

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Statement of Issues:

PATRICIA A. DILLON,

Respondent,

and

RANCHO SANTIAGO COMMUNITY
COLLEGE DISTRICT,

Respondent.

Case No. 2014-0858

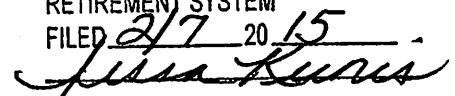
OAH No. 2015080488

PROPOSED DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), on July 28, 2016, and October 7, 2016, in Glendale, California.

Terri L. Popkes, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS). Michael D. Treger, Esq., Straussner Sherman, represented Patricia A. Dillon (respondent). No appearance was made by or on behalf of Rancho Santiago Community College District (District).

Oral and documentary evidence was received. The record was held open for the parties to simultaneously file written closing briefs by November 30, 2016, and response briefs, if any, by December 14, 2016. CalPERS timely filed its closing brief, which was marked as Exhibit 10, together with a request for official notice, which was marked as Exhibit 11. CalPERS did not file a response brief. Respondent timely filed her closing brief, which was marked as Exhibit OOO and a response brief, which was marked as Exhibit PPP. Respondent did not file a response to CalPERS's request for official notice. CalPERS request for official notice is hereby granted. The record was closed on December 14, 2016. Subsequently, the ALJ re-opened the record and, with the agreement of parties, issued an Order Extending Due Date for Proposed Decision to January 31, 2017, which the ALJ marked as Exhibit 12. The record was re-closed and the matter was submitted.



ISSUE

Whether, at the time of her application for disability retirement, respondent was permanently disabled or substantially incapacitated from the performance of her duties as Director of Apprenticeship Programs for the District on the basis of rheumatologic (arthritis, fibromyalgia) conditions.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Anthony Suine made and filed the Statement of Issues in his official capacity as the Chief of the Benefit Services Division of CalPERS.
2. Respondent was employed by the District from 1982 to 2012. By virtue of her employment by the District, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150. Respondent has the minimum service credit necessary to qualify for retirement.
3. Respondent was promoted to the position of Director of Apprenticeship Programs in 2002. She worked in that position for 10 years until December 2012, when she was medically laid off by the District. On December 14, 2012, the District filed an application for disability retirement on respondent's behalf. The application was dated December 11, 2012, and signed by John Didion, Executive Vice-Chancellor, HR. The application stated respondent's last day on payroll was December 17, 2012, and the effective date of retirement was December 18, 2012.
4. By letter dated December 19, 2012, CalPERS notified respondent of the application for disability retirement filed by the District. The letter enclosed a CalPERS publication that included a disability retirement application. The letter advised respondent that she should complete and return the application to CalPERS.
5. On April 22, 2013, respondent filed and signed an application for disability retirement. In filing the application, respondent claimed disability on the basis of fibromyalgia and bi-lateral ankle arthritis further damaged by injury. The application indicates a separation date of December 18, 2012, and indicates December 17, 2012, as respondent's termination date and last day on payroll.
6. By letter dated May 8, 2014, CalPERS notified respondent that her application for disability retirement was denied. The letter explained that, based on a review of all medical evidence submitted, CalPERS determined that respondent's rheumatologic (arthritis and fibromyalgia) conditions were not disabling and that she was not substantially incapacitated from performing her duties as Director of Apprenticeship Programs with the District. The letter also advised respondent of her appeal rights. By letter dated July 2,

2014, respondent filed a timely appeal and requested a hearing. The Statement of Issues was filed on December 29, 2014.

Job Duties

7. The District's Apprenticeship Programs provide students with a combination of on-the-job training and classroom training in various trades, such as carpentry and electrical. The Apprenticeship Programs work with trade unions which provide on-the-job training while the District provides training in the classroom.

8. The Director of Apprenticeship Programs is responsible for the day-to-day administration, implementation and coordination of the Apprenticeship Programs. The Director's representative duties include establishing and maintaining a cooperative working relationship with apprenticeship committees, college personnel, and the Division of Apprenticeship Standards; supervising off-site registration; devising, collecting and maintaining student records; writing comprehensive reports pertaining to program goals, achievements and evaluations; tracking academic and attendance performance of apprentices; preparing monthly, semester, annual and special reports; preparing the apprenticeship semester schedule; obtaining classrooms for apprenticeship classes and testing; coordinating the apprenticeship curriculum in conjunction with apprenticeship committees and college instructional staff; developing topical outlines, timelines, staffing, and other requirements; meeting with various committees and staff to develop new programs; working directly with students, faculty and apprenticeship committees to provide information on apprenticeship programs; and supervising and evaluating assigned staff.

