ATTACHMENT E

THE PROPOSED DECISION
In the Matter of the Denial of Application for Disability Retirement of:

KARIN CERVANTES,

Respondent.

and

CALIFORNIA STATE PRISON – AVENAL, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Respondent.

Case No. 2016-0634
OAH No. 2016110053

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 25, 2017, in Fresno, California.

The California Public Employees Retirement System (CalPERS) was represented by Charles Glauberman, Senior Staff Attorney.

Karin Cervantes (respondent) was present and was represented by Ryan Trotta, Attorney at Law.

There was no appearance by or on behalf of California State Prison – Avenal, California Department of Corrections and Rehabilitation (CDCR).\(^1\) CalPERS established that CDCR was properly served with the Notice of Hearing. Consequently, this matter proceeded as a default hearing against CDCR under Government Code section 11520.

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\(^1\) At the hearing, CalPERS amended the Statement of Issues to correctly identify respondent's employer as California State Prison – Avenal (and not California State Prison – Solano).
Evidence was received on April 25, 2017. The record remained open to allow the parties to submit closing briefs. On May 19, 2017, CalPERS submitted its closing brief, which was marked as Exhibit 12, and respondent submitted her closing brief, which was marked as Exhibit V. On May 26, 2017, CalPERS submitted its reply brief, which was marked as Exhibit 13, and respondent submitted her reply brief, which was marked as Exhibit W. The record closed and this matter was submitted for decision on May 26, 2017.

ISSUE

The issue for determination in this matter is whether, at the time respondent applied for disability retirement, on the bases of conditions involving her low back, shoulders, elbows, wrists, and hands, she was permanently disabled or substantially incapacitated from the performance of her duties as an Office Assistant (General) for CDCR.

FACTUAL FINDINGS

1. Respondent was employed by CDCR as an Office Assistant (General). She began her employment with CDCR on March 5, 2007. She was injured at work on December 27, 2011. She did not successfully return to work after that date. She filed an application for disability retirement with CalPERS on November 9, 2015. At the time she applied for disability retirement, she was 52 years old.

Respondent's Disability Retirement Application

2. On respondent’s November 9, 2015 disability retirement application, she described her disability as:

Bulging discs in the lower lumbar region with degenerative disc disease to the L1/2 through L4/5 discs. Additionally, I have suffered severe muscle strain and experience frequent spasms (Bilateral hands/wrists) Carpal Tunnel Syndrome (Left shoulder & elbow). Diagnoses unknown at this point.

She stated that her disability occurred on December 27, 2011, as follows:

While picking up a tray of mail which weighed approximately twenty (20) lbs, I suffered significant pain in my lower back, which caused me to fall to my right knee. Also, I have since developed difficulty with both my hands/wrists, left elbow and left shoulder.
She described her limitations/preclusions as:

No lifting, carrying, pushing or pulling over fifteen (15) lbs, alternate between sitting, standing or walking every twenty (20) minutes as tolerated and no repetitive bending or twisting.

Respondent stated that, due to her physical condition and physicians' restrictions, she is no longer able to perform the essential functions of her job.

3. On February 24, 2016, CalPERS sent respondent a letter denying her disability retirement application, and advising her of her right to appeal from the denial. Respondent filed a timely appeal.

Respondent's Duties as an Office Assistant (General)

4. Respondent worked as an Office Assistant (General) in the prison's mailroom. At the hearing, CalPERS submitted two documents describing respondent's duties as an Office Assistant (General): (1) an Essential Functions list; and (2) a completed Physical Requirements of Position/Occupational Title form. As set forth on the Essential Functions list, as an Office Assistant (General) in the mailroom, respondent was required to perform the following relevant essential functions:

- Frequently sit to process incoming and outgoing mail (e.g., receive, open, proofread, search, date/time stamp, distribute, gather/collect, sort, etc.) including confidential matters.

- Frequently perform physical labor to pull, lift, carry, retrieve, access, and track or drag items such as reams of paper, mail, magazines, newspapers, books, etc., weighing up to 20 pounds. Boxes may be broken down to accommodate poundage if necessary.

- Frequently reach high and low to retrieve and place mail on working tables/desks/carts/shelves.

- Frequently bending and twisting of the neck.

- Occasionally to frequently bending and twisting of the body throughout the day while receiving and distributing the inmate and institutional mail.

- Occasionally to frequently operate various office machines/equipment such as the telephone, photocopier, fax, computer, mail machine/scale/meter, etc.
- Occasionally answer incoming telephone calls, communicate effectively, verbally, in writing and in person to departmental staff, public, inmates, and family members of inmates, etc., in order to obtain information, respond to inquiries, and/or receive/provide direction/orders, prepare correspondence, and take messages etc.

- Occasionally perform key data entry tasks using various databases/programs such as Microsoft Word, Excel, Inmate locator, and DATS etc., in order to track documents, maintain and update records, logs, etc.

- Occasionally file documents using various filing systems (alphabetic, chronological, numeric, subject matters, etc.) to organize and maintain documents for future reference by utilizing binders, folders, etc.

5. As set forth in the completed Physical Requirements of Position/Occupational Title form, Office Assistants (General) assigned to the mailroom: (1) constantly (over six hours a day) sit, bend at the neck and waist, twist at the neck and waist, push and pull, lift up to 10 pounds, are exposed to excessive noise, and temperature, humidity and wetness; (2) frequently (three to six hours a day) repetitively use their hands; (3) occasionally (up to three hours a day) stand, walk, kneel, squat, reach above and below their shoulders, engage in fine manipulation, use a keyboard and mouse, lift up to 25 pounds, are exposed to dust, gas fumes, or chemicals, and work with bio-hazards; and (4) never run, crawl, climb, engage in power or simple grasping, lift more than 25 pounds, walk on uneven ground, drive, work with heavy equipment, work at heights, operate foot controls or repetitive movement, or use special visual or auditory protection.

Respondent's Testimony

6. At the hearing, respondent described the injury she suffered at work on December 27, 2011. According to respondent, it was the busiest time of the year for the mailroom in terms of the amount of mail received, and only four of the usual staff of 10 were working that day. Respondent picked up a tray of mail, and twisted her back. She “went to the ground.” She felt pain in her back, left knee, left shoulder, and right wrist. She went to the sergeant’s office and lay on a table for the rest of her shift. The next day, she saw her physician at Kaiser. She was told she pulled all the muscles in her lower back. She was prescribed medications. She was taken off work. She tried to return to work in 2013, but was not able to do so. On May 25, 2016, she had carpal tunnel surgery on her right hand. According to respondent, since her surgery, her right hand has been “stuck” and cannot move. She was told that her nerves may have been cut during the surgery.
7. At the hearing, respondent described the medical issues she has with her back, hands, legs and shoulders. She attributed her medical issues to the back injury she suffered on December 27, 2011. She asserted that due to her medical issues, she is unable to perform the duties of her Office Assistant (General) position. She asserted further that her employer could not accommodate the restrictions her doctors imposed.

**Evaluation and Testimony by CalPERS's Expert**

8. CalPERS retained Ghol B. Ha’Eri, M.D., to conduct an Independent Medical Evaluation (IME) of respondent, review her medical records, and issue an IME report setting forth his findings and opinions. Dr. Ha’Eri is a board-certified orthopedic surgeon. On February 2, 2016, he conducted an IME of respondent, reviewed her medical records, and issued his IME report.

9. Respondent told Dr. Ha’Eri about her December 27, 2011 injury. She described her present complaints as: (1) lower back pain with radiation to her legs associated with leg cramping and numb feeling in her feet; (2) numb feeling in both her hands; (3) bilateral elbow and forearm pain; and (4) no complaint to her left shoulder. After conducting a physical examination of respondent and reviewing her medical records, job description, and disability retirement application, Dr. Ha’Eri diagnosed respondent as follows:
   1. Lumbosacral strain.
   2. Mild preexisting degenerative disc disease at L5-S1.
   3. Left shoulder strain, resolved.
   4. Bilateral elbow, wrist, and hand strain.
   5. Obesity.

10. Dr. Ha’Eri found that there were no specific Office Assistant (General) job duties that respondent was unable to perform because of her physical condition. He found “no significant abnormal objective findings.” The imaging studies he reviewed showed “mild degenerative changes of the lower lumbar spine” that were “compatible with [respondent’s] age, and also her obesity.” Dr. Ha’Eri opined that respondent was not substantially incapacitated from performing her duties as an Office Assistant (General) for CDCR. At the hearing, Dr. Ha’Eri testified that, during his IME of respondent, he found no objective evidence to support her symptoms and complaints of pain.

**Respondent’s Medical Records**

11. Respondent did not call an expert witness to testify on her behalf. She submitted copies of medical reports from her workers’ compensation case, which were admitted as administrative hearsay, and have been considered to the extent permitted under Government Code section 11513, subdivision (d).[^2] In her briefs, respondent argued that she

[^2]: Government Code section 11513, subdivision (d), in relevant part provides, “Hearsay evidence may be used for the purpose of supplementing or explaining other
saw a number of doctors, including Richard D. Scheinberg, M.D., and Marshall D. Lewis, M.D. According to respondent, both Dr. Scheinberg and Dr. Lewis diagnosed her with carpal tunnel syndrome. Dr. Scheinberg “placed a permanent work restriction on [her] that precluded her from using her right hand” and found her to be a qualified injured worker in her workers’ compensation case. Respondent argued that her testimony and her medical records show that she is permanently and substantially incapacitated from performing the usual duties of an Office Assistant (General).

Discussion

12. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of an Office Assistant (General) for CDCR. Dr. Ha’Eri’s opinion that respondent was not substantially incapacitated from performing her usual job duties was persuasive. Dr. Ha’Eri’s IME report was detailed and thorough, and his testimony at hearing was comprehensive. The results of his physical examination and his review of respondent’s medical records supported his opinion.

13. The burden was on respondent to offer sufficient competent medical evidence at hearing to support her disability retirement application. She failed to do so. She did not call an expert witness to testify. There was no indication in the medical reports respondent offered at hearing that the doctors who authored those reports evaluated her according to the standards applicable to a CalPERS disability retirement proceeding. To the extent the doctors applied evaluation standards applicable in workers’ compensation cases, their opinions can be given little weight. The standards in CalPERS disability retirement cases are different from those in workers’ compensation. (Bianchi v. City of San Diego (1989) 214 Cal.App.3d 563, 567; Kimbrough v. Police & Fire Retirement System (1984) 161 Cal.App.3d 1143, 1152-1153; Summerford v. Board of Retirement (1977) 72 Cal.App.3d 128, 132 [a workers’ compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different].)

14. In sum, because respondent failed to offer sufficient competent medical evidence at hearing to establish that, at the time she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual duties of an Office Assistant (General) for CDCR, her disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent’s employment as an Office Assistant (General) for CDCR, she is a member of CalPERS.

Evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.
2. A CalPERS member who seeks disability retirement bears the burden of proof. 
(McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051, n. 5; Gov. Code, § 11504.)

3. To qualify for disability retirement, respondent had to prove that, at the time she applied, 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.

4. 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.)

5. 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 submit sufficient evidence based upon competent medical opinion that, at the time she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual duties of an Office Assistant (General) for CDCR. Consequently, her disability retirement application must be denied.

ORDER

The application of respondent Karin Cervantes for disability retirement is DENIED.

DATED: June 1, 2017

Karen Brandt
Administrative Law Judge
Office of Administrative Hearings

KAREN J. BRANDT
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