

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:

DELISA RIOS,

Respondent,

and

CALIFORNIA DEPARTMENT OF
SOCIAL SERVICES,

Respondent.

Case No. 2014-0528

OAH No. 2016061217

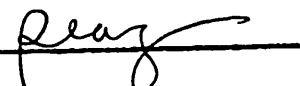
PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, Office of Administrative Hearings, State of California, on November 3, 2016, in Sacramento, California.

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

There was no appearance by or on behalf of Delisa Rios (respondent) or the California Department of Social Services (Department). Respondent and the Department were duly served with Notices of Hearing. The matter proceeded as a default against respondent and the Department, pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on November 3, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED November 21 2016


ISSUE

Whether on the basis of neck and back conditions (orthopedic conditions), respondent is permanently disabled or substantially incapacitated from the performance of her duties as a Disability Evaluation Analyst (Analyst) for the Department?

PROCEDURAL FINDINGS

1. Respondent was employed by the Department as an Analyst. On February 23, 2013, respondent signed and thereafter filed an application for disability retirement (application) with CalPERS. By virtue of her employment, respondent is a miscellaneous member of CalPERS subject to Government Code section 21150. Respondent was 49 years old when she filed her application. In filing the application, respondent claimed disability on the basis of chronic neck and low back pain.

2. CalPERS obtained medical records and reports prepared by Bradley Bower, M.D., Anant Ram, M.D., Jeffrey Alan Lee, M.D., Arnel Balbuena, M.D., and Mohinder Nijjar, M.D., who conducted an Independent Medical Evaluation (IME) of respondent concerning her orthopedic conditions. After reviewing the reports, CalPERS determined that respondent was not substantially incapacitated from the performance of her job duties as an Analyst for the Department.

3. On October 3, 2013, CalPERS notified respondent that her application for disability retirement was denied. Respondent was advised of her appeal rights. Respondent filed an appeal and request for hearing by letter dated October 15, 2013. On September 24, 2014, Anthony Suine, in his official capacity as Chief, Benefit Services Division, CalPERS, made and thereafter filed the Statement of Issues.

FACTUAL FINDINGS

Duties as an Analyst

1. The duties of an Analyst for the Department include adjudicating disability claims for benefits under the Social Security Supplemental Security Income or Medi-Cal programs. An Analyst is responsible for "establishing an applicant's eligibility for disability benefits by obtaining medical and vocational evidence, determining impairment severity, completing Psychiatric Review Technique Forms (PRTFs) and assessing Physical and/or Mental Residual Functional Capacity (RFC) in appropriate cases and evaluating the applicant's ability to engage in substantial work activity."

2. On February 22, 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

form, when working as Analyst, respondent: (1) constantly (over 6 hours) sat, twisted at her neck, reached below her shoulders, pushed and pulled, used fine manipulation, simple grasped, used a keyboard and mouse, and lifted between one and 10 pounds; (2) occasionally (up to three hours) stood, walked, bent at the neck and waist, and twisted at the waist; and (3) never ran, crawled, kneeled, climbed, squatted, reached above her shoulders, power grasped, lifted more than 10 pounds, walked on uneven ground, worked with heavy equipment, was exposed to dust, gas, fumes or chemicals, used special visual or auditory protective equipment, or worked with bio-hazards.

IME by Mohinder Nijjar, M.D.

3. On July 18, 2013, at the request of CalPERS, Mohinder Nijjar, M.D. conducted an orthopedic IME of respondent. Dr. Nijjar prepared an initial report on July 18, 2013, and a supplemental report on February 15, 2014. Dr. Nijjar testified at hearing. Dr. Nijjar has been licensed to practice medicine in California since 1980. He is a qualified medical evaluator, and he is certified by the American Board of Orthopedic Surgery.

4. As part of the IME, Dr. Nijjar interviewed respondent, obtained a personal and medical history, conducted a physical examination, and reviewed respondent's medical records and diagnostic reports related to her orthopedic conditions from Bradley Bower, M.D., Anant Ram, M.D., Jeffrey Alan Lee, M.D., Arnel Balbuena, M.D., Benjamin Corpuz, M.D., and Jay Grimaldt, M.D. Dr. Nijjar also reviewed respondent's duty statement and the physical requirements of her position as an Analyst.

RESPONDENT'S COMPLAINTS AND PHYSICAL EXAMINATION

5. Respondent informed Dr. Nijjar that in October 1996, she was involved in an auto accident which injured her neck and low back. She experienced neck and low back pain for years. In 2006, she had a surgical fusion of her C5-6 level cervical spine, which caused more pain and discomfort. Respondent attempted to relieve the pain with physical therapy and chiropractic care, with no success. In August 2012, she had surgery on her C6-7 level cervical spine. Respondent also complained of long-term low back pain. She treated the pain with medication, exercise, chiropractic treatments, and physical therapy.