9. The physical requirements of the Director position include "constantly" sitting, bending and twisting at neck, repetitive use of hands, keyboard use, and mouse use, and "occasionally" standing, walking, bending and twisting at waist, reaching above and below shoulders, lifting or carrying up to 10 pounds, walking on uneven ground, and driving. (Exh. II.)

10. The two colleges within the District are Santa Ana College and Santiago Canyon College. The Director of Apprenticeship Programs was required to work on campus five days per week, eight hours per day.

Medical History

11. Lisa L. Thomsen, M.D., testified at the hearing on respondent's behalf. Dr. Thomsen has been respondent's treating physician for 14 years. Dr. Thomsen graduated from medical school in 1987 and completed her residency in 1990. She is board certified in family medicine. She has treated fibromyalgia patients for 29 years. Currently, she is treating 100 patients with fibromyalgia. She explained that fibromyalgia is a chronic condition that is difficult to diagnose initially because its presentation is variable. But over time, fibromyalgia is diagnosed by exclusion, meaning that other conditions must be excluded or ruled out before a diagnosis of fibromyalgia is made.

12. Respondent was diagnosed with fibromyalgia in 1997 but she began experiencing symptoms in the 1980s. Dr. Thomsen has been treating respondent for fibromyalgia since 2002. Respondent's fibromyalgia symptoms include migraines, lightheadedness (e.g., dizziness, vertigo), sleep disorder (e.g., difficulty falling asleep and staying asleep), muscle aches, abnormal fatigue, and pain issues in her trunk, trapezius muscle, upper back, and around her neck. The fibromyalgia affects respondent's brain function and impedes her decision-making ability, creating a condition referred to as "fibro fog." Dr. Thomsen testified that when respondent's condition has been stable, she would bring respondent in for a visit every six months; however, she would see respondent more frequently when her symptoms would flare up. Respondent has good days and bad days in terms of the severity of her symptoms, which is typical with fibromyalgia patients.

13. Dr. Thomsen testified that when she first met respondent in 2002, she felt that respondent was doing well with her fibromyalgia and continued to do so until respondent suffered a fall at her home. In February 2012, respondent fell off her porch at home and injured both of her ankles. Dr. Thomsen found that respondent's ankle injuries exacerbated her fibromyalgia symptoms. Dr. Thomsen referred respondent to a rheumatologist and adjusted her medications. The rheumatologist referred respondent to a physical therapy program specifically tailored for fibromyalgia patients. Respondent attended the three-month physical therapy program from August to October 2012. Dr. Thomsen testified that, since the 2012 injury, respondent's fibromyalgia has stabilized but she still has good days and bad days, unpredictable bouts of fatigue, and days where she feels sore, has more migraines, or has difficulty sleeping.

14. Dr. Thomsen opined that, after her ankle injury in February 2012, respondent was and is unable to work a 40-hour work week, eight hours per day, five days per week, without accommodations. Dr. Thomsen testified that she understood that, prior to the ankle injury in February 2012, respondent was productive in employment and had been working under an accommodated work schedule. Dr. Thomsen released respondent to return to work in January 2013 under the accommodated work schedule that was in effect prior to February 2012. Dr. Thomsen believes respondent requires accommodations to her work schedule to be productive and work a full-time job. Dr. Thomsen has never worked with patients applying for disability retirement with CalPERS. She has not evaluated a patient for substantial incapacity for purposes of CalPERS disability retirement.

Employment History

15. Respondent has worked for the District since 1982. She worked in various positions and was promoted over the years. In 2002, respondent was promoted to a management position as Director of Apprenticeship Programs. She worked as Director for 10 years from 2002 to 2012.

16. On November 16, 2001, respondent was being treated by Alan C. Compton, M.D., for fibromyalgia and chronic tension headaches. Dr. Compton provided a note to respondent's employer recommending that, due to her condition, "it would be beneficial for

[respondent] to work some of her days on an alternative schedule that can be broken into several 3-4 hour segments per day rather than 10 hours straight." (Exh. FF.) The District agreed to provide respondent with an accommodated work schedule as recommended by Dr. Compton. Respondent was allowed to work at home when needed, take work home, and/or go to the health center to lie down and rest for a few hours and then return to work. Respondent performed her duties as Director of Apprenticeship Programs under the accommodated work schedule from 2002 until February 2012 and received excellent performance reviews, commendations, and raises.

