ATTACHMENT E

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:

TAMMY J. WARNER,

Respondent,

and

CALIFORNIA DEPARTMENT OF MOTOR
VEHICLES,

Respondent.

Case No. 2016-0104
OAH No. 2016070526

PROPOSED DECISION

This matter was heard before Heather M. Rowan, Administrative Law Judge, Office
of Administrative Hearings, State of California, on June 14, 2017, in Sacramento, California.

Kevin Kreutz, Senior Staff Attorney, represented the California Public Employees’
Retirement System (CalPERS).

Tammy J. Warner (respondent) appeared and represented herself.

There was no appearance by or on behalf of respondent California Department of
Motor Vehicles (DMV). CalPERS established the DMV was properly served the Notice of
Hearing. Consequently, this matter proceeded as a default hearing against the DMV
pursuant to Government Code section 11520, subdivision (a).

Evidence was received on June 14, 2017. The record was held open until June 23,
2017, to allow respondent to submit additional medical records, and CalPERS to respond to
those records and submit a written closing statement. CalPERS’s statement was marked as
Exhibit 21. The record was closed and this matter was submitted for decision on June 23,
2017.
ISSUE

On the basis of orthopedic (neck, left shoulder, back) and psychological (mental) conditions, is respondent permanently disabled or substantially incapacitated from performing her usual and customary duties as a Motor Vehicle Field Representative for the DMV?1

FACTUAL FINDINGS

1. Respondent was employed as a Motor Vehicle Field Representative by the DMV. The DMV submitted a Disability Retirement Election Application on respondent's behalf on December 4, 2013. Respondent submitted two Disability Retirement Election Applications to CalPERS, dated March 6, 2014, and June 3, 2014, respectively.2

Respondent's Disability Retirement Application

2. In the application it filed on respondent’s behalf, the DMV described respondent’s disability using workers' compensation codes only. In her March 6, 2014 application, respondent described her disabilities as: “mental disability along with physical.” In her June 3, 2014 application, she described her disabilities as:

   Neck, back, left hip, left leg, both hands (had neck surgery 9/3/04).

   Respondent listed that her disability occurred on August 24, 2007. She fell at work, hit her head on a table, and had a seizure. She described her limitations/preclusions as: “(All) no lifting, no picking up, no bending, can't sit for long time. Can’t drive a long distance.” She further contended that her disability has affected “everything” concerning her ability to perform her job.

3. By letter dated November 18, 2015, CalPERS informed respondent that respondent’s medical reports from Drs. Leon Jackson, John Dozier, S.K. Uppal, Douglas Merrill, and Robert Henrichsen had been reviewed and that her disability retirement application had been denied. Respondent timely appealed from the denial, asserting both her “mental state” and “physical state.”

1 The Statement of Issues limits the issue on appeal to respondent’s orthopedic condition. Respondent’s application, however, also lists “psychological issues” as a basis for disability.

2 The applications submitted were notarized, but were written with different handwriting and the signatures did not match. Respondent could not remember at hearing the circumstances of these applications being filed.
4. On January 7, 2016, CalPERS sent respondent a letter stating: “If you would like for us to consider a mental illness you will need to provide additional information which includes medical records from 1/2014 to the present and a Physician's Report on disability.” Respondent did not provide the requested information, and consequently, CalPERS did not consider the portion of her application based on mental health disability.

Duties of a Motor Vehicle Field Representative

5. CalPERS submitted two exhibits that described the duties of a Motor Vehicle Field Representative: (1) the DMV's Position Duty Statement; and (2) a completed Physical Requirements of Position/Occupational Title form. As set forth in the position duty statement, a Motor Vehicle Field Representative, under the supervision of a Manager I, reviews, analyzes, and processes newly received traffic accident reports, and keys source documents into a computer database. The Motor Vehicle Field Representative is also responsible for processing accident information, reviewing and analyzing the driver record via video terminal to determine appropriate action, processing insurance information requests, reviewing, analyzing, and processing hearing requests on a priority basis, providing telephone coverage on public and office lines, responding to telephone inquiries, and accessing driving records through a computer database.

6. As set forth in the Physical Requirements of Position/Occupational Title form, completed by respondent and the DMV, a Motor Vehicle Field Representative: (1) frequently (three to six hours a day) bends, squats, and performs simple grasping; (2) constantly (over six hours per day) sits, and repetitively uses hands, a keyboard, and a mouse; (3) occasionally (up to three hours a day) stands, walks, twists, reaches above or below the shoulder, pushes and pulls, and lifts or carries up to 10 pounds.

Independent Medical Evaluation

7. CalPERS retained Robert Henrichsen, M.D. to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Henrichsen is a Board-certified orthopedic surgeon. He evaluated respondent on July 28, 2015, and submitted an IME report on July 29, 2015. After CalPERS provided him additional information, Dr. Henrichsen submitted a supplemental report dated October 13, 2015. At hearing, Dr. Henrichsen provided testimony consistent with his reports.

8. Dr. Henrichsen reviewed respondent’s duty statement, job description, physical requirements, and relevant medical records. He also interviewed and examined respondent. In his IME report, Dr. Henrichsen concluded that respondent was not substantially incapacitated from performing her job. At hearing, Dr. Henrichsen clarified that his specialty is orthopedic surgery, and he has no medical background in psychiatry or psychology.

9. At the time of the IME, respondent was 47 years old. During the evaluation, respondent presented with pain and tenderness in her shoulders, pain in her neck and down
her left arm to the fingers, and pain in her left hip. She explained that she had fallen at work in 2007, hit her head, and had a seizure. Following this, she took seizure medication until her doctors determined she did not have a seizure disorder. She underwent acupuncture and shock treatments and had what Dr. Henrichsen described in his report as “an electrical study.” In 2008, she underwent anterior cervical discectomy and fusion (ACDF), and the fusion did not complete.

A decade earlier, in 1996, she was in a car accident that caused her to be paralyzed. She had decompressive surgery in her low back and, after 18 months, she was able to walk again. Respondent stated she is able to vacuum, carry groceries, and make a bed, but that she has a large amount of pain when she is active. She also reported she suffered from depression, memory loss, and nerve difficulty, all of which run in her family. Her last day at work was October 19, 2009.

10. Dr. Henrichsen described respondent’s current symptoms as:

Reduced motion of her neck and pain in the posterior part of her neck going down to her low back. . . . She has more left than right arm symptoms, which are described as burning, throbbing and sharp pain to the left hand and fingers . . . She has reduced motion of the left should and feels a popping. Sometimes there is a grinding in her shoulder. In her low back, Ms. Warner has aching more on the left than the right; she has symptoms on the left foot to the toes and a feeling of numbness. Sitting and walking are about equally tolerated with about a 20 minute limit each.

11. During his physical examination, Dr. Henrichsen noticed respondent had a limp and favored her left leg. He further noted she had reasonable mobility in her low back, and limited mobility in her left hip, neck, and left shoulder. Respondent had degenerative issues in her low back, including arthritis. Dr. Henrichsen could find no evidence of an incision related to respondent’s reported back surgery in 1996. Respondent had good strength in her upper and lower extremities, though she had less feeling and sensitivity in the left leg than the right. There was some evidence of neuropathy in her left leg, which causes her tingling and occasional numbness. Dr. Henrichsen found no objective evidence to support respondent’s subjective pain.

12. Dr. Henrichsen reviewed respondent’s medical and other records provided by CalPERS. The other records included a December 4, 2013 internal memorandum from the DMV stating that the DMV would submit a disability retirement application on respondent’s behalf because respondent was “presently disabled by a combination of medical and psychiatric problems.” Dr. Henrichsen also reviewed a medical note from Dr. William Lofthouse explaining that respondent was disabled from a combination of medical and psychiatric issues, and estimated her recovery would be December 31, 2013. A disability statement from Dr. S.K. Uppal describing respondent’s fall at work, her subsequent seizure,
neck pain, and back pain, as well as memory loss. Dr. Uppal opined that respondent’s fall caused a “substantial incapacity for the performance of her duties and this was a permanent incapacity.” While Dr. Uppal explained that she was mentally able to handle her financial affairs and enter into contracts, he also stated she has a problem with her memory and “was not able to remember things well.”

On January 4, 2013, Dr. Uppal evaluated respondent and diagnosed her with: “neck pain, failed neck surgery, peripheral neuropathy, bilateral shoulder pain, left hip pain, low back pain with radiculopathy.” He prescribed Neurontin for nerve pain, as well as Naprosyn and Norco for pain. Respondent returned to Dr. Uppal on July 3, 2013 and reported she had been depressed and her pain was constant. She had some tenderness in her neck and shoulders.

On October 21, 2013, Dr. John Dozier met with respondent to evaluate her “chronic pain syndrome . . ., depression, and low back pain with sciatica.” Dr. Dozier ordered an MRI and reported that there was some disc bulging, mild degenerative changes without disc protrusion or stenosis, and the “foramina were patent,” meaning there was no narrowing of the nerve canal in the spine. He found no significant abnormalities.

In April of 2014, Dr. Dozier saw respondent in relation to her disability retirement application and completed a CalPERS disability report. He found she had tenderness in her neck and back with mild pain. He found her to be “psychiatrically oriented and had appropriate mood and affect.” He stated that respondent was “unable to sit, stand, or walk the required amount of time and she had permanent substantial incapacity for her work.” There is no evidence of any testing done by Dr. Dozier. On July 28, 2014, Dr. Dozier reviewed an Agreed Medical Examination that respondent brought him, which was prepared in support of her worker’s compensation claim. Dr. Dozier summarized that report, saying the examination found she was uncomfortable, her gait was normal, her neck and thoracic spine were tender, and she had moderate pain with motion.

Dr. Douglas Merrill prepared a Physicians Report on Disability and stated that respondent had “pain with motion.” The examination findings included radiculopathy, which is pain, numbness, tingling, or weakness caused by compressed spinal nerves. He recommended that respondent limit her work to two to four hours per day, and limit lifting. He opined that she was permanently and substantially incapacitated from performing her work.

13. Following the IME, Dr. Henrichsen diagnosed respondent with: history of cervical ACDF surgery with history of nonunion, history of lumbar spine decompression, left shoulder pain, symptoms of peripheral neuropathy, and chronic pain syndrome. At hearing, he explained that chronic pain syndrome is a psychological, rather than an orthopedic condition. He admitted that the best method to “determine a person’s ability or inability to

3 CalPERS did not produce either Dr. Dozier’s or Dr. Merrill’s report.
accomplish their occupational tasks" is through finding a reasonable correlation of symptoms, examination findings, and imaging studies. Dr. Henrichsen had no imaging studies to which he could refer in his evaluation. He opined that, based on respondent's sedentary job and the lack of objective evidence for her subjective reports of pain, respondent was not substantially incapacitated from performing the usual duties of her job.

**Respondent’s Evidence**

14. Respondent began working for the DMV in 2000 or 2001. To the best of her recollection, her last actual day at work was October 19, 2009. She took a long leave of absence due to her medical issues and worker’s compensation disability. Upon her return, she found her belongings packed up on her desk and learned she no longer worked there. She did not understand what had occurred, or how the DMV could take such action without notice to her. When the DMV filed for disability retirement on her behalf in December 2013, respondent believed it correlated with when she stopped receiving worker’s compensation insurance payments.

15. Respondent explained her work injury and its lasting effects. She testified that she fell at work, hit her head on a table, and had a seizure. Respondent saw several doctors, tried multiple treatments, and took many medications to try to treat her neck pain. In 2008, she saw a specialist who explained that part of her neck "had disintegrated" and fluid was draining out of her spinal cord. She believed her doctor meant her life was in danger and she may or may not survive the surgery. Her cervical spine was fused in surgery, but the fusion was not complete for several years. She submitted 2010 and 2011 reports from her surgeon, Dr. John Yen, in which he stated he did not know the cause of respondent’s continued pain as the x-rays showed her spinal fusion looking stable and “fairly good.”

16. Respondent also submitted a July 7, 2011 report from Dr. Charles Potter, a Diplomate of the American Board of Orthopedic surgery, who evaluated respondent related to her worker’s compensation claim. Dr. Potter was an Agreed Medical Examiner (AME) who had previously evaluated respondent and issued reports on March 9, 2006, June 23, 2006, August 28, 2006, November 6, 2006, June 10, 2009, January 27, 2010, March 7, 2010, September 1, 2010, and October 30, 2010. In his 2011 report, he opined respondent was permanent and stationary as to her orthopedic condition based on her neck fusion, and that she had a disability that prevented her from returning to her regular job duties. He also noted that she had “neurologic issues and [he] would defer her being permanent and stationary to a neurologist due to the fact that one is dealing with an abnormal electroencephalogram obtained on March 14, 2011.”

17. Respondent did not call an expert witness to testify on her behalf. She submitted a sampling of medical records that cover several years of treatment. Because no medical doctor testified on respondent’s behalf, the records were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section
11513, subdivision (d). Among the medical records respondent produced were records of myriad health issues she has had over approximately 15 years. The medical records referred to the following diagnoses and procedures: cancer, gastric bypass surgery, a lumbar spine decompression surgery, a tonsillectomy, and a cervical spine fusion. Though respondent offered no records from a mental health professional, her medical records reference that she has suffered from depression, anxiety, sleep disturbances, and was previously prescribed antipsychotic medications.

18. Respondent testified that several co-workers witnessed the event that led to her injury. She did not call any of her co-workers as witnesses at the hearing, stating she did not know how. She further argued that the DMV should have been present at hearing to explain why it filed the application on her behalf, among other employment-related questions she had. Ultimately, respondent admitted she did not understand the purpose of the hearing or what she was required to prove.

Respondent's Claim of Psychological Disability

19. At hearing, CalPERS stated that respondent had not made a prima facie case of a psychological disability, as claimed in her application. Therefore, CalPERS did not send respondent for an IME based on her psychological condition. CalPERS engaged Dr. Henrichsen to perform an IME and sent respondent's medical records for his review. That review included, as discussed above, many references to respondent's mental health status, her memory problems, depression, anxiety, and abnormal neurological findings.

20. Respondent denied having a psychological issue at hearing. She testified that she did not remember listing a psychological disorder on her application and her disability is based on her orthopedic (neck, back, shoulder) pain. Throughout the hearing, however, respondent was confused, unable to follow instructions, and unclear why the DMV filed an application on her behalf. She could remember the emotional effects of her injury and discharge from the DMV, but not the factual history. While she was able to question Dr. Henrichsen regarding his testimony, her own testimony was partially incoherent. She showed limited understanding when asked questions.

Discussion

21. 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 a Motor Vehicle Field Representative for the DMV. The burden was on respondent to offer sufficient competent medical evidence at hearing to support her disability retirement application. She failed to do so.

^"Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would admissible over objection in civil actions.” (Gov. Code § 11513, subd. (d).)
22. Dr. Potter’s 2011 AME report in which he rated respondent as “permanent and stationary” and found her unable to perform her job duties, is afforded little weight as Dr. Potter’s ratings and opinion related to her worker’s compensation claims. It is well- recognized that the standard for CalPERS’ disability retirement is different than the standard in a workers’ compensation case. (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].)

23. Conversely, Dr. Henrichsen’s testimony that respondent was not permanently and substantially incapacitated from performing her job duties based on an orthopedic condition was credible and persuasive. He conducted a thorough examination and found no objective evidence which explained respondent’s subjective complaints of pain.

24. Finally, respondent was not a credible witness. Her inability to understand the purpose of the hearing and her difficulty in remembering the events that led up to her retirement were concerning. She did not offer evidence regarding her psychological condition, nor could she remember that she had applied for disability on the basis of a psychological condition.

25. In sum, respondent failed to offer sufficient competent medical evidence at hearing to establish that she was substantially and permanently incapacitated from performing the usual duties of a Motor Vehicle Field Representative for the DMV at the time she applied for disability retirement. Accordingly, her disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent’s employment as a Motor Vehicle Field Representative, she is a local miscellaneous member of CalPERS pursuant to Government Code section 21150.

2. 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.

3. 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 his 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.)

The burden of proof is on respondent to demonstrate that she is substantially incapacitated from the performance of her usual and customary duties such that she is permanently disabled. (Harmon v. Board of Retirement of San Mateo County, supra, 62 Cal. App. 3d 689; Glover v. Board of Retirement (1980) 214 Cal. App. 3d 1327, 1332.) To meet this burden, respondent must submit competent, objective medical evidence to establish that, at the time of her application she was permanently disabled or incapacitated from performing the usual duties of her position as a Motor Vehicle Field Representative for the DMV. (See Harmon v. Board of Retirement, supra, 62 Cal.App.3d at 697.)

4. In light of the analyses in Mansperger, Hosford, Smith, and Keck, when all the evidence is considered, respondent did not establish that her disability retirement application should be granted. She failed to submit sufficient competent medical evidence that, at the time she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual duties of a Motor Vehicle Field Representative for the DMV. Consequently, her disability retirement application must be denied.

ORDER

The application of respondent Tammy J. Warner for disability retirement is DENIED.

DATED: June 30, 2017

HEATHER M. ROWAN
Administrative Law Judge
Office of Administrative Hearings