

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Of:

SARAH E. STEWART,

Respondent,

and

BOARD OF EQUALIZATION,

Respondent.

Case No. 2016-0411

OAH No. 2016070589

PROPOSED DECISION

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in San Luis Obispo, California, on December 18, 2016.

Terri L. Popkes, Senior Staff Counsel, represented Complainant Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Sarah E. Stewart (Respondent) represented herself.

Respondent Board of Equalization (BOE) did not appear at the hearing.

Complainant seeks to deny Respondent's continuing disability retirement allowance on grounds that the medical evidence no longer supports her orthopedic (low back) disability. Respondent asserts that she is disabled for the performance of her duties.

Oral and documentary evidence was received at the hearing. The record was left open for Respondent to submit a medical report pertinent to the initial approval of her disability retirement application and for the submission of closing argument. On January 6, 2017, Respondent submitted the August 6, 2012 report of Richard D. Kahmann, M.D. (Kahmann) entitled "CalPERS Independent Medical Examination," which document has been marked for identification as Exhibit D. No objection was submitted by the January 17, 2017 deadline, and Exhibit D is received in evidence. On February 1, 2017, Respondent submitted her closing argument. CalPERS filed a Closing Brief at the hearing, and did not submit additional closing

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argument by the January 31, 2017 deadline. The matter was submitted for decision on February 1, 2017.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in his official capacity.
2. At the time Respondent filed her application for disability retirement, she was employed by Respondent BOE as an office technician. By virtue of her employment, Respondent is a state miscellaneous member of CalPERS.
3. Respondent discharged her duties for Respondent BOE in the State of New York. Under the supervision of a Supervising Tax Auditor, Respondent performed a variety of administrative, secretarial and support duties involving the collection of taxes outside California. Her position required frequent (three to six hours) sitting, standing, bending, and twisting, and occasional (up to three hours) crawling, climbing, squatting, bending of the neck, reaching above her shoulder, reaching below her shoulder, pushing and pulling, fine manipulation, and repetitive use of hands. She was frequently required to lift up to 25 pounds and occasionally up to 50 pounds.
4. Before working for Respondent BOE, Respondent worked for the California Department of Transportation (DOT) as part of the landscape crew. In May 1999, Respondent injured her back while in a vehicle that was hit by another. In 2002, she underwent back surgery in the lumbar area, and was able to return to work for DOT as an office technician. On January 15, 2008, Respondent reinjured her back in New York while lifting a 50-pound box at her BOE job.
5. Respondent experienced severe pain, and received treatment from Dr. Andrew Brown (Brown) and others. She attempted to work while receiving treatment, but was unable to regularly do so. She had difficulty getting to work on the train, and her pain worsened as the workday progressed.
6. On November 17, 2011, Respondent filed a Disability Retirement Election Application, which was received by CalPERS on November 28, 2011. She described her disability as "Extreme back pain & limited mobility due to extreme back pain – occurred on 1/15/08 while moving a box of paper." (Exh. 3, at p. 9.) She listed her limitations as "Unable to sit or stand for any length of time without pain. Unable to lift, bend, kneel, twist or reach without pain that both manifests immediately and then is unbearable for 1-3 days thereafter. (Commuting on train – jostling & jerking of train leaves me incapacitated for days afterward as well)." (*Ibid.*) With respect to how her injury affected her ability to perform her job, Respondent stated: "Due to limited mobility and the cycle of work/pain, it takes me longer to be able to care for personal needs and get to work, resulting in consistent tardiness, if I'm even able to be present at work at all. Unable to sit at desk, type, move audits, stand, push cart, lift or move mail, file or sort paperwork for any length of time without pain." (*Ibid.*)

7. a. CalPERS contracted Dr. Kahmann to perform an evaluation of Respondent. Dr. Kahmann examined Respondent and issued a report dated August 6, 2012. Dr. Kahmann obtained a medical history from Respondent, and reviewed records of treating physicians. Dr. Kahmann noted that Respondent had suffered a prior back injury in the late 1990s, which led to a successful anterior interbody fusion at the L5-S1 level in 2002.

b. With respect to his physical examination, Dr. Kahmann wrote: "Lumbar spine examination shows tenderness to palpation in the middle low back at the waist level, over L5-S1 and over the sacroiliac bilaterally. Range of motion of the lumbar spine is approximately 50% of normal limited by pain. This pain is in the low back region. No paravertebral spasm noted. [¶] Neurological examination shows normal muscle strength and sensation in both lower extremities, in all major muscle groups and dermatomes. Reflexes: Quadriceps and Achilles tendons are 1+ and symmetric. Nerve tension signs are negative bilaterally." (Exh. D, at p. 5.)

c. Dr. Kahmann's diagnoses were chronic low back pain and status post anterior interbody fusion L5-S1. In his opinion, Respondent had undergone all appropriate conservative treatment without improvement to her symptoms and was not a candidate for further surgery. The following were her permanent limitations: no lifting of more than 10 pounds; no repetitive bending; no sitting, standing, or walking for more than 30 minutes without a five-minute change in activities; no sitting for more than two hours cumulatively in an eight-hour work day; and no standing for more than one hour cumulatively in an eight-hour work day. In his opinion, Respondent could not carry out a full time sedentary position.

b. Dr. Kahmann answered the following four specific questions posed by CalPERS, as follows:

"1. Are there any specific job duties that you feel the member is unable to perform because of physical or mental condition? If so, please explain in detail.

"After reviewing the job requirements, the patient is unable to sit or stand for prolonged periods of time. She is unable to climb, squat, push or pull. She is unable to lift over 10 pounds. She is unable to work with heavy equipment.¹ All of the activities outlined are a significant part of her job duties.

"2. In your professional opinion, is the member substantially incapacitated for his/her performance of the usual duties? If yes, on what date did the disability begin?

¹ Dr. Kahmann incorrectly referred to Respondent working with heavy equipment, something she had not done at BOE. This error does not seem to impact his opinion since, as set forth in factual finding number 7, he concluded that Respondent could not carry out a full time sedentary position, a fact Dr. Kahmann reaffirms in his answer to the question, number 1, posed by CalPERS.

"In my opinion, [Respondent] is substantially incapacitated for the performance of her usual duties. This assessment is based on the review of the physical requirements of position/occupational title for Office Technician, [BOE]. This disability commenced on 01/15/2008.

"3. If incapacitated, is the incapacity permanent or temporary?

"The incapacity of [Respondent] is permanent.

"4. Is the member cooperating with the examination and putting forth the best effort, or do you feel there is exaggeration of complaints to any degree?

"Yes, I feel that she cooperated fully and to the best of her ability." (Exh. D, at p. 6.)

8. Respondent's disability application was approved, and she started receiving her disability retirement allowance in 2012.

9. Respondent testified that she continues to regularly experience pain "in virtually every position" and that increase of back pain following taxing activity typically leads to back spasms.

10. a. In 2015, CalPERS directed Respondent to undergo further examination, this time by Brendan McAdams, M.D. (McAdams). Dr. McAdams examined Respondent on November 23, 2015. Before the examination, Dr. McAdams reviewed the medical records of Dr. Brown and the August 6, 2012 report from Dr. Kahmann. Dr. McAdams obtained medical history information from Respondent. Respondent reported back spasms that sometimes "blossoms" down both her legs. (Exh. 7, at p. 2.) She also reported that she was not able to sit for any length of time and that has a great deal of difficulty moving and bending. At the time of the examination, Respondent was five-feet, five-inches tall and weighed 290 pounds.

b. Dr. McAdams observed Respondent walk into the examination room without demonstrating evidence of discomfort or limp. She stood erect. She sat for a while in the examination room, appearing comfortable and cooperative. On two occasions, Respondent stood up due to reported back discomfort. During the range of motion examination, Respondent had marked restriction and flexed forward to only 40 degrees and was unable to bend backwards. Her extension was minimal. Lateral bending was limited to 20 degrees in both directions. There was minimal rotation. Respondent had normal strength in her leg muscles.

While lying on her back in the examination table, Respondent was only able to lift her legs to the 30 degree position. Dr. McAdams discounted her limitations in this regard because Respondent did not demonstrate consistent limitations when asked to lift her legs from a seated position.

Respondent described tenderness in her lower back. Respondent initially complained of muscle tightness in the lumbar spine, but when the palpation was repeated she stated that it did

not bother her as much. Dr. McAdams used a pinwheel to test for objective evidence of Respondent's pain, but concluded her sensory responses were not consistent with the pain being reported.

c. Dr. McAdams arrived at the following conclusions in the "Diagnoses" section of his report to CalPERS, which statements are consistent with his hearing testimony: "Status post lumbar fusion, by history obtained from the patient, that is apparently solid. I cannot give an educated answer as to what the mechanism of injury was, nor of her immediate symptoms post alleged injury. Based on my evaluation today, [Respondent] manipulated the examination to a great extent and had no true positive findings other than a scar that would indicate an anterior approach to the lumbar surgery." (Exh. 7, at p. 5.)

d. Dr. McAdams answered the same questions posed by CalPERS staff to Dr. Kahmann, reaching contrary conclusions. In response to question number 1, regarding specific job duties the member was unable to perform, Dr. McAdams wrote: "Based on my physical examination, in which there are truly no absolute objective findings, I can find no specific job duties [Respondent] would be unable to perform because of any of her physical conditions evaluated today. Despite the fact that she is very vocal about her complaints of pain, she lacked any true reproducible physical findings. She did manipulate the examination, and that included the straight leg raising particularly, in that it was no limitation when in the sitting position, marked limitation in the supine position, and then shortly thereafter, in sitting on the table, she sat fully upright with both legs fully extended, without any complaint of pain." (Exh. 7, at p. 6.)

11. Respondent challenged Dr. McAdams's examination as insufficient, and presented a video recording of the examination in support of her testimony. On cross-examination, Dr. McAdams testified that his physical examinations last between 10 to 15 minutes. When asked if his examination of Respondent lasted five minutes, Dr. McAdams stated that he doubted it had been that short. Respondent testified that the physical examination lasted approximately five minutes. Her testimony is supported by the videotape, which shows the examination lasting about eight minutes. She also testified that, pursuant to Dr. McAdams's instructions, she did not bend or move beyond what she could tolerate.

12. On December 21, 2015, CalPERS notified Respondent that based on Dr. McAdams's report it had concluded that she was no longer disabled for the performance of her duties and that she would be reinstated to her former position in accordance with Government Code section 21192. On February 12, 2016, Respondent appealed CalPERS' determination.

13. The credible medical evidence and opinion establishes that Respondent is incapacitated for the performance of duty by reason of a low back orthopedic condition. In 2012, CalPERS found Dr. Kahmann's opinions persuasive and supportive of Respondent's disability claim. At the time of the initial CalPERS determination, Dr. Kahmann's opinions were supported by undisputed evidence, such as Respondent's two injuries and her back surgery. The injuries and the surgery remained undisputed at the hearing, and Respondent presented testimony consistent with her continuing pain and limitations. Respondent

demonstrated significant physical limitations during her examination by Dr. McAdams, which are also consistent with her testimony and with Dr. Kahmann's examination and opinions. In light of the foregoing, Dr. McAdams contrary opinion, based on a brief examination of Respondent and rooted primarily on his conclusion that Respondent was exaggerating her symptoms, is insufficient to show changed circumstances or to overcome Respondent's testimony or the medical evidence and prior determination that supported her disability claim.

LEGAL CONCLUSIONS

1. Government Code section 20026 defines the following relevant terms: "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. Government Code section 21156 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. . . ."

3. Pursuant to Government Code section 21192: "The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination The examination shall be made by a physician or surgeon, appointed by the board . . . at the place of residence of the recipient or other place mutually agreed upon. Upon the basis of the examination, the board . . . shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency . . . where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement."

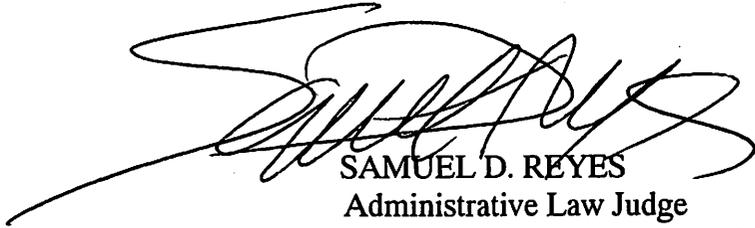
4. By reason of factual finding numbers 3 through 11, and 13, Respondent has established that he is incapacitated for the performance of duty within the meaning of Government Code sections 20026 and 21156, by reason of an orthopedic condition related to her lower back.

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ORDER

The appeal is sustained.

DATED: 2/24/17

A large, stylized handwritten signature in black ink, appearing to read 'S. Reyes', is written over the typed name.

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings