

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. 2015-1193

LUCILLE J. MCGOWAN,

OAH No. 2016071145

Respondent,

AND

CERRITOS COMMUNITY COLLEGE
DISTRICT,

Respondent.

PROPOSED DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on December 8, 2016, in Los Angeles, California.

Charles H. Glauberman, Senior Staff Attorney, represented the Petitioner, California Public Employees' Retirement System (CalPERS). Respondent Lucille J. McGowan (Respondent) appeared at hearing and represented herself. No one appeared on behalf of Respondent Cerritos Community College District.¹

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on December 8, 2016.

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¹ Respondent Cerritos Community College District was properly served with the Statement of Issues and the Notice of Hearing, but failed to appear at hearing. The matter therefore proceeded as a default against Respondent Cerritos Community College District.

FINDINGS OF FACT

Jurisdiction and Procedural Background

1. On July 30, 2016, Anthony Suine, in his official capacity as Benefit Services Division Chief, Board of Administration, CalPERS, executed a Statement of Issues, Case No. 2015-1193, against Respondent.
2. Previously, Respondent had submitted to CalPERS a March 30, 2012 application for disability retirement, but CalPERS cancelled the application on October 16, 2012, alleging Respondent failed to establish continuous disability. Respondent resubmitted her application for disability retirement on November, 9, 2012. CalPERS cancelled Respondent's disability retirement application on February 2, 2014, which Respondent appealed.
3. On December 17, 2014, the Office of Administrative Hearings issued a proposed decision granting Respondent's appeal and permitting Respondent to apply for disability retirement. Thereafter, CalPERS reviewed Respondent's medical records and advised Respondent on August 4 and 28, 2015 that it determined Respondent was not permanently disabled or incapacitated from performing her duties as a custodian at Cerritos Community College District. As such, CalPERS denied Respondent's application for disability. Respondent filed an appeal and requested a hearing.

Factual Background

4. In January 2007, Respondent began working for the Cerritos Community College District as a custodian. Respondent's job duties included, among other things, dusting, sweeping, cleaning, scrubbing, mopping, waxing, polishing, sanitizing, emptying trash containers, operating equipment such as vacuums, steam shampooers, and floor scrubbing and polishing machines, and moving chairs, desks, tables, furniture, and equipment. These duties required Respondent to stand and walk for more than six hours per shift; kneel, squat, bend her neck and waist, twist her neck and waist, and reach above her shoulder for three to six hours per shift. She was also required to reach below her shoulder, push, pull, power grasp, repetitively use her hands, experience exposure to dust, gas fumes, or chemicals, and operate foot controls for more than six hours per shift. Additionally, she was required to lift between 25 and 100+ pounds for three to six hours per shift; walk on uneven ground, work with heavy equipment, experience exposure to extreme temperatures, humidity, and wetness, work at heights, and work with bio-hazardous substances (e.g., sewage) for three to six hours. Respondent was required to perform her duties indoors and outdoors.
5. Respondent testified credibly at hearing. Beginning in June 2007, Respondent began experiencing a chronic cough she thought was related to a cold or flu. Several weeks later, Respondent awoke and could not move her body, because she was experiencing great pain and joint swelling. Respondent was hospitalized and subsequently diagnosed with

rheumatoid arthritis. Rheumatoid arthritis is a chronic inflammation of the joints caused by autoimmune issues. She was treated with systemic steroids during the hospitalization and experienced limited relief, but was bedbound for a time due to her whole-body pain. When she attempted to return to work in July 2007, Respondent could not perform her duties as a custodian as a result of her disabling physical condition. Consequently, she resigned from the Cerritos Community College District on July 13, 2007.

6. From July 2007 to 2011, Respondent suffered seven hospitalizations. At hearing, Respondent explained that in 2007 alone, she was rushed to the hospital on seven or eight occasions because of intense pain she experienced in her joints, including her hands, ankles, wrists, hips, shoulders, knees, neck, and elbows. In 2009, Respondent was diagnosed with interstitial lung disease secondary to rheumatoid arthritis. Interstitial lung disease is characterized by progressive scarring of the lung tissue between and supporting the air sacs, which causes progressive lung stiffness, eventually affecting the ability to breathe.

7. On March 30, 2012, Respondent submitted to CalPERS an application for disability retirement, with a requested retirement date of July 12, 2007.

Independent Medical Examination and Written Report

8. On June 1, 2015, CalPERS requested Dr. Quang Vo to perform an Independent Medical Examination (IME) of Respondent. Specifically, CalPERS instructed Dr. Vo to conduct a disability evaluation regarding Respondent's rheumatologic condition, and to answer three specific questions: (1) Were there any job duties he felt Respondent was unable to perform because of a physical or mental condition?; (2) Was Respondent presently, substantially incapacitated for the performance of her duties, and if yes, what date did the disability begin?; and (3) Was Respondent cooperating with the examination and putting forth her best efforts, or did Dr. Vo feel there was an exaggeration of complaints?

9. Dr. Vo testified at hearing. Dr. Vo has been a board certified rheumatologist since 2008, and is licensed in California, Washington, Idaho, and Nevada. He earned his bachelor's degree in biochemistry from the University of California at San Diego, in 1997, and his doctor of medicine from the Medical College of Wisconsin in 2001. Dr. Vo completed his residency in internal medicine at the University of Southern California in 2004, and completed rheumatology fellowship training at the University of California at Los Angeles (San Fernando Valley program) in 2008.

10. On June 6, 2015, Dr. Vo reviewed Respondent's medical records, performed a physical examination of Respondent, and prepared a written report. In the report, Dr. Vo referenced Respondent's job duties as a custodian, and summarized the medical records he reviewed, which spanned from August 23, 2007 to April 8, 2015. Neither party produced any of Respondent's actual medical records at hearing or proffered any testimony from any of Respondent's physicians.

11. During his physical examination of Respondent, Dr. Vo noted a full range of motion in Respondent's cervical spine, shoulders, elbows, wrists, knees, ankles, and toes. He also noted tenderness of Respondent's right wrist and ankles, with synovial hyperplasia (i.e., increase in cells of the membrane between the joints), but no swelling or warmth. He also noted tenderness in Respondent's middle knuckle of her right hand. After performing his physical of Respondent and reviewing her medical records, Dr. Vo concluded Respondent suffered from rheumatoid arthritis with secondary interstitial lung disease.

12. In his written report, Dr. Vo, in response to the three questions posed by CalPERS, answered each one in the affirmative. Specifically, Dr. Vo stated there were specific job duties he felt Respondent could not perform because of her "uncontrolled rheumatoid arthritis" and "underlying interstitial lung disease secondary to rheumatoid arthritis that still has intermittent and frequent exacerbations spontaneously." and seemed to be "very dependent on systemic steroid therapy." (Exhibit 8, page 12.) Dr. Vo also noted Respondent had "morbid obesity that would make it difficult for her to continue with her previous job as a custodian," and opined the morbid obesity was the result of long-term corticosteroid therapy for her lung disease and rheumatoid arthritis. (*Id.*) Dr. Vo stated Respondent could no longer perform heavy lifting, heavy holding, operating heavy equipment, bending, stooping, prolonged walking or standing, or engage in the fine use of and repetitive activities of the small joints of the hands and wrists. Dr. Vo also stated Respondent could no longer "perform the required raising, reaching overhead, or carrying anything heavier than 10 pounds continuously for more than 10 minutes." (*Id.*)

13. Dr. Vo concluded Respondent was presently "substantially incapacitated for the performance of her duties due to the combination of obesity, uncontrolled rheumatoid arthritis, with active inflammation and symptomatic disease activity in the right hand and ankles bilaterally." (Exhibit 8, page 12.) Additionally, he noted Respondent's interstitial lung disease seemed to exacerbate spontaneously on a regular basis, possibly aggravated by chemicals, smoke, and perfumes. (Exhibit 8, page 13.) Dr. Vo stated in his report that Respondent's "disability began when she stopped working in July 2007," and believed that her incapacity was permanent, given the challenging nature of her rheumatoid arthritis and interstitial lung disease. (*Id.*) Dr. Vo opined that a more aggressive regimen of medication would not result in significant gain or benefit to the point where Respondent could resume her job duties. (*Id.*)

14. Finally, Dr. Vo stated in his report that Respondent cooperated with the examination and did not believe Respondent exaggerated her complaints. Dr. Vo forwarded his report to CalPERS.

First Supplemental Report

15. Dr. Vo's report, apparently, did not resolve the matter. CalPERS sent Dr. Vo three follow-up questions:

- (1) Please explain why you found the member substantially incapacitated despite the fact that objective findings within the medical records are consistently normal and the current exam finds normal except for tenderness in the wrists and ankles. Please do not consider obesity when answering this question. (Exhibit 9, page 1.)
- (2) In the medical records that were provided, there were no abnormal objective findings until 5/15/2009.² Given the lack of abnormal objective rheumatologic findings from the member's last day on pay (7/5/2007) to the exam on 5/15/2009, please explain why you find the member to be substantially incapacitated as of July 2007. (Exhibit 9, page 2.)
- (3) Please explain why you limit the member from performing bending, stooping, prolonged walking or standing, and teaching when the objective rheumatologic findings from the medical records and the exam are normal. Please do not consider obesity when answering this question. (*Id.*)

16. Dr. Vo prepared a written supplemental report on June 19, 2015 to address the follow-up questions posed by CalPERS. In response to the first follow-up question, Dr. Vo stated the following:

Although her joint symptoms are improved with the current therapy, her lung disease cannot be adequately predicted as to when it will exacerbate. The patient is chronically dependent on steroids. Furthermore, her job would not allow her to perform her usual duties given her ongoing symptoms of pain and ongoing swelling in the ankles and wrists. Also, due to her interstitial lung disease secondary to rheumatoid arthritis, exposure to chemicals and fumes from her job may cause aggravation of her underlying disease. (Exhibit 9, page 1.)

17. In response to the second follow-up question, Dr. Vo stated the following:

Based on the oral history given, in which she claims to have been fully bedbound due to whole-body pain and swelling and given the underlying diagnosis of rheumatoid arthritis, it is reasonable to assume that she had a severe flare of (*sic*) disease at the onset that would have made her substantially incapacitated as of July 2007. (Exhibit 9, page 2.)

² Dr. Vo's report included a summary of Respondent's rheumatology follow-up visit with her physician on May 15, 2009, which stated in part, "On exam, there was mild swelling along the right MCP's." (Exhibit 8, page 6.) MCP is an acronym for metacarpal phalangeal joints (i.e., the big knuckles of the hand).

18. In response to the third follow-up question, Dr. Vo stated the following:

Without the consideration of morbid obesity, then there is no limitation or restriction with bending, stooping, or reaching overhead. However, claimant would still be unable to perform the required duties involving prolonged standing and walking due to potential exacerbation of ankle pain from rheumatoid arthritis. (*Id.*)

Second Supplemental Report

19. After receiving Dr. Vo's supplemental report, CalPERS sent Dr. Vo a letter asking him to clarify his opinion concerning the date on which Respondent became unable to work. Specifically, CalPERS requested Dr. Vo to explain why he found Respondent to be substantially incapacitated as of July 2007, and requested him not to consider Respondent's interstitial lung disease, obesity, or oral history.

20. In response, Dr. Vo prepared another supplement report dated July 8, 2015, and stated that without considering Respondent's "interstitial lung disease, obesity, or oral history, the only objective evidence of her disease due to RA as evidenced by joint synovial thickening was on 2/13/2008.³ But the first time clinically significant disease activity involving the right hand was documented was on 5/15/2009. Taking these things into consideration, I change my opinion of the state that her substantial incapacity began to 5/15/2009." (Exhibit 10, page 1.)

