

**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 the  
Industrial Disability Retirement of:

JUANITA COLEMAN,

Applicant/Respondent,

and

CALIFORNIA STATE HOSPITALS,  
METROPOLITAN,

Contracting Entity/Respondent.

Case No. 2016-0916

OAH No. 2017010295

**PROPOSED DECISION**

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 30, 2017, in San Bernardino, California.

Charles Glauberman, Staff Counsel, represented complainant Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California.

No appearance was made by respondent or anyone on behalf of respondent.

The matter was submitted on March 30, 2017.

**DEFAULT**

On proof of compliance with Government Code sections 11505 and 11509, this matter proceeded as a default pursuant to section 11520.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED April 13 20 17

## ISSUE

Was respondent permanently disabled or incapacitated from performing the usual and customary duties of a Unit Supervisor at the Department of State Hospitals, (DSH) as a result of a cervical strain condition at the time she filed her application for an industrial disability retirement on February 16, 2016?

## FACTUAL FINDINGS

### *Jurisdictional Matters*

1. Respondent was employed as a Unit Supervisor with DSH at the time she filed her disability retirement election application on February 16, 2016. Respondent elected an effective service retirement date of May 24, 2016, pending a determination of her industrial disability retirement application. By virtue of her employment, respondent is a member of CalPERS subject to Government Code section 21151.

2. On her application, respondent claimed she was disabled as a result of being struck by a patient on April 4, 2014, struck in the face by a patient in 2013, and falling while at work in 2008. Respondent claimed she was in "constant pain" and the pain has affected her job by causing her to be "guarded because [of being] afraid to get struck again by a patient. . . ."

3. CalPERS reviewed medical records and reports related to respondent's condition. CalPERS selected an independent physician to perform a disability evaluation of respondent. On April 25, 2016, CalPERS sent a letter to Robert Kolesnik, M.D., explaining claimant's complaints and requesting he perform an independent medical examination to determine if respondent was substantially incapacitated from performance of her usual job duties at the time she filed her application for a disability retirement.

4. On May 10, 2016, Dr. Kolesnik performed an independent medical examination and concluded respondent was not substantially incapacitated from performance of her usual job duties at the time she filed her application for a disability retirement.

5. By letter dated June 9, 2016, CalPERS notified respondent that she was not entitled to a disability retirement. On July 2, 2016, respondent appealed that determination.

6. On October 21, 2016, complainant signed the Statement of Issues in his official capacity. The Statement of Issues and other jurisdictional documents were served on respondent and DSH. The signature on the return receipt that was attached to the Statement of Issues and other applicable pleadings matched respondent's signature on her disability retirement election application. The Notice of Hearing was also served at the same address where the pleadings were served. Thus, CalPERS properly served respondent with all required documents.

7. On March 30, 2017, respondent did not appear. She did not contact OAH to ask for a continuance. Counsel for complainant stated he contacted respondent immediately prior to the commencement of the hearing to inquire as to where she was. Respondent told complainant's counsel that she would not be appearing at the hearing. She claimed to have a family emergency but did not specify the emergency. Respondent then told complainant's counsel to do the hearing without her.

8. Good cause did not exist under Government Code section 11524 to continue the matter and it proceeded, at complainant's request, by default.

#### *Duties of a Unit Supervisor*

9. Respondent held the position of Unit Supervisor in the Forensic Facility at DSH. According to the official duty statement, a unit supervisor is generally responsible for overall management and supervision of an organized nursing unit, which includes implementing and evaluating practices used by staff<sup>1</sup> to provide patient care. A unit supervisor also handles preparation of staffing schedules, ensures adequate staffing levels, writes performance evaluations of staff, orientates staff regarding policies and procedures, ensures each staff member takes appropriate mandatory continuing education courses, and other administrative duties.

#### *Dr. Kolesnik's Independent Medical Evaluation*

10. Dr. Kolesnik testified at the hearing. Dr. Kolesnik obtained his medical degree in 1979 from the University of Southern California. Following medical school, he completed both his internship and residency in the Department of Orthopaedic Surgery at Los Angeles County/University of Southern California Medical Center. Dr. Kolesnik has been board-certified in orthopedic surgery since 1985. He has also made multiple academic presentations in the field of orthopedics and has published in a peer-reviewed journal.

11. Prior to conducting the independent medical examination, Dr. Kolesnik reviewed respondent's medical history and interviewed respondent. Dr. Kolesnik also reviewed the engagement letter sent to him by CalPERS, which correctly stated the standard used to determine whether someone qualifies for a disability retirement. The following is a summary of Dr. Kolesnik's testimony and report.

Respondent told Dr. Kolesnik that she injured her neck and left arm on March 4, 2014, when she was opening a door and a patient assaulted her. She reported that the patient struck the left side of her head and neck and she eventually fell to the floor. The patient continued to strike her, but staff members were able to pull the patient off of her.

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<sup>1</sup> The staff a unit supervisor must supervise includes psychiatric technicians, psychiatric technician assistants, psychiatric assistant trainees, licensed vocational nurses, and hospital workers.

Following the injury, respondent saw a doctor who diagnosed her with a closed head injury, facial pain, and neck pain. She was treated and sent home. In April 2014, respondent saw a different doctor complaining of pain in her neck with “electrical shocks” radiating into both arms. She was diagnosed at that time with a neck strain/sprain and an acute herniated disc at C7. Respondent underwent an MRI on May 14, 2014, which showed a small disc bulge at C4-C5. Respondent was declared permanent and stationary for purposes of her worker’s compensation claim with no impairment. In November 2014, respondent went to a different doctor complaining of the same pain, and noted that it had increased. That doctor provided her with some injections, which helped with the pain. Over the ensuing two years, respondent continued treating with different doctors, complainant of recurring pain. Respondent has received no documented treatment since March 2016.

Dr. Kolesnik’s examination included checking respondent’s vital signs, cervical spine, shoulders, upper arms and elbows, and upper and lower extremities. Respondent showed no signs of atrophy, which would usually be present in persons who have pain to such a level that they limit the use of a particular extremity. Respondent had no tenderness or muscle spasm in her cervical spine on palpation. Dr. Kolesnik found no swelling, tenderness, or deformity in respondent’s shoulders. Respondent’s range of motion in both shoulders was normal. There were no defects in respondent’s biceps or triceps. Respondent’s arm circumference was equal in both arms, which, as in the case of lack of atrophy, indicated respondent was not limiting the use of either arm due to pain. Respondent’s forearm circumferences were also equal and she had no swelling, tenderness, or deformities in her forearms. Finally, respondent’s range of motion in both wrists and hands was normal and she showed no limitations in her range of motion. In sum, Dr. Kolesnik concluded respondent’s neurological exam was “completely normal” and she was not substantially incapacitated from performing the usual and customary duties of a unit supervisor.

### *Evaluation of the Evidence*

12. Respondent did not appear at the hearing. No competent medical evidence was submitted to support respondent’s claim that she is substantially incapacitated from performance of her usual and customary job duties at the time she filed her application for a disability.

By contrast, Dr. Kolesnik’s expert testimony qualifies as a competent medical opinion. Dr. Kolesnik is a highly trained, board-certified, orthopedic surgeon with substantial experience in diagnosing and treating conditions like the one claimed by respondent on her disability application. Dr. Kolesnik reviewed numerous medical records, interviewed respondent, and conducted a physical examination of respondent. Based on the medical evidence in the record, there was no objective evidence to support respondent’s subjective reports of pain to her neck and left arm.

It is also noted, in her disability retirement election application, respondent claimed she was constantly "guarded" because she was "afraid" to get struck by a patient again. Mere pain is not enough to warrant a disability retirement; nor is fear of being injured in the future.

Accordingly, a preponderance of the evidence did not establish respondent's right to receive a CalPERS disability retirement.

## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

### *Applicable Statutes*

2. Government Code section 20026 provides in part:

"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. Government Code section 21151, subdivision (a), provides in part:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

4. Government Code section 21156, subdivision (a), provides in part:

(a)(1) 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 . . .

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis

of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process. . . .

*Appellate Authority*

5. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his customary duties, even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854.) Further, respondent must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Id.* at 863.)

*Cause Exists to Deny the Application*

6. Cause does not exist to grant respondent's application for a disability retirement. A preponderance of the evidence did not establish that respondent suffered from a physical or mental condition of a permanent or extended and uncertain duration that rendered her substantially incapacitated from performing the usual and customary duties of a unit supervisor at the time she filed her application for a disability retirement.

ORDER

The application for a disability retirement filed by Juanita Coleman with the California Public Employees' Retirement System is denied.

DATED: April 10, 2017

DocuSigned by:  
*Kimberly Belvedere*  
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KIMBERLY J. BELVEDERE  
Administrative Law Judge  
Office of Administrative Hearings