

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:

YOLANDA BENNETT,

and

DEPARTMENT OF CALIFORNIA
HIGHWAY PATROL,

Respondents.

Case No. 2015-0296

OAH No. 2016060582

PROPOSED DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on May 9, 2017, in Bakersfield, California. The California Public Employees' Retirement System (CalPERS) was represented by Senior Staff Attorney Kevin Kreutz. Yolanda Bennett (Respondent) was present and represented herself. Although it was properly served with the notice of hearing, no appearance was made on behalf of Respondent Department of California Highway Patrol.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on May 9, 2017.

FACTUAL FINDINGS

1. Anthony Suine, Chief of the Benefits Services Division of CalPERS, filed the Statement of Issues while acting in his official capacity.

2. At the time she filed her application for retirement, Respondent was employed as an Office Assistant with the Department of California Highway Patrol (CHP). By virtue of her employment, Respondent is a "state miscellaneous member" of CalPERS.

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3. On May 19, 2014, Respondent signed, and subsequently filed, an application for service retirement pending industrial disability retirement (application), which was processed as a disability retirement application. Respondent's claimed disability on the basis of an orthopedic condition (low back).

4. The Statement of Issues, paragraph IV, page 2, lines 311, alleged that "Respondent . . . retired for service effective May 1, 2014, and has been receiving her retirement allowance from that date." There was no evidence submitted to establish this allegation. However, the totality of the evidence indicated that Respondent had retired for service sometime in or after May 2014.

5. After review of medical reports submitted by Respondent in support of her application, CalPERS determined that Respondent was not substantially incapacitated for performance of her duties as an Office Assistant.

6. In a letter dated January 14, 2015, CalPERS notified Respondent of its determination that she was not substantially incapacitated for the performance of her duties as an Office Assistant and that her application for disability retirement was denied.

7. In a letter dated February 10, 2015, Respondent timely appealed the denial and requested a hearing.

8. The issue on appeal is whether, on the basis of an orthopedic condition (low back), Respondent is substantially incapacitated for performance of her duties as an Office Assistant.

9. In her February 10, 2015 appeal letter, Respondent noted she had provided reports from Alan Moelleken, M.D. (orthopedic spine specialist), David Pechman, M.D. (orthopedic surgeon), and "Dr. Burgoyne." (Exhibit 5.) She further asserted that, "These are the doctors that told me I was unable to perform full duties as an [Office Assistant] for CHP. CHP was unable to accommodate limited duty which consisted of breaks every 10 minutes. Therefore I applied for disability retirement. I have an appointment to see Dr. Moelleken on February 13, 2015. I will send a copy of duty restrictions at that time."¹ (*Ibid.*)

10. Respondent is 61 years old. She worked as an Office Assistant for CHP from January 2011 until June 2013. Her duties included processing arrest reports which involved three to six hours of sitting and three to six hours of standing per day. In 2013, she began experiencing low back pain which became gradually worse. The pain often resulted in her

¹ Neither party submitted any medical records or reports from Drs. Moelleken, Pechman, or Burgoyne. However, in his Independent Medical Evaluation report, Complainant's expert summarized Respondent's treatment, including that provided by Drs. Moelleken and Pechman. The expert's summary in his report and his supporting testimony provided the basis for Factual Finding 11.

having to leave work. However, Respondent did not feel that sitting at her job caused her to develop her lower back pain.

11(a). In March 2013, Respondent went to her primary care physician, and he ordered x-rays and magnetic resonance imaging (MRI) of her lumbar spine. The x-rays (taken March 29, 2013) showed mild degenerative disc disease at the L3-L4 level. The MRI (taken June 21, 2013) showed loss of disc height at L3-L4 with mild to moderate neural foraminal stenosis.

11(b). Respondent was referred to physical therapy and also to a chiropractor, Craig Gunderson, D.C. Dr. Gunderson in turn referred Respondent to a pain management specialist, Ashok Parmor, M.D. who prescribed pain medication.

11(c). Respondent was seen by Dr. Moelleken in October 2013, and he obtained a new MRI of the lumbar spine in June 2014. The MRI showed degenerative changes from L3-S1, which was worst at the L3-L4 level with marked narrowing of the disc space, associated with moderate neural foraminal stenosis, right worse than left.

11(d). Dr. Moelleken referred Respondent for an electrodiagnostic study of her bilateral lower extremities which was conducted in November 2013. The results from this study were normal.

11(e). In January, March, April, and October 2014, Respondent saw pain management specialist Thomas Jacques, M.D. He administered a lumbar epidural steroid injection on the right side at her last visit.

11(f). Respondent was seen by Dr. Pechman in his capacity as the Agreed Medical Examiner in her Workers' Compensation matter. Dr. Pechman found that Respondent had a dull ache in her lower back, which changed to a sharp pain with physical activities.

12(a). On November 24, 2014, board certified orthopedic surgeon Ghol Ha'Eri, M.D. conducted an Independent Medical Evaluation (IME) of Respondent at the request of CalPERS. His evaluation included: a review of Respondent's prior medical records; a review of the job description and physical requirements of an Office Assistant; a patient medical history; and a clinical examination.

12(b). On the evaluation date, Respondent complained of: lower back pain brought on with prolonged sitting, radiating to the anterior aspect of her left thigh. Dr. Ha'Eri observed that Respondent walked independently without a limp. She had normal posture and did not wear a back brace.

12(c). On physical examination, Dr. Ha'Eri noted that Respondent's lower back showed normal lumbar lordosis. Palpation of her lower back revealed diffuse mild tenderness with no paravertebral muscle spasm. Range of motion in her lumbar spine was slightly limited due to pain inhibition.

12(d). Dr. Ha'Eri diagnosed Respondent with multilevel lumbar degenerative disc disease (L3-S1), with the worst level at L3-L4 (marked disc space narrowing associated with bilateral neural foraminal stenosis).

13(a). During his records review, Dr. Ha'Eri noted a June 18, 2014 Physician's Report on Disability by Dr. Moelleken which indicated that Respondent was permanently incapacitated from returning to her regular occupation as an Office Assistant. However, since this report was not in evidence, and Dr. Moelleken did not testify at the administrative hearing, the bases for Dr. Moelleken's purported conclusion were not disclosed by the evidence.

13(b). Dr. Ha'Eri testified as CalPERS's expert at the administrative hearing. Dr. Ha'Eri credibly testified that, upon reviewing Dr. Moelleken's report, he could not determine why Dr. Moelleken found Respondent permanently incapacitated and that there was no identifiable basis for Dr. Moelleken's conclusion. Consequently, Dr. Moelleken's purported conclusion of Respondent's permanent incapacity was given no weight.

13(c). Dr. Ha'Eri's credible testimony and his report established that:

(1). Respondent's lower back pain resulted from a naturally occurring degenerative condition of the lumbar spine common in the population of Respondent's age. Such "wearing out" of the lower spine and loss of disc height is part of the natural aging process.

(2). The treatment Respondent received prior to seeing Dr. Ha'Eri (which included a full course of physical therapy, a full course of chiropractic treatment, acupuncture, aqua therapy, an epidural injection, and narcotic pain medications) was excessive and unnecessary. Specifically regarding the epidural steroid injection, there was no clear indication for the injection (such as neurological deficits in the patient's extremities), and the risks (e.g., infection, abscess, headaches) outweighed the possible benefits. After satisfactory completion of physical therapy, a self-guided conditioning program and stretching exercises for home as well as over-the-counter analgesics would have been more helpful.

(3). There are no job duties of an Office Assistant which Respondent is unable to perform due to the condition of her lower back (i.e., degenerative changes with no disc herniation and no significant radiculopathy).

(4). Respondent is not substantially incapacitated for performance of her usual duties as an Office Assistant.

14. Respondent testified credibly at the administrative hearing. She recalled that the chiropractic treatment she received made her pain "worse" and that the epidural injection was "no good." She also disliked taking the narcotic pain medications she was prescribed. However, Respondent believed "going to Dr. Ha'Eri helped." After talking with Dr. Ha'Eri at her IME, Respondent followed his advice and began physical therapy and exercise, which

helped tremendously. Although she still experiences pain and spasm with prolonged sitting or standing, walking is helpful, and she also practices a deep breathing exercise that Dr. Ha'Eri recommended.

15. As set forth more fully below, the totality of the evidence did not establish that Respondent was substantially incapacitated for performance of her duties as an Office Assistant with the CHP based on an orthopedic condition (lower back).

LEGAL CONCLUSIONS

1. Respondent has not established that she is entitled to retirement for disability, as set forth in Factual Findings 2 through 15, and Legal Conclusions 2 through 7.

2. Respondent has the burden of proof regarding her entitlement to the retirement benefits for which she has applied. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) She has not met that burden.

3. Government Code section 21150 provides, in pertinent part:

Any 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

4. Government Code section 20026, states, in pertinent 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.

5. "Incapacitated for the performance of duty," means the "substantial inability of the applicant to perform her usual duties," as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) The increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future or further injury are insufficient to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d 854, 862 - 863.)


6. The totality of the evidence did not establish that Respondent's medical condition in her lower back rendered her substantially unable to perform her usual duties as an Office Assistant, as opposed to performing the duties with discomfort.

7. Given the foregoing, the evidence did not establish that Respondent was substantially incapacitated from performance of her usual duties as an Office Assistant with the CHP based on an orthopedic condition (lower back).

ORDER

The appeal of Respondent Yolanda Bennett, seeking retirement for disability as a state miscellaneous member of CalPERS, is denied.

DATED: May 17, 2017

DocuSigned by:

JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings