

**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:

ROSA PONCE,

Respondent,

and

FAIRFIELD SUISUN UNIFIED SCHOOL  
DISTRICT,

Respondent.

Case No. 2014-1098

OAH No. 2016061238

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Joy Redmon, Office of Administrative Hearings, State of California, on November 16, 2016, in Sacramento, California.

Rory Coffey, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Respondent Rosa Ponce was present at the hearing and represented herself.

There was no appearance by or on behalf of the Fairfield Suisun Unified School District. The school district was duly served with Notices of Hearing. The matter proceeded as a default against the school district, pursuant to California Government Code section 11520, subdivision (a).

Respondent informed CalPERS during the hearing that she submitted medical documents to CalPERS on November 15, 2016. CalPERS sought a continuance for Michael Brooks, M.D., who conducted an independent medical evaluation of respondent, to review the additional medical documents. Respondent did not oppose the request. Dr. Brooks reviewed respondent's additional medical information and timely submitted a supplemental report on December 6, 2016. Respondent timely submitted a written response to Dr. Brooks'

PUBLIC EMPLOYEES RETIREMENT SYSTEM

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supplemental report on December 15, 2016. The record was closed and the matter submitted for decision on December 15, 2016.

## ISSUE

The issue on appeal is whether, at the time she filed the application, respondent was permanently disabled or substantially incapacitated from performing her duties as a Cafeteria Assistant I for Fairfield Suisun Unified School District on the basis of orthopedic (low back) condition.

## JURISDICTIONAL FINDINGS

1. On August 27, 2013, respondent signed and filed with CalPERS an application for disability retirement. On November 27, 2013, respondent signed and filed with CalPERS an application for service retirement pending disability retirement (Application). Until approximately March 1, 2014, respondent was employed as a Cafeteria Assistant I (Assistant) with the school district. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21151.

2. In her Application, respondent stated her specific disability was: “strain of lumbosacral joints and ligaments, thoracic segmental dysfunction [sic], sciatica, spondylosis myofascial pain syndrome, low back pain, thoracic segmental dysfunction [sic], tension headaches, hyperthyroidism, paresthesia.”<sup>1</sup>

3. CalPERS obtained reports concerning respondent’s condition, prepared by Charles Kitchens, M.D., Jason Huffman, M.D., Brian Knapp, M.D., Michael Wilson, D.C., and Andrew Brooks, M.D. Dr. Brooks conducted an Independent Medical Evaluation (IME) of respondent at CalPERS’ request. After reviewing the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of her duties as a Cafeteria Assistant I at the time she filed her application.

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<sup>1</sup> Per *Merriam-Webster Medical Dictionary*, these terms are generally defined as:

- thoracic segmental dysfunction refers to mid-back mechanical problems of the joints and related ligaments and muscles that link the spinal cord and bones;
- sciatica is pain along the large sciatic nerve;
- spondylosis is osteoarthritis;
- myofascial pain syndrome is a chronic pain disorder, specifically pressure on sensitive points causes pain in seemingly unrelated parts of the body;
- hyperthyroidism is an overactive thyroid often caused by Graves Disease; and
- paresthesia an abnormal sensation, typically tingling or pricking (“pins and needles”), caused chiefly by pressure on or damage to peripheral nerves.

4. On August 15, 2014, CalPERS notified respondent and the school district that respondent's Application was denied. Respondent was advised of her appeal rights.

5. By letter dated September 15, 2014, respondent filed an appeal and request for hearing. Respondent referenced additional documents from Matthew Johnson, M.D., and Angelita Tango, M.D., two additional medical providers regarding her orthopedic (low back) condition, and requested that CalPERS reconsider the denial of her application. It is unknown if respondent submitted the reports from Drs. Johnson and Tango.

6. On January 14, 2015, Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, signed and thereafter filed the Statement of Issues.

7. On November 29, 2016, Dr. Brooks submitted his supplemental IME report. He reviewed additional medical records from Ethelynda Tolentino, M.D., and Andrew Burt, M.D., including progress notes from the Spine and Nerve Diagnostic Center. Dr. Brooks concluded that the additional medical reports did not change his opinions expressed in his original report dated June 23, 2014. The reports will be discussed below.

## FACTUAL FINDINGS

### *Respondent's Employment History and Duties as a Cafeteria Assistant I*

1. Respondent worked for the school district for approximately 10 years, until her last date of service effective on March 1, 2014. She was 60 years old when she retired.

2. On December 11, 2013, CalPERS received a completed "Physical Requirements of Position/Occupational Title" (Physical Requirements), signed by respondent. According to the Physical Requirements, as a Cafeteria Assistant I, respondent: (1) frequently (three to six hours per day) stood, walked, bent her neck, twisted her neck and waist, reached below the shoulder, repetitively used hands, and carried or lifted between 0-10 pounds; (2) occasionally (up to three hours a day) knelt, climbed, squatted, bent at the waist, reached above the shoulder, pushed or pulled, engaged in fine manipulation, power and simple grasping, keyboarded, used a mouse, lifted or carried between 11-50lbs, walked on uneven ground, was exposed to excessive noise, and rarely was exposed to extreme temperature, humidity, and wetness and worked with biohazards; and (3) respondent never sat, ran, crawled, lifted or carried more than 51 pounds, worked with heavy equipment, exposed to dust, gas, fumes, or chemicals, worked at heights, operated a foot control or repetitive movements, and used special visual or auditory protective equipment.

### *Independent Medical Evaluation, by Andrew Brooks, M.D.*

3. On June 23, 2014, at the request of CalPERS, Dr. Brooks conducted an IME of respondent. Dr. Brooks prepared two reports and testified at the hearing in this matter. Dr.

Brooks currently works as an orthopaedic surgeon for North Bay Hospital. He formerly worked as an orthopaedic surgeon at Woodland Healthcare. Dr. Books obtained a medical license in Arkansas in 1990, and in California in 1996. In 1997, Dr. Brooks added qualifications in Orthopaedic Surgery by the American Academy of Orthopaedic Surgery. In 1999, Dr. Brooks became a Fellow of the American Academy of Orthopaedic Surgery. Dr. Brooks' practice primarily includes treating patients; however, approximately five percent of his practice is devoted to medical-legal work such as conducting IME's for CalPERS.

4. As part of respondent's IME, Dr. Brooks interviewed respondent, obtained a personal and medical history, conducted a physical examination, and reviewed respondent's medical records related to her orthopedic (low back) condition. Dr. Brooks also reviewed respondent's duty statement and the physical requirements of her position as a Cafeteria Assistant I.

#### BACKGROUND

5. During the evaluation, Dr. Brooks took a detailed background and history of complaints from respondent related to her physical condition. Respondent explained that she worked for the school district until she retired. She described the initial injury that triggered her request for disability retirement. Specifically, on August 17, 2012, she was transferring cartons of milk from one cooler to another. She had two cartons in each hand when the cart began to slip and she twisted her back in an effort not to drop the milk. As she twisted, pain shot from her head to her tailbone. Since that time, she has had constant pain in her back, pain in her head, and numbness in her hands and arms.

6. Respondent continued working and the same day reported the injury to the occupational medicine nurse who instructed respondent to be seen by an occupational medicine physician. Respondent complied and saw Charles Kitchens, M.D. at North Bay Occupational Medicine that same day. Dr. Kitchens released respondent to work with light work restrictions for approximately three months. He prescribed physical therapy to treat respondent's back. She attended approximately 18 sessions.

7. Respondent returned to work the day after the injury and began working as a file clerk. On October 3, 2012, respondent requested Dr. Kitchens order an MRI of her back. Dr. Kitchens ordered the MRI of the lumbar spine. The MRI was conducted on October 25, 2012. The MRI showed minimal degenerative changes characterized by mild loss of disc signal intensity; mild disc protrusion at L3-L4; very mild grade 1 spondylolisthesis of L4-L5; focal spinal stenosis at the L4-L5 level. No spinal or foraminal stenosis was identified and her cord signal was normal. The diagnostic impression from the MRI was that broad-based central disc protrusion at L3-L4 and grade 1 spondylolisthesis of L4-L5 which together with facet hypertrophy causes focal spinal stenosis. Dr. Kitchens reviewed the MRI results and did not modify respondent's light duty work restrictions at that time. Dr. Brooks reviewed the MRI results as part of respondent's IME. He concluded that the MRI was consistent with normal aging and not trauma. He noted that some patients with similar results would be asymptomatic.

8. On November 2, 2012, respondent hurt her back again when she opened a file cabinet on her light duty assignment. She returned to Dr. Kitchens who did not consider it a new injury but an exacerbation of the original injury sustained on August 17, 2012. He recommended respondent continue with physical therapy and did not modify his light duty recommendation. She returned to work for three days but felt increased pain. Respondent then saw her acupuncturist, Dr. Lindo, who recommended she stop working. Respondent did not return to work again.

9. Respondent's complaints at the time of the IME, included back pain, numbness in her shoulders, spine, and arms. She expressed pain in all four extremities.

#### PHYSICAL EXAMINATION

10. Dr. Brooks conducted a physical examination of respondent. He noted that it is unusual for a patient to complain of pain in so many areas of the body. He concluded, therefore, he would conduct a complete physical examination including, among other things, a neurologic exam, sensory exam, strength, and range of motion exam. As her initial complaints stemmed from lumbar pain, he started his examination in that region.

11. Dr. Brooks noted no ambulatory concerns as respondent walks with a normal heel-to-toe gait. Regarding her lumbar spine, Dr. Brooks concluded her neurologic exam, sensory exam, strength, and range of motion were all within normal limits. During the examination of her cervical spine, respondent showed tenderness in the cervical area and between her shoulder blades. She had a slight decrease in sensation of her nerve distribution. There was no one root or nerve he could pinpoint which was causing the decreased sensation. Overall, he determined the cervical spine was unremarkable. Dr. Brooks also examined respondent's lower extremities and found nothing significant or abnormal.

#### REVIEW OF MEDICAL RECORDS

12. At the time Dr. Brooks issued his initial report, he had reviewed an extensive amount of respondent's medical records relating to her back condition from 2012 through the date of the IME in June 2014. As noted previously, respondent provided CalPERS with additional medical records from doctors who saw respondent in 2015 and 2016. Dr. Brooks reviewed those additional medical records. He noted that many of the newly submitted records were incomplete. The records revealed that respondent continued to complain of symptoms in numerous parts of her body including her head, both upper extremities, both lower extremities, mid-back, neck, shoulders, low back, and feet. The records also included a new MRI report. The findings do not point to any one acute injury and, according to Dr. Brooks, are consistent with typical age-related changes.

#### DIAGNOSIS AND OPINION

13. In his IME and testimony at hearing, Dr. Brooks concluded that respondent's complaints are difficult to follow because they involve all four extremities and her entire

spine from her neck to her lumbar spine and include numbness and tingling. He wrote in his report that, "it is very hard to relate all these complaints to her 8/17/2012 injury." He acknowledged a history of prior low back pain that may have been attributable to automobile accidents that occurred prior to 2012, for which she was not seeking treatment at the time of the injuries she sustained while moving milk cartons or opening the file cabinet. Dr. Brooks' physical examination of respondent did not reveal any neurologic deficits in either respondent's upper or lower extremities. His ultimate opinion in the IME report, and at hearing, was that respondent likely had some existing chronic low back pain that she was able to work with and which was aggravated on August 17, 2012. Her treatment was appropriate and the MRI findings were consistent with degenerative changes and not an acute injury. There was no physiologic cause for her upper extremity complaints or numbness or tingling, but those symptoms may represent myofascial pain syndrome.

14. Dr. Brooks' opinion did not change after reviewing the additional medical records submitted by respondent covering the care and treatment she received in 2015 and 2016 following the IME. Based on these records, he noted that, "[t]here certainly may be a significant psychological component to her complaints, but that evaluation goes beyond my area of expertise." His final conclusion was that the additional records did not change "...any of the opinions expressed in my original report..."

15. Dr. Brooks opined that based on his medical evaluation, review of respondent's medical records and review of respondent's job duties, respondent can perform all the functions of the position. He further opined that respondent was not substantially incapacitated from the performance of her duties, as a result of her orthopedic (low back) condition.

#### *Respondent's Evidence*

16. Respondent contends that she is in chronic pain and has numbness and tingling from her head to her tailbone. The chronic pain, numbness, and tingling make it difficult for her to function. She has attempted to take medication to manage the pain, but she feels that medication adversely affects her health. She wants to return to work but does not believe she is physically capable of doing so.

17. At the hearing, respondent testified that she had four injuries while working as a Cafeteria Assistant I for the school district. In April 2004, when using oven proofers in a vehicle on a rainy day, her foot slipped from a ramp and she fell approximately two inches from the ground. In 2006, while walking in the kitchen she slipped on a spill and landed on her tailbone and head. She testified that she made a report to her supervisor but the report was either lost or not processed. In 2010, as she was taking a tray from an oven she slipped on spilled oil and, "did the splits." Respondent also testified to two car accidents that occurred prior to her employment with the school district. She maintains that the pain she feels now is directly related to the injuries she sustained at work because she passed the physical examination at the time she was hired by the school district.

18. Respondent submitted medical records from her treating physicians generated in 2015 and 2016, which were admitted as administrative hearsay, and have been considered to the extent permitted under Government Code section 11513, subdivision (d).<sup>2</sup> Respondent did not call any doctors to testify at the hearing. The medical records and letters do not state that respondent is substantially incapacitated from the performance of her duties as a Cafeteria Assistant I.

### *Discussion*

19. When all the evidence is considered, Dr. Brooks' opinion that respondent is not permanently disabled or substantially incapacitated from performance of the duties of a Cafeteria Assistant I is persuasive. Respondent's physical examinations and the medical records reviewed by Dr. Brooks did not reveal any objective evidence that her orthopedic (low back) condition would prevent her from performing the usual and customary duties of a Cafeteria Assistant I.

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

### LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Cafeteria Assistant I for the school district, respondent is a local miscellaneous member of CalPERS, subject to Government Code section 21151.<sup>3</sup>

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<sup>2</sup> 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.

<sup>3</sup> Government Code section 21151, in relevant part, provides:

- (a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of a duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.
- (b) This section also applied to local miscellaneous members if the contracting agency employing those members elects to be subject to this section by amendment to its contract.



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* (1978) 77 Cal. App. 3d 854, 863-864.) As the court explained in *Hosford*, prophylactic restrictions imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature.

4. An applicant for disability retirement must submit competent, objective medical evidence to establish that at the time of application, she was permanently disabled or incapacitated from performing the usual duties of her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.) In *Harmon*, the court found that a deputy sheriff was not permanently incapacitated from the performance of his duties, because “aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for [the sheriff’s] condition are dependent on his subjective symptoms.”

5. Findings issued for the purposes of worker’s compensation are not evidence that respondent’s injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at 207; *English v. Board of Administration of the Los Angeles City Employees’ Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego*, (1989) 214 Cal.App.3d 563.)

6. Respondent bears the burden of proving that she is permanently and substantially unable to perform her usual duties such that she is permanently disabled. (*Harmon v. Board of Retirement of San Mateo County, supra*, 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) Although respondent asserted subjective complaints of disability, she did not present competent, objective medical evidence to establish that she was permanently disabled or incapacitated from performance

of her duties as a Cafeteria Assistant I for the school district 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 21151.

**ORDER**

**The application of Rosa Ponce for disability retirement is DENIED.**

**DATED: January 17, 2017**

DocuSigned by:

*Joy Redmon*

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**JOY REDMON**  
**Administrative Law Judge**  
**Office of Administrative Hearings**