17. When respondent fell and injured her ankles in February 2012, respondent was able to work from home while she recovered from the ankle injuries, as she was already set up to work at home under her accommodated work schedule. In March 2012, for reasons not explained by the evidence, the District discontinued respondent's accommodated work schedule and required her to work a regular schedule, five days a week, eight hours per day. She was no longer allowed to work at home or bring work home. During the ensuing months, respondent remained off-work as she recovered from her ankle injury.

18. Dr. Thomsen wrote a note for respondent's employer dated November 28, 2012, in which she released respondent to return to work on January 4, 2013, under her "pre-injury work schedule" (i.e., the accommodated work schedule in effect prior to respondent's February 2012 ankle injury). In a letter dated November 29, 2012, the District acknowledged receipt of Dr. Thomsen's note and advised respondent that all of her leave entitlements, including regular sick leave, extended sick leave, and all accrued vacation leave, would be exhausted on December 17, 2012. The letter advised respondent that, once her leave entitlements were exhausted, the District was "required to do a Medical Lay-off and place [her] on a 39-month rehire list" and "required to file for disability retirement with CalPERS on [her] behalf." (Exh. NN.)

19. On December 11, 2012, the District sent respondent a letter notifying her that her request for Catastrophic Illness Leave could not be approved. The letter explained: "The catastrophic illness bank was created to temporarily extend sick leave benefits to managers who are recovering from an accident or illness and who need some additional leave before they return to work. The information provided by your doctor indicates that your condition is most appropriately categorized as a chronic illness and that your return to work is uncertain at best." (Exh. OO.) The District changed respondent's employment status to medical layoff effective December 12, 2012.

Medical Examination by Dr. Vo

20. Quang Dihn Vo, M.D., testified at the hearing on behalf of CalPERS. Dr. Vo performed a medical examination of respondent on January 7, 2014, at the request of CalPERS. Dr. Vo is board certified in internal medicine and rheumatology. He graduated from medical school in 2001 and completed his residency in internal medicine in 2006. Dr. Vo interviewed and performed a physical examination of respondent. He reviewed respondent's medical records from 2012 and 2013, which were mostly from her primary care

physician Dr. Thomsen, as well as x-rays of her left foot and both ankles taken in February 2012. He also reviewed a job description for the position of Director of Apprenticeship Programs. Dr. Vo prepared an Independent Medical Evaluation (IME) report dated January 7, 2014, and a Clarification Report dated April 4, 2014.

21. As noted by Dr. Vo in the IME report, respondent's chief complaint at the time of the examination was fibromyalgia. Dr. Vo interviewed respondent regarding her medical history and found her to be a credible historian. Respondent reported that her fibromyalgia symptoms started in the 1980s, when she began having pain along her upper neck and lower back, along with migraine headaches. By 1996, respondent's primary care provider had already done a complete workup that was all negative and he diagnosed her by exclusion with fibromyalgia. During the ensuing years, respondent's physicians prescribed various medications to address her fibromyalgia symptoms (e.g., headaches, back pain). In 2012, respondent's rheumatologist confirmed the diagnosis of fibromyalgia and referred respondent to a three-month physical therapy program, which respondent attended three times per week from August 2012 to October 2012. Respondent told Dr. Vo that the physical therapy program helped tremendously. Prior to the program, respondent could not function. After the program, respondent felt much better and could sit up to one hour continuously, stand up to one hour continuously before having to sit down or get off her feet, and walk at least 15 minutes before having to rest. Respondent reported that she was still engaged in pool therapy three times per week in addition to doing yoga on her own. Respondent complained of bilateral upper shoulder and lower neck pain but reported that she saw a chiropractor regularly.

22. (A) Based on his review of records and his examination of respondent, Dr. Vo assessed respondent as having fibromyalgia and migraines, but he concluded there are no specific job duties that respondent is unable to perform because of a physical or mental condition and, in his professional opinion, respondent is not substantially incapacitated for the performance of her usual job duties as Director of Apprenticeship Programs.

(B) Dr. Vo noted that respondent showed clinical progress since completing the three-month therapy program in 2012. After the program, she reported improvements in her ability to get out of bed and to sit up, stand, and walk. On cross-examination, Dr. Vo clarified that his opinion that respondent could perform all of her job duties applied only on the day that he performed his examination of respondent. Dr. Vo acknowledged that fibromyalgia is a complicated disease, the level of fibromyalgia pain may differ from day-to-day, and fibromyalgia patients can have good days and bad days. Dr. Vo testified he was unaware that respondent had worked under an accommodated work schedule for 10 years prior to her ankle injury. His review of medical records was limited to records dated after February 2012. Dr. Vo explained that his conclusion that respondent had made "clinical progress" was based his inferences from her reported medical history that she had difficulty with some activities (e.g., standing, sitting, getting out of bed) prior to attending the physical therapy program, but her condition improved for those activities after completing the physical therapy program. He also noted that, after the program, respondent reported that she continued with pool therapy and yoga. During the examination, Dr. Vo did not ask

respondent about her job duties because he felt there was no reason to because respondent indicated that her last day of work was in May 2012.

23. In the Clarification Report dated April 4, 2014, Dr. Vo stated his medical opinion that respondent did not have ankle arthritis and she did not have any incapacity due to her arthritis. Dr. Thomsen, in her testimony, did not specifically identify ankle arthritis as a disabling conditioning for respondent. Dr. Thomsen's testimony focused on respondent's fibromyalgia as a basis for respondent's incapacity to perform her job duties.

Respondent's Testimony

24. Respondent testified that the examination with Dr. Vo lasted a total of approximately 30 to 45 minutes. Part of that time was spent with the physician assistant/nurse who took her vital signs (e.g., weight, blood pressure, pulse). Dr. Vo's examination lasted approximately 30 minutes. Respondent does not recall Dr. Vo asking about her job duties or the accommodated work schedule.

25. Respondent testified that her fibromyalgia symptoms are pain in various parts of her body (e.g., neck, right side, knees, and ankles), problems falling asleep and staying asleep, getting tired easily (e.g., she can clean one room in her house but then needs to rest for several hours), and dry eyes and sensitivity to light. Respondent testified that mornings are the worse time for her because she is sore and stiff and must stretch for 15 minutes before she is able to get up from her bed, and because of "fibro fog" (e.g., she has difficulty putting thoughts together or making clear decisions). Respondent testified that she has good days and bad days, so not every day is not a bad day, and the changes in her symptoms are unpredictable. Respondent testified that the fibromyalgia affects her ability to work if she is having one of her bad days. On a bad day, the fibromyalgia makes it impossible for respondent to work eight consecutive hours because she needs to take a lot of breaks due to fatigue and pain, and she has memory problems, especially in the morning.

26. Respondent's accommodated work schedule was implemented at the end of 2001 at the recommendation of her physician, Dr. Compton. For the most part, as Director of Apprenticeship Programs, respondent worked a swing shift schedule, where her work day started in the early afternoon and ended in the evening hours. The accommodated work schedule allowed respondent to work more hours on her good days to make up for the hours she was unable to work on the bad days. The accommodated work schedule allowed respondent to work the swing shift, but she was allowed to take work home if needed. If she was unable to work a full day in the office, she could take work home to make up the time. On her bad days, respondent was permitted to lie down. The accommodated schedule remained in effect until 2012.

27. Respondent was notified in March 2012 that her previous work accommodations would no longer be provided, her work schedule had to be 8 a.m. to 5 p.m. or 9 a.m. to 6 p.m., Monday through Friday, and she would no longer be compensated for work performed at home or outside of the schedule. The District rerouted respondent's

telephone and email back to the office and retrieved the laptop and equipment that she had been using at her home. Respondent does not know why the District removed her work accommodations.

LEGAL CONCLUSIONS

Burden of Proof and Jurisdiction

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.)

2. The Public Employees Retirement Law (PERL), set forth at Government Code section 20000 et seq., is a comprehensive statutory scheme and the Legislature has expressly vested PERS with the sole authority to determine the type and level of benefits paid under the system. (§§ 21023-20125.) Because of the need for statewide uniformity in its application, the board has been vested with the sole authority to determine who are employees and the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under the system. (*Metropolitan Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 503–505; *City of Los Altos v. Board of Administration* (1978) 80 Cal.App.3d 1049, 1051.)

3. The statutory scheme for disability retirement requires a "disability of permanent or extended and uncertain duration, as determined . . . on the basis of competent medical opinion." (Gov. Code, § 20026.) The board 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." (Gov. Code, § 21154.) "If the medical examination and other available information show to the satisfaction of the board that the member . . . 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." (Gov. Code, § 21156.) The term "incapacitated for performance of duty" has been defined to mean the "[s]ubstantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876–877.)

4. An applicant does not qualify for a disability retirement when she can perform customary duties, even though doing so may sometimes be difficult or painful. (*Mansperger, supra*, 6 Cal.App.3d 873; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) In *Hosford*, the court found that although sitting for long periods of time would probably bother the applicant's back, which was the condition subject to his disability retirement application, that did not mean he was unable to do so, particularly since he could stop and exercise as needed. (*Hosford, supra*, 77 Cal.App.3d at p. 862.)

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Discussion

5. Under Government Code section 20026, the determination of disability or incapacity for performance of duty is made "on the basis of competent medical opinion." Government Code section 21156 further directs the board to consider the medical examination it can order (under section 21154) "and other available information." In this case, medical opinion was presented through the testimonies of Dr. Vo and Dr. Thomsen. Both doctors are qualified by their education and experience for the medical opinions given through their testimony at the hearing. Dr. Vo conducted the medical examination ordered by CalPERS pursuant to Government Code section 21154. Dr. Thomsen's opinions were based on her 14 years as respondent's treating physician. Although Dr. Thomsen's opinions were not based on her application of CalPERS's standards for disability retirement, her opinions should be considered by virtue of her treating respondent as a patient over the past 14 years. Dr. Thomsen's testimony and medical records may be considered as "other available information" in determining whether respondent qualifies for disability retirement.

6. Official notice was taken of a CalPERS precedential decision (OAH Case No. L-1999120097) in a case addressing a disability application based on an orthopedic condition. (Exh. 11.) CalPERS asserts that the decision establishes that competent medical evidence is needed to support a finding on the question of whether an applicant qualifies for a disability retirement. CalPERS contends that Dr. Vo's reports and opinions are the only competent medical evidence in this matter, as he relied upon the standard of whether the worker has a substantial inability to perform the usual duties of the position. The precedential decision refers to the concept of competent medical evidence, a concept included in Government Code section 20026. However, the statutory direction in Government Code section 21156 requires the board to consider the medical examination it can order (under section 21154) "and other available information." Dr. Thomsen's testimony and medical records constitute "other available information." Therefore the question is raised as to the weight, if any, to be given to Dr. Thomsen's medical records and testimony.

7. In this case, the preponderance of the evidence established that respondent was substantially incapacitated to perform her usual duties as Director of Apprenticeship Programs at the time she applied for disability retirement. Respondent and Dr. Thomsen testified credibly regarding respondent's fibromyalgia and the resulting limitations on her ability to perform her job duties without an accommodated work schedule. Respondent worked under an accommodated work schedule for 10 years and was able to perform her usual job duties. In 2012, the District took away the accommodated work schedule without explanation. The District placed respondent on medical layoff and filed a disability retirement application for respondent pursuant to Government Code section 21153. Section 21153 allows an employer to apply for disability retirement of any member "believed to be disabled." Thus, the District's filing of the application is evidence of its belief that respondent was disabled, and corroborates respondent's claim of disability and inability to perform her job duties.

8. In determining the weight to be given expert testimony, it is the material from which expert opinion is fashioned and the reasoning of the expert in reaching his or her conclusion that is important. (*In re marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1345.) “[T]he weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion[;]’ its value ‘rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion.’ Such an opinion is no better than the reasons given for it,” (*White v. State of California* (1971) 21 Cal.App.3d 738, 759-760 (citations omitted).)


9. CalPERS's evidence, consisting of Dr. Vo's testimony and expert reports, was insufficient to rebut respondent's evidence and the District's belief she was disabled. In his written report, Dr. Vo concluded that there were no specific job duties that he felt respondent was unable to perform because of her medical condition. But, in his testimony, after acknowledging that fibromyalgia symptoms may vary from day-to-day and fibromyalgia patients have good days and bad days, Dr. Vo clarified that his opinion was that there were no specific job duties respondent could not perform on the day of the medical examination. Dr. Vo's opinions and testimony were entitled to less weight than Dr. Thomsen's opinions and testimony. Dr. Vo met respondent on one occasion for 30 minutes. He only reviewed medical records dating back to 2012. He was unaware that respondent had worked under an accommodated work schedule for 10 years. He did not ask respondent about her job duties and the limitations in performing her duties caused by her fibromyalgia. Dr. Thomsen provided the more credible and persuasive medical evidence in this case.

10. Based on the foregoing, the preponderance of the evidence established that respondent was permanently disabled or substantially incapacitated from the performance of her duties as Director of Apprenticeship Programs for the District on the basis of rheumatologic (fibromyalgia) condition. Respondent application for disability retirement shall be granted. (Factual Findings 1-27; Legal Conclusions 1-9.)

ORDER

The application for disability retirement of respondent Patricia A. Dillon is granted.

Dated: February 3, 2017



ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings