

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of Application for Disability  
Retirement of:

JESSICA R. SMITH,

and

ELK GROVE UNIFIED SCHOOL DISTRICT,

Respondents.

Case No. 2015-1194

OAH No. 2016061274

**PROPOSED DECISION**

On January 17, 2017, a hearing in this matter convened before Marilyn A. Woollard, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, in Sacramento, California.

Charles Glauberman, Senior Staff Attorney, represented complainant, California Public Employees' Retirement System (CalPERS).

There was no appearance by or on behalf of either respondent Jessica R. Smith (respondent) or the Elk Grove Unified School District (District). The matter proceeded as a default against both respondents, pursuant to Government Code section 11520.

Oral and documentary evidence was received. The record was then closed and the matter was submitted for decision on January 17, 2017.

**ISSUE**

Was respondent permanently disabled or substantially incapacitated from the performance of her duties as a Buyer II for the District, based on a rheumatoid arthritis condition, at the time she filed her application for disability retirement?

## FACTUAL FINDINGS

1. At the time she filed her application for disability retirement (application), respondent was employed by the District as a Buyer II. Based on her employment with the District, respondent is a local miscellaneous member of CalPERS subject to Government Code section 21150. She has the minimum service credit to qualify for such retirement.<sup>1</sup>
2. On February 14, 2014, the District signed an application on respondent's behalf.
3. On June 26, 2014, respondent signed her application and claimed disability on the basis of a rheumatoid arthritis condition. Respondent described her specific disability as: "debilitating pain – can't sit, can't stand, rheumatoid arthritis, ongoing back injuries (bulging disc)." The disability occurred by "health deterioration," which created the following limitations: "can't sit or stand for a sig. time – pain causes fogginess, forgetfulness, extreme fatigue back takes me totally out four to five days a month." Respondent wrote that her condition affected her ability to perform her job in the following manner: "I can't think, I can't reliably say I can walk or sit on what day or moment to make/keep appointments. Pain would make it impossible to even come several days a week." She also reported that "just the amount of dr. appoint., physical therapy and everything I do to try to keep my body going isn't compatible [*sic*] w/working." She indicated that Dennis Liu, M.D., was her treating rheumatologist.
4. CalPERS arranged for an Independent Medical Examination (IME) of respondent with Douglas Haselwood, M.D. On July 30, 2015, Dr. Haselwood conducted the IME on respondent. As detailed in his August 3, 2015 IME Report, Dr. Haselwood concluded that there were no specific Buyer II job duties that respondent could not perform and that she was not substantially incapacitated for the performance of the essential duties of this position.
5. By letter dated August 19, 2015, CalPERS notified respondent that it had reviewed medical reports pertaining to her rheumatoid arthritis condition and determined that she was not permanently disabled or incapacitated from performance of her usual duties as a Buyer II at the time she filed her application.
6. On September 17, 2015, respondent filed her appeal and requested an administrative hearing. In her appeal letter, respondent noted that she is "filled with anxiety every day because of the pain I deal with daily...." She wrote: "With my pain condition also comes anxiety and pain which brings about my depression. Depression has been a horrible side effect of my disability."

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<sup>1</sup> 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 or 21077."

7. Respondent and the District were timely notified of the time, date and place for hearing and did not appear. The matter proceeded as a default, pursuant to Government Code section 11520. CalPERS called two witnesses: its investigator Troy Shinpaugh and Douglas M. Haselwood, M.D. The testimony of these witnesses is paraphrased as relevant below.

8. *Buyer II Job Duties and Physical Requirements:* As reflected in the District's Class Title Buyer II job description, the basic functions of a Buyer II are to "exercise independent judgment in procurement of supplies, equipment, and services in accordance with established policies, procedures and state procurement laws, maintain automated purchase order and warehouse inventory system, prepare specifications for bids." The essential functions include: recommending new or revised purchasing procedures; assisting in development of District policies, administrative regulations and department procedures; overseeing the warehouse inventory systems; communicating with other departments, sites and vendors; operating a computer and related software; and driving a vehicle to various sites to conduct work. The position requires the ability, *inter alia*, to "move hands and fingers to operate a computer keyboard," and to sit or stand "for extended periods of time."

As reflected in the Physical Requirements of Position/Occupation (Physical Requirements), the Buyer II position is predominantly sedentary. It involves "constantly over 6 hours" of sitting, repetitive use of hands, and use of a keyboard and mouse; "frequently 3 – 6 hours" of standing, walking, fine manipulation, walking on uneven ground, and driving; and "occasionally" up to 3 hours of kneeling, climbing, squatting, bending/twisting of neck and waist, reaching above and below shoulders, pushing and pulling, power and simple grasping, and lifting up to 10 pounds. It never involves lifting or carrying more than 11 pounds or working with heaving equipment.

9. *Investigation:* Troy Shinpaugh is a CalPERS Investigator who engaged in 42 hours of stationary and moving surveillance of respondent's public activities in March and April of 2015.<sup>2</sup> He initially verified respondent's identity and likeness through her application, as well as through the Department of Motor Vehicles and internet and social media sites. During the operative dates, Mr. Shinpaugh took a video tape of all of respondent's public activities. He then prepared a surveillance video and surveillance log, which were made available to Dr. Haselwood for his IME review.

10. *Independent Medical Examination:* Dr. Haselwood is a rheumatologist who is certified by the American Board of Internal Medicine, with an additional certification in Rheumatology. He has been in private practice limited to rheumatology since 1977, and has been a Clinical Assistant Professor of Medicine at the University of California, Davis Medical Center. Dr. Haselwood is a Qualified Medical Evaluation for the California Department of Industrial Relations. His other professional activities have included work as a Consulting Physician in rheumatology for the Veterans Administration Outpatient Clinic and for the California State Teachers' Retirement System.

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<sup>2</sup> The specific surveillance dates were: March 20, April 8, 9, 10, 17 and 20, 2015.

For the IME, Dr. Haselwood met with and examined respondent. He also reviewed her available medical records, her job description and Physical Requirements, and the video surveillance and log. He concluded that respondent's position was primarily a sedentary one that involved both clerical functions and driving to oversee work at other sites. As reflected in his IME Report:

...In the context of the periodic surveillance from 3/20/2015 through 4/20/2015, the video documented Ms. Smith, without any assistance, performing numerous school and shopping related errands/activities in which she managed to handle her 3-year-old and toddler in the context of these excursions. The chronology and nature of the surveillance activities/excursions are detailed in the surveillance log.... Suffice it to say, throughout the entirety of the video surveillance, Ms. Smith appeared to perform an impressive range of physical activities and maneuvers including standing, walking, lifting, carrying purses and packages, frequent lifting and carrying of the toddler, and securing both children in the car without any visual evidence or obvious displays of discomfort, dysfunction, or physical impairment beyond those commensurate with her body habitus. Throughout the surveillance, there was no demonstrable evidence that arthritic symptomatology and/or dysfunction was in any significant way impairing Ms. Smith's functionality.

11. Based on his review and examination, Dr. Haselwood diagnosed respondent with:

Chronic, complex widespread musculoskeletal pain and dysfunction syndrome presumptively representing the cumulative effect of:

- A Credible historical precedence for rheumatoid factor negative erosive rheumatoid arthritis
- B Chronic morbid obesity with accompanying physical deconditioning
- C Nonspecific widespread myofascial discomfort with hypervigilance for same
- D Possible element of nonorganic amplification related to chronic anxiety/depression associated with life stressors and comorbidities.

12. In Dr. Haselwood's opinion, respondent has "some legitimate sources of musculoskeletal discomfort and dysfunction." In concluding that respondent was not

presently substantially incapacitated for the performance of her duties, however, Dr. Haselwood summarized as follows:

Unfortunately, the totality of Dr. Liu's records, while documenting evidence of a chronic rheumatoid factor negative arthritis with limited erosions and mild synovitis, do not consistently document measurable clinical or physical musculoskeletal pathophysiology or impairments that would be expected to permanently preclude Ms. Smith from performing even a sedentary level of physical vocational functionality. Indeed Ms. Smith's current historical and physical presentation in conjunction with the very contemporary surveillance video findings do not support the conclusion that her rheumatoid arthritis or any other demonstrable musculoskeletal abnormality is of such severity as to preclude her from performing at least a sedentary level of physical vocational functionality. . . .

Dr. Haselwood's testimony was consistent with his IME Report.

13. *Discussion:* The burden was on respondent to offer sufficient competent medical evidence at hearing to support her disability retirement application. By failing to appear at the hearing and call an expert witness to testify about her condition, respondent did not meet her burden. By contrast, Dr. Haselwood's IME Report and testimony were persuasive and fully support CalPERS' determination to deny respondent's application.

## LEGAL CONCLUSIONS

1. To qualify for disability retirement, respondent had to prove that, at the time she filed her application, she was "incapacitated physically or mentally for the performance of [her] duties." (Gov. Code, § 21156.) As defined in Government Code section 20026:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion.

2. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.) The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 863, explained that prophylactic restrictions that are 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. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, the court found that

discomfort, which may make it difficult for an employee to perform her duties, is not sufficient in itself to establish permanent incapacity. (See also, *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.)

3. When all the evidence in this matter is considered in light of the analyses in *Mansperger*, *Hosford*, *Smith*, and *Keck*, respondent did not establish that her disability retirement application should be granted. She failed to appear and submit any competent medical opinion evidence that, at the time she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual duties of a Buyer II with the District. Consequently, her disability retirement application must be denied.

ORDER

The application of respondent JESSICA R. SMITH for disability retirement is DENIED.

DATED: February 6, 2017

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MARILYN A. WOOLLARD  
Administrative Law Judge  
Office of Administrative Hearings