6. Respondent complained that she had constant pain in her neck and low back. She rated the pain a "6" on a 10-point scale. The pain increases with sitting, standing, and walking more than 10 minutes. The pain radiates to both upper and lower extremities. Respondent also complained of a stiff neck and difficulty turning her neck. Respondent reported that she took morphine and hydromorphone for pain.

7. Dr. Nijjar conducted a physical examination of respondent, including her spine and upper and lower extremities. Dr. Nijjar noted that respondent's neck had a "slight straightening of the cervical curvature." She had "no localized tenderness of the midline" and "minimal paraspinous muscle spasm." Respondent had decreased range of motion in her neck. Respondent's thoracic spine showed "no deformity, no localized tenderness, and no

paraspinal muscle spasm," with normal range of motion. Respondent had tenderness at the midline and in the paraspinal area of her lumbar spine. Her lumbar spine range of motion was also decreased.

8. Respondent's upper extremities showed no deformity, no tenderness, and no muscle spasm in the trapezial area or rhomboids. Respondent had no sign of atrophy. Her bilateral shoulder and elbow examinations were normal. Her bilateral hands had no deformity or tenderness. Her bilateral wrist examination revealed no atrophy and full range of motion. Her lower extremities measurements were the same, bilaterally. The neurological examination of her lower extremities was normal.

DIAGNOSIS AND OPINIONS

9. Based on Dr. Nijjar's evaluation of respondent, his diagnosis of respondent's orthopedic conditions was:

1. Cervical spine strain/sprain with surgical excision and fusion of disc at C5-6 level and C6-7 level;
2. Lower back pain.

10. In response to the question posed by CalPERS to Dr. Nijjar concerning whether there were specific job duties that respondent was unable to perform because of a physical or mental condition, Dr. Nijjar answered "No." Dr. Nijjar opined that "from an orthopedic surgical point of view, [respondent] is able to perform all the functions described in the job description" of an Analyst." Dr. Nijjar further opined that respondent was not incapacitated from the performance of her usual duties as an Analyst.

FEBRUARY 15, 2014 SUPPLEMENTAL REPORT

11. Dr. Nijjar issued a supplemental report dated February 15, 2014, after he reviewed additional medical records and diagnostic reports from Dr. Balbuena, Dr. Lee, George Lawrence Blankinship, M.D., Monica Lee Foster, Ph.D., and Raymond Malveaux, M.D., None of the information reviewed by Dr. Nijjar changed his opinions set forth in his July 18, 2013 report.

Discussion

12. When all the evidence is considered, Dr. Nijjar's opinion that respondent is not permanently disabled or substantially incapacitated from the performance of her usual and customary duties as an Analyst for the Department, based upon her orthopedic conditions, was persuasive. Dr. Nijjar based his opinion on his review of respondent's job description, the physical requirements of her job, review of her medical records, and a physical examination. The physical examination revealed that respondent had surgery on her cervical spine in 2006 and 2012. Respondent has decreased range of motion and complained of pain

in her cervical spine and lower back. However, these conditions and subjective complaints of pain do not prevent respondent from performing the duties of an Analysts. Additionally, none of the medical records reviewed by Dr. Nijjar contradict his opinion that respondent is not substantially incapacitated from the performance of her usual and customary duties as an Analyst. There is no indication in the records that any of the doctors determined that respondent was permanently disabled or substantially incapacitated from the performance of her usual and customary duties as an Analyst for the Department, based on her orthopedic conditions.

13. Respondent failed to appear at hearing, and did not present competent medical evidence to demonstrate she is permanently disabled or substantially incapacitated from the performance of her usual and customary duties as an Analyst based upon the legal criteria applicable in this matter. Consequently, respondent failed to establish that her disability retirement application should be granted based upon her orthopedic conditions.

LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21150, subdivision (a), which provides, in pertinent part, that “[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 854, 863-864.)

4. 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*, (1976) 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) To meet this burden, respondent must submit competent, objective medical evidence to establish that, at the time of her application she was permanently disabled or incapacitated from performing the usual duties of her position. (*Harmon v. Board of Retirement, supra*, 62 Cal. App. 3d at 697.) Respondent did not present competent, objective medical evidence to establish that she was permanently disabled or incapacitated from performance of her duties as an Analyst for the Department at the time she filed her disability retirement application. Therefore, based on the Factual Findings and Legal Conclusions, respondent is not entitled to retire for disability pursuant to Government Code section 21150.

ORDER

The application Delisa Rios for disability retirement is DENIED.

DATED: November 17, 2016

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Marcie Larson
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MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings