers get numb. She has not had the third back surgery because she has been told it is more dangerous than the other two and she has a young family. She is unable to do most things for her family, and her husband and mother help a lot. Ms. Ortega's mother helps get the children ready for school and takes them to school. Her husband helps her get dressed and with some of her daily hygiene needs. Ms. Ortega spends most of her day in bed.

23. Ms. Ortega introduced reports of the results of a February 11, 2016, MRI Thoracic Spine Without Contrast, an April 8, 2016, CT Thoracic Spine Without Contrast, and a May 18, 2016, MRI Thoracic Spine Without Contrast as new evidence of her disabling condition. Ms. Ortega did not, however, introduce any medical evidence explaining what the test results meant and/or how they supported, if they did, a finding that she was disabled and incapacitated from performing the essential functions of her job. Dr. Hendricks reviewed the three test results and stated his opinion was not altered by the information provided in the results reports.

24. Ms. Ortega's testimony was sincere, credible and genuine. She did not appear to exaggerate or equivocate when answering questions. She did not appear to be malingering. Her testimony demonstrated a true and sincerely held belief that her injuries and medical conditions resulted in her inability to perform the essential job duties of an Office Assistant.

Ms. Ortega's Mother's Testimony at the Hearing

25. Antonia Ruiz, Ms. Ortega's mother, testified at the hearing. She stated that Ms. Ortega is "always in pain." Ms. Ruiz bathes her grandchildren, dresses them, and takes them to school. Ms. Ortega cannot bend to bathe the children. Ms. Ruiz does just about everything for Ms. Ortega.

Before her accident, Ms. Ortega was a happy girl, always on the go. Now most of her activities have stopped and she spends most days in bed. Ms. Ruiz and Ms. Ortega's husband try to get Ms. Ortega out during the day and on weekends. Ms. Ortega tries to do the housecleaning, but gets tired and is concerned she will hurt her back. Ms. Ortega does not want to be alone when she drives so Ms. Ruiz does what she can to help out. Ms. Ruiz stated she will always be there to help when she can.

LEGAL CONCLUSIONS

Statutory and Regulatory Authorities

1. Ms. Ortega has the initial burden to establish that she was, at the time of her application, permanently disabled or substantially incapacitated from the performance of her usual and customary duties as an Office Assistant. (Evid. Code, §§ 500; 550.) The standard of proof is a "preponderance of the evidence." (Evid. Code, § 115.)

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 21150, subdivision (a), provides:

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, unless the person has elected to become subject to Section 21076, 21076.5, or 21077.

4. Government Code section 21152, subdivision (d), provides that an application for disability retirement can be filed by a CalPERS member.

5. Government Code section 21154 provides in part:

The application shall be made only (a) while the member is in state service, . . . On receipt of an application for disability retirement of a member . . . the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. . . .

6. Government Code section 21156, subdivision (a)(1) provides:

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, . . .

Case Law Authorities

7. In order for Ms. Ortega to receive a disability retirement, she must establish she is disabled and incapacitated from the performance of her duties as an Office Assistant with the EDD. The phrase “incapacitated for the performance of duty” means “the substantial inability of the applicant to perform her usual duties.” (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Further, Ms. Ortega must establish the disability is presently disabling; a disability which is prospective and

speculative does not satisfy the requirements of the Government Code. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854, 863.)

8. The applicant in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and to apprehend violators; issuing warnings and serving citations; serving warrants and making arrests. He suffered injury to his right arm while arresting a suspect. There was evidence that Mr. Mansperger could shoot a gun, drive a car, swim, row a boat (but with some difficulty), pick up a bucket of clams, pilot a boat and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry the prisoner away. The court noted “although the need for physical arrests does occur in petitioner’s job, they are not a common occurrence for a fish and game warden.” (*Id.* at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding the applicant was not incapacitated for the performance of his duties, the court noted the activities he was unable to perform were not common occurrences and he could otherwise “substantially carry out the normal duties of a fish and game warden.” (*Id.* at p. 876.)

9. In *Hosford*, the court held that in determining whether an individual was substantially incapacitated from his “usual duties,” the court must look to the duties actually performed by the individual, and not exclusively at the job descriptions. Horace Hosford, a state traffic officer with the California Highway Patrol, suffered a back injury lifting an unconscious victim. In determining eligibility for a disability retirement, the court evaluated Mr. Hosford’s injuries according to the job duties required of his position as a sergeant, as well as the degree to which any physical problem might impair the performance of his duties. Thus, the actual and usual duties of the applicant must be the criteria upon which any impairment is judged. Generalized job descriptions and physical standards are not controlling nor are actual but infrequently performed duties to be considered. The *Hosford* court found that although Mr. Hosford suffered some physical impairment, he could still substantially perform his usual duties.

The *Hosford* court also rejected Mr. Hosford’s contention that he was substantially incapacitated from performing his usual and customary duties because his medical conditions created an increased risk of future injury. The court held the disability must be presently existing and not prospective in nature.

Evaluation

10. Ms. Ortega made a compelling case for finding she is disabled and substantially incapacitated from performance of the job duties of an Office Assistant. Her testimony about her daily pain and discomfort and the impact it has on her daily life was credible, sympathetic, and substantiated by her mother’s testimony. It is undisputed that Ms. Ortega’s life was altered in a dramatic and substantial way on March 4, 2011.

11. Despite Ms. Ortega’s credible testimony, the determination of whether she is disabled and incapacitated for performance of her essential job duties must be based on

“competent medical opinion.” (Gov. Code § 20026). The only medical evidence presented at the hearing came from Dr. Hendricks who examined Ms. Ortega, prepared a report of his findings and testified at the hearing. Although Dr. Hendricks stated in his report that he disagreed with Dr. Steinman’s opinion that Ms. Ortega was disabled, there was no persuasive evidence that Dr. Steinman opined that Ms. Ortega was disabled and incapacitated from the performance of her work duties under the standards applicable to CalPERS disability claims. Dr. Steinman did not testify at the hearing or provide a current report to support a finding of disability; all information about his evaluation of Ms. Ortega was provided by Dr. Hendricks in his summary of the medical records he reviewed. Those records included a September 2014 chart note in which Dr. Steinman opined that Ms. Ortega “could work only sedentary type of jobs.” Dr. Hendricks described Ms. Ortega’s work as an Office Assistant as the most sedentary of jobs. In a May 2015, note summarized by Dr. Hendricks, Dr. Steinman stated Ms. Ortega’s “disability” was not permanent and was expected to resolve in less than six months.

12. Upon this record, the only finding supported by the evidence is that Ms. Ortega failed to prove by a preponderance of the evidence, and by competent medical evidence, that she is substantially incapacitated from performing the usual and customary duties of an Office Assistant EDD within the meaning of *Mansberger* and *Hosford, supra.*

ORDER

Lorimarie Ortega’s appeal of CalPERS’s determination that she was not permanently disabled or incapacitated from performance of her duties as an Office Assistant (Typing) at the time she filed his application for a disability retirement is denied.

DATED: October 26, 2016

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Susan J. Boyle
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SUSAN J. BOYLE
Administrative Law Judge
Office of Administrative Hearings