21. At hearing, Dr. Vo explained that in reviewing the medical records, he noted that on August 23, 2007, Respondent's physician, Dr. Patrice Leonard, documented that Respondent had complained of swelling and pain, but on examination, there was no synovitis (i.e., inflammation of the synovial membrane) usually detected through palpation, and all joints had good range of motion and no swelling or tenderness. Additionally, Dr. Leonard indicated that steroid tapering was required. Based on Dr. Leonard's notes, Dr. Vo concluded that medication had been controlling Respondent's symptoms after the sudden onset of her symptoms the month prior, enough where Dr. Leonard sought to taper Respondent's steroids. Dr. Vo did not include this rationale in his second supplemental report he submitted to CalPERS. However, Dr. Vo also testified at hearing that long-term steroid use was not a preferred practice because it could be dangerous to the patient, and explained the standard practice concerning the management of rheumatoid arthritis dictated a weaning of steroids, to be replaced by autoimmune suppressants. Indeed, Dr. Vo noted that

³ Dr. Vo's report included a summary of Respondent's February 13, 2008 examination, which stated in part, "The examination documented trace synovial thickening to the MCP's and PIP's right hand. Dr. Leonard's impression was rheumatoid arthritis with minimal disease activity." (Exhibit 8, page 6.)

Dr. Leonard documented on August 23, 2007 that she would increase Respondent's methotrexate, which is an immune suppressant.

22. Dr. Vo also explained at hearing that in reviewing the medical records, Dr. Leonard noted no synovitis on March 26, 2008. This factor, combined with his review of Dr. Leonard's August 23, 2007 notes, as well as no definitive entry mentioning synovitis until May 15, 2009, led Dr. Vo to change his opinion that Respondent's substantial incapacity began in July 2007, but rather in May 2009. Overall, Dr. Vo modified his opinion because he now believed that Respondent's rheumatoid arthritis was under control at the beginning of the disease. Dr. Vo did not include in his second supplemental report the detailed rationale he offered at hearing concerning the modification of his position.

Denial of Application for Disability Retirement

23. On August 4, 2015 and again on August 28, 2015, CalPERS sent Respondent a letter advising that it had determined that Respondent's rheumatologic condition was not disabling. As such, CalPERS found that Respondent was not substantially incapacitated from the performance of her job duties as a custodian, and denied her application for disability retirement accordingly.

24. On October 3, 2015, Respondent sent CalPERS a letter appealing its decision to deny her application for disability retirement, claiming her condition was, in fact, disabling.

Respondent's Evidence

25. Respondent submitted, among other things, evidence showing Dr. Leonard completed a CalPERS' physician's report on October 17, 2012, indicating that Respondent's rheumatoid arthritis first presented in July 2007, that her interstitial lung disease presented in July 2009, and that as a result, Respondent was substantially incapacitated from performance of her usual duties as a custodian, and that her incapacity was permanent. (Exhibit A.) Respondent also submitted an October 22, 2012 letter addressed to CalPERS from Dr. Leonard stating Respondent had been "disabled since 2007 because of complications of Rheumatoid Arthritis." (Exhibit B.) Dr. Leonard did not testify at hearing.

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*Credibility Findings*⁴

26. Respondent was a very credible witness, as she testified in a clear, concise, and forthright way, particularly when describing her physical incapacities after the sudden onset of her rheumatoid arthritis symptoms in June 2007, rendering her unable to perform her job duties as a custodian, and which resulted in more than a half-dozen hospital visits in 2007 alone. Respondent credibly testified that her physical incapacities resulted in her eventual resignation of her position as a custodian, effective July 13, 2007. Respondent's testimony concerning her disability is corroborated by Dr. Vo's initial findings, as set forth in his written report and first supplemental report, in which Dr. Vo determined that Respondent's "disability began when she stopped working in July 2007," and believed that her incapacity was permanent, given the challenging nature of her rheumatoid arthritis and interstitial lung disease. (Exhibit 8, page 12.) Dr. Vo also stated Respondent's job "would not allow her to perform her usual duties given her ongoing symptoms of pain and ongoing swelling in the ankles and wrists." (Exhibit 9, page 1.)

⁴ The manner and demeanor of a witness while testifying are the two most important factors a trier of fact considers when judging credibility. (See Evid. Code § 780.) The mannerisms, tone of voice, eye contact, facial expressions and body language are all considered, but are difficult to describe in such a way that the reader truly understands what causes the trier of fact to believe or disbelieve a witness.

Evidence Code section 780 relates to credibility of a witness and states, in pertinent part, that a court "may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: . . . (b) The character of his testimony; . . . (f) The existence or nonexistence of a bias, interest, or other motive; . . . (h) A statement made by him that is inconsistent with any part of his testimony at the hearing; (i) The existence or nonexistence of any fact testified to by him. . . ."

The trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And the testimony of "one credible witness may constitute substantial evidence," including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.) A fact finder may disbelieve any or all testimony of an impeached witness. (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671.)

27. Respondent's testimony is further corroborated and supported by Dr. Leonard's October 22, 2012 letter addressed to CalPERS, stating Respondent had been "disabled since 2007 because of complications of Rheumatoid Arthritis." (Exhibit B.) Moreover, Respondent's testimony is bolstered by the CalPERS' physician's report Dr. Leonard completed on October 17, 2012, indicating, among other things, that Respondent's rheumatoid arthritis first presented in July 2007, that Respondent was substantially incapacitated from performance of her usual duties as a custodian, and that her incapacity was permanent. (Exhibit A.) In light of the above factors, Respondent's testimony is afforded great weight.

28. Dr. Vo's testimony regarding his initial findings is credible and afforded great weight, as he testified in a clear, concise, and confident manner, buttressed by his wealth of knowledge and his years of experience as a board certified rheumatologist. However, his testimony regarding his rationale for modifying the date of Respondent's substantial disability from July 2007 to May 15, 2009 lacked credibility, as it was based on far-reaching inferences and rank speculation. Specifically, Dr. Vo, who reached his modified conclusion only after CalPERS instructed him to ignore certain factors (i.e., Respondent's oral report regarding her physical condition in July 2007, Respondent's obesity, which Dr. Vo had previously opined resulted from Respondent's steroid medication, and Respondent's subsequent diagnosis of interstitial lung disease), based his modification, in part, on his review of medical reports prepared by Dr. Leonard on August 23, 2007. In Dr. Leonard's notes, according to Dr. Vo, she wished to taper Respondent's steroid medication. Consequently, Dr. Vo inferred that because Dr. Leonard believed that steroid tapering was warranted, the steroid medication must have been controlling Respondent's symptoms enough where she could perform her duties as a custodian. This inference, however, does not appear based on medical certainty. Rather, it constitutes rank speculation that fails to consider that even if the steroid medication had resulted in some positive impact on Respondent's overall health, it did not mean that Respondent's health had improved to the point where she was not incapacitated. Respondent's uncontroverted testimony indicates that she required seven or eight hospital visits from June 2007 to December 2007 as a result of her rheumatoid arthritis, which is evidence that Respondent's symptoms were not under the kind of control Dr. Vo would have the court believe.

29. Moreover, Dr. Vo, himself, testified at hearing that long-term steroid use was not a preferred practice because it could be dangerous to the patient, and explained the standard practice concerning the management of rheumatoid arthritis dictated a weaning of steroids, to be replaced by autoimmune suppressants. In this regard, Dr. Leonard, according to Dr. Vo, documented on August 23, 2007 that she would increase Respondent's methotrexate, which is an immune suppressant. Given this, it is reasonable to find that Dr. Leonard was simply following the preferred practice in relation to rheumatoid arthritis treatment when she noted her desire to taper Respondent's steroid medication. as opposed to concluding that Dr. Leonard had suggested a tapering because Respondent's debilitating symptoms were all under control.

30. Finally, Dr. Vo's credibility is called into question because he failed to discuss in his second supplemental report his modification rationale as it related to Dr. Leonard's August 23, 2007 note. Such failure suggests that Dr. Vo manufactured the rationale for hearing, primarily for the purpose of appeasing the party paying him, CalPERS. For this and all of the reasons set forth above, Dr. Vo's testimony regarding his rationale for modifying the date in which he determined Respondent was incapacitated, specifically from July 2007 to May 15, 2009, is afforded no weight.

LEGAL CONCLUSIONS

1. Respondent has the burden of proof regarding her entitlement to the retirement benefits for which she has applied. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) As set forth in more detail below, Respondent has met this burden.

2. Government Code section 20016 provides:

“‘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, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.”

3. Government Code section 21152 provides, in pertinent part:

“Application to the board for retirement of a member for disability may be made by:

“(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member. [¶] . . . [¶]

“(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

“(d) The member or any person in his or her behalf.”

4. Government Code section 21153 provides:

“Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions

or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.”

5. Government Code section 21154 provides, in pertinent 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. “Incapacitated for the performance of duty,” means the “substantial inability of the applicant to perform her usual duties,” as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) The increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future or further injury are insufficient to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d 854, 862 - 863.)

7. Government Code section 21156, subdivision (a)(1), provides, in pertinent part:

“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”

8. Here, Respondent met her burden of demonstrating that CalPERS erred in denying her application for disability. Specifically, the totality of the evidence established that Respondent’s rheumatoid arthritis rendered her substantially unable to perform her usual duties as a custodian for Cerritos Community College District as of July 12, 2007. Specifically, Respondent’s credible testimony established her substantial incapacity to perform her job duties, which was corroborated by Dr. Vo’s finding that Respondent could no longer perform heavy lifting, heavy holding, operating heavy equipment, bending, stooping, prolonged walking or standing, or engage in the fine use of and repetitive activities of the small joints of the hands and wrists. Dr. Vo also concluded Respondent could no longer “perform the required raising, reaching overhead, or carrying anything heavier than 10 pounds continuously for more than 10 minutes.” (Exhibit 8, page 12.) The evidence also showed that Dr. Leonard submitted a letter to CalPERS stating Respondent could not perform her normal work duties as of July 2007, and Respondent’s series of hospital visits from June 2007 to December 2007 appears to support Dr. Leonard’s overall conclusion. Additionally, Dr. Vo credibly opined that a more aggressive regimen of medication would

not have resulted in significant gain or benefit to the point where Respondent could resume her job duties. (Factual Findings 4 through 30; Legal Conclusions 1 through 7).

9. Notwithstanding the evidence demonstrating that Respondent's rheumatoid arthritis rendered her substantially unable to perform her usual duties as a custodian, CalPERS contends Respondent was not substantially incapacitated at the time she resigned in July 2007. CalPERS based this contention on Dr. Vo's modification of his conclusion that Respondent's substantial incapacity commenced in May 2009, as opposed to July 2007. However, as set forth in detail in Factual Findings 26 through 30, Dr. Vo's testimony regarding his rationale for modifying the date of Respondent's substantial disability lacked persuasiveness and credibility, and, therefore, was afforded no weight. As such, CalPERS contention fails.

10. In light of the above, it is clear that Respondent is incapacitated for the performance of duty or substantially unable to perform her usual duties. As such, Respondent's appeal shall be granted. (Factual Findings 4 through 30; Legal Conclusions 1 through 8).

ORDER

Respondent's appeal is granted. Respondent's Disability Retirement Election Application seeking disability retirement as of July 12, 2007 is approved.

Date: January 5, 2017

DocuSigned by:

Carla L. Garrett

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CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings