PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on September 12, 2017, in Fresno, California.

Rory J. Coffey, Senior Staff Attorney, represented the California Public Employees’ Retirement System (CalPERS).

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

Evidence was received, the record was closed, and this matter was submitted for decision on September 12, 2017.
ISSUE

On the basis of an internal (severe muscle and bone pain) condition, is respondent permanently disabled or substantially incapacitated from performing her usual and customary duties as a Motor Vehicle Representative for the DMV?

FACTUAL FINDINGS

1. Respondent was employed as a Motor Vehicle Representative by the DMV. On February 11, 2016, CalPERS received a Disability Retirement Election Application (Application) from respondent, bearing respondent’s signature dated November 30, 2015. In her Application, respondent stated she was applying for “Service Pending Disability Retirement.” Respondent retired for service effective March 1, 2016, and has been receiving her retirement allowance since that date.

Respondent’s Disability Retirement Application

2. In her application, respondent described her disabilities as: “severe muscle and bone pain in my legs, back and hands.” Respondent explained in her Application how her disability occurred, as follows: “I was diagnosed with stage IV breast cancer which metastasized to my bones. Chemotherapy caused osteopenia. I have to take [a] permanent cancer hormone blocker which causes severe muscle and bone pain in my legs, back, and hands.”

Respondent described her limitations/preclusions, as follows: “I have been working with pain for several years. My pain has become excruciating and it has been more constant.” She explained that her condition has affected her ability to perform her job, stating: “My job is sedentary which requires me to sit for approximately 7 1/2 hours per day seven days a week. Due to my severe pain I am finding it difficult to perform my job duties.”

3. By letter dated June 24, 2016, CalPERS notified respondent that, after reviewing the medical evidence, it had determined that her severe muscle and bone pain condition is not disabling. Consequently, CalPERS denied respondent’s Application. Respondent timely appealed from the denial of her application.

Duties of a Motor Vehicle Representative

4. CalPERS submitted two exhibits that describe the duties of a Motor Vehicle Representative: (1) the DMV’s Position Duty Statement; and (2) a completed Physical Requirements of Position/Occupational Title form. Both are described in pertinent part, below.
5. The Position Duty Statement states that a Motor Vehicle Representative will spend approximately 95 percent of her time as a Call Center Agent, as follows:

Under the direct supervision of an immediate supervisor the function of the position requires a Call Center Agent to interpret, explain and apply the provisions of the California Vehicle Code as well as other laws administrative regulations policies and procedures pertaining to the registration and ownership of motor vehicles and licensing of drivers.

Analytical skills are utilized to provide accurate and effective responses to basic and complex inquiries via the telephone. Provides guidance and explains use of forms applications and required fees to assist the public in completion and resolution of registration licensing and reinstatement requirements.

6. The Physical Requirements of Position/Occupational Title form describes the requirements of a Motor Vehicle Representative as including over six hours per day of sitting; three to six hours per day of simple grasping, repetitive use of hands, keyboard use, and mouse use; and up to three hours per day of standing, walking, bending (neck), twisting (neck and waist), reaching (above and below shoulder), pushing and pulling, and lifting/carrying up to 10 pounds. The form stated that the physical requirements never include running, crawling, kneeling, climbing, squatting, bending at the waist, fine manipulation, power grasping or lifting/carrying over 10 pounds.

Expert Opinion

7. CalPERS retained Samuel B. Rush, M.D., to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Rush is board-certified in internal medicine. Dr. Rush examined respondent, took her medical history, reviewed her medical records, and prepared an IME report dated May 25, 2016, which was admitted into evidence. Dr. Rush did not testify in this matter.

8. At the time of the IME, respondent was 56 years of age. She was diagnosed with breast cancer in 2010. She was treated with chemotherapy, radiation, and a right mastectomy. A PET scan indicated possible metastatic lesions in her pelvic bones, for which she was prescribed Letrozole for a period of approximately five years to counteract the possibility of metastatic breast cancer. Her oncology reports have been favorable, indicating remission from breast cancer. Respondent takes Lipitor for high blood pressure.

9. Respondent told Dr. Rush that the Letrozole causes her to have bone pain, especially with prolonged sitting, as required at her job. Respondent tries to be fairly active in walking and using an elliptical exercise machine, which she does without difficulty. Upon examination, Dr. Rush found respondent’s musculoskeletal ranges of motion to be within normal limits.
10. After examining respondent, taking her history, and reviewing her medical records, Dr. Rush summarized his findings, stating: "Claimant has a good outcome from her treatment for breast cancer and is currently under surveillance. However, the Letrozole anti-hormone does cause some bone pain. There are no orthopedic limitations noted. This does not seem to be related to her employment." Dr. Rush concluded in his IME report that there are no specific job duties that respondent is unable to perform because of a mental or physical condition, and that she is therefore not substantially incapacitated from the performance of her duties as a Motor Vehicle Representative.

Discussion

11. Dr. Rush's opinion that respondent is not substantially incapacitated from performing her usual job duties is persuasive. Respondent did not appear at the hearing and did not offer any evidence to support her Application. In sum, because respondent failed to offer any competent medical evidence at the hearing 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 Representative, her Application must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Motor Vehicle Representative for the DMV, she is a member of CalPERS subject to Government Code section 21151.

2. To qualify for disability retirement, respondent had to prove that, at the time of her Application, 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.) 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.)

4. The burden of proof was on respondent to demonstrate that she is permanently and substantially unable to perform her usual duties. (Harmon v. Board of Retirement of San
Mateo County, (1976) 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. (Harmon v. Board of Retirement, supra, 62 Cal. App. 3d at 697.)

5. When all the evidence in this matter is considered in light of the analyses in Mansperger, Smith, and Keck, respondent did not establish that her disability retirement application should be granted. She failed to appear and did not submit any 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 a Motor Vehicle Representative for the DMV. Consequently, her disability retirement application must be denied.

ORDER

The Application of respondent Gloria A. Lugo for disability retirement is DENIED.

DATED: September 28, 2017

TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings