

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:

JUANA AMAYA,

Respondent,

and

CALIFORNIA STATE POLYTECHNIC
UNIVERSITY, SAN LUIS OBISPO,

Respondent.

Case No. 2017-0409

OAH No. 2017061138

PROPOSED DECISION

Matthew Goldsby, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on December 18, 2017, at San Luis Obispo, California.

Austa Wakily, Senior Staff Attorney, appeared and represented complainant Anthony Suine, Chief of the Benefits Division of the Board of Administration, California Public Employees' Retirement System (CalPERS).

Russell R. Ghitterman, Attorney at Law, appeared and represented respondent Juana Amaya.

No appearance was made on behalf of the California State Polytechnic University, San Luis Obispo (Employer).¹

The record was held open for the parties to file closing briefs on or before January 22, 2018. Complainant timely filed a brief, marked for identification as Exhibit 11. Respondent timely filed a brief, marked for identification as Exhibit E. The record was closed and the matter was submitted for decision on January 22, 2018.

¹ Although the Employer is a respondent in this case, all references to "respondent" shall refer only to respondent Juana Amaya, unless otherwise specified.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED 2/22 2018
Det. J. Woolen

FACTUAL FINDINGS

Jurisdictional and Procedural Facts

1. On June 8, 2017, complainant made and filed the Accusation in his official capacity as Chief of the Benefits Division of CalPERS.
2. Respondent worked for the Employer as a Custodian. Pursuant to Government Code section 21150, respondent was a local miscellaneous member of CalPERS. She has the minimum service credit necessary to qualify for retirement.
3. On July 6, 2016, respondent completed and signed a Disability Retirement Election Application (Application) for service pending disability retirement benefits. On the Application, respondent described her specific disability as follows: "Left knee, lumbar sprain (*sic*), right lower extremity radiculitis, upper back, neck and shoulder right." (Ex. 3.)
4. On December 8, 2016, CalPERS denied the Application based on its determination that respondent's orthopedic conditions were not disabling, and that she was "not substantially incapacitated from the performance of [her] job duties as a Custodian with [the Employer]." (Ex. 4.) CalPERS granted and paid service retirement benefits to respondent.
5. On January 4, 2017, respondent filed an appeal of CalPERS's denial of the Application. A hearing on the appeal was scheduled on December 18, 2017, at San Luis Obispo, California. Notice of the hearing was given to respondent and the Employer as required by law.

Employment History

6. For 13 years, respondent worked for the Employer as a Custodian. Her position made her a member of the "University Housing team" and her duties and responsibilities included "a wide range of custodial and related duties for assigned University Housing areas." (Ex. 9.) Pursuant to the Employer's Position Description, a Custodian must meet the following special condition: "Must be able to perform work involving, but not limited to, lifting, carrying and maneuvering heavy objects, squatting, climbing, kneeling, twisting, standing, walking, bending, stooping, reaching, pushing, and pulling." (Ex. 9.)
7. During the school year, respondent worked at the Sequoia Dormitory, a three-story building with no elevator. She was responsible for cleaning the women's bathrooms on each floor, the lounge, and kitchen. In each bathroom, she emptied trash cans, mopped the floors, and cleaned the facilities, including four toilet stalls, five shower stalls, six sinks and mirrors. She lifted and carried trash bags weighing up to 30 pounds downstairs and outside to the trash bins. Twice per semester, respondent shampooed the carpets in the hallways with heavy machinery.

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8. When school was out of session, respondent worked at all 30 dormitories on campus. She cleaned dorm rooms and the lounge areas. Her daily tasks required more strenuous actions, included moving mattresses in the dorm rooms, and pushing or pulling sofas, tables, and chairs in the lounges.

Work-Related Injuries

9. On or about May 15, 2012, respondent injured herself while working for the Employer and performing her job duties. While carrying two bags of trash down a flight of stairs, respondent tripped and fell forward at the bottom of the staircase. She injured the right side of her leg, hip, and arm. Respondent was examined and medically treated the next day. She was sore and bruised, but sustained no fracture. She was able to return to work.

10. On August 14, 2014, respondent injured herself again while working for the Employer and performing her job duties. She injured her back and right shoulder while moving a heavy table that got caught on carpeting. Respondent was examined and medically treated the next day. She testified that an MRI revealed "something in my spine and a nerve that is not right" and that she returned to work in spite of "a lot of pain." She was able to return to work.

11. Respondent continued to work for the Employer as a custodian, taking pain medication to complete her assignments. Respondent last worked for the Employer on Wednesday June 22, 2016, when a supervisor instructed her to stop working and report to the human resources department the following Monday. Respondent credibly testified that she wanted to continue working, in spite of her pain and discomfort; however, at the meeting on June 22, 2016, the Employer refused to allow respondent to continue her employment as a custodian, and gave her only the option to retire.

Medical Evidence

12. On August 31, 2016, at CalPERS's request, respondent underwent an independent medical examination by Brendan McAdams, M.D. (IME). The IME testified that he does not have an active clinical practice, having to "stop doing surgery in the 1980's due to vision problems." He has served as a Medical Expert for the Social Security Office of Hearings and Appeals, an Independent Medical Examiner for the Employment Development Department and the Department of Social Services, and a Medical Evaluator for the Department of Rehabilitation.

13. CalPERS directed the IME to evaluate whether respondent's condition had rendered her substantially incapacitated for the performance of her usual job duties as a custodian and, if so, the anticipated duration of that incapacity. (Ex. 7.) CalPERS furnished the IME with respondent's medical records, a description of her job duties as a Custodian, and the physical requirements of the position.

14. For the evaluation, the IME testified that he greeted respondent in the examination room, and that she appeared comfortable and pleasant throughout the interview. Respondent argued that the IME was unable to effectively communicate with respondent

without a Spanish language interpreter. Although respondent relied on a Spanish interpreter during the hearing, the IME's testimony and his detailed report tend to show that the absence of language assistance did not impair the evaluation. The report made contemporaneous to the examination reflects that respondent "gave" the medical history, and "stated" facts consistent with her testimony given with the assistance of an interpreter. Accordingly, the finding is made that the IME was able to elicit sufficient information to base his opinion.

15. The IME performed a physical examination of respondent, observing a normal gait without limp or listing. Respondent was unable to bend forward and reach for the floor without complaining of pain, and her range of motion bending backwards was restricted. In spite of respondent's complaints in these range of motion exercises, the IME made no objective findings to explain the limitation. Respondent had no points of tenderness, or signs of atrophy. Her muscle strength was considered normal, and her range of motion in the ankles was normal.

16. After reviewing the medical records relating to respondent's injury and performing the physical examination, the IME diagnosed respondent with "contusion and sprain of lumbar spine secondary to the [May 2012] injury." (Ex. 8.) In his report to CalPERS, the IME expressed the opinion that respondent was not restricted in any way from performing her job duties because of a physical or mental condition, and that she was not substantially incapacitated from performing the duties of a custodian. (Ex. 8, pp. 7-8.)

17. Respondent presented reports and records relating to her workers' compensation claim, including reports and records from Robert J. Schorr, M.D., Jashvant G. Patel, M.D., Allen S. Fonesca, M.D., and Alan Moelleken, M.D. The records show that each of these doctors performed evaluations and assessments, calculating respondent's impairment for purposes of her workers' compensation claim, but the records fail to show that any evaluating physician expressly determined that respondent was "incapacitated for the performance of duty" for purposes of her application for disability retirement benefits. (See Legal Conclusions 4.)

18. After listening to respondent's testimony and responding to questions on cross-examination, the IME ratified his conclusions under oath that respondent was not substantially incapacitated from performing the duties of a custodian. Notwithstanding all points and authorities cited in respondent's closing brief, the IME's direct testimony was credible and given greater weight than the hearsay reports presented by respondent.

LEGAL CONCLUSIONS

1. In administrative proceedings, the party asserting the claim or making the charges is the moving party and generally has the burden of proof. (Cal. Administrative Hearing Practice (Cont. Ed. Bar 2d ed. 1997) § 7.50, p. 365; see also, Evid. Code § 500.) In this case, having filed an application for disability retirement benefits, respondent is the moving party and has the burden of proving by a preponderance of the evidence that she is entitled to those benefits. (Evid. Code, § 115.)

2. Retirement benefits and reinstatement rights are fundamental vested rights. (*Roccaforte v. City of San Diego* (1979) 89 Cal.App.3d 877, 886.)

3. A member who is incapacitated for the performance of duty is eligible for disability retirement benefits. (Gov. Code, § 21150, subd. (a).)

4. “Disability” and “incapacity for performance of duty” as a basis of retirement mean a disability of permanent or extended and uncertain duration, as determined by CalPERS on the basis of competent medical opinion. (Gov. Code, § 20026.) “Incapacitated for the performance of duty,” means the “substantial inability of the applicant to perform his usual duties,” as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877.)

5. In determining whether an individual is substantially incapacitated from his or her “usual duties,” the actual duties of the applicant are the criteria upon which any impairment is judged. Generalized job descriptions and physical standards are not controlling nor are actual but infrequently performed duties. Moreover, prophylactic restrictions imposed to reduce the risk of future injury are insufficient. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.)

6. In this case, competent medical evidence and respondent’s own testimony established that she is not substantially incapacitated from the performance of her usual job duties. Respondent’s testimony that she suffers pain and is unable to lift was explained and supplemented by records relating to her workers’ compensation claim; however, this evidence fails to show a “substantial inability” to perform her usual duties. (*Mansperger v. Public Employees’ Retirement System, supra.*, 6 Cal.App.3d 873, 877.) On the contrary, the weight of the evidence established that respondent is substantially able to perform the vast majority of the essential functions of a custodian, albeit with pain and discomfort as to some essential functions.

7. Moreover, medical opinions of a permanent disability for purpose of a workers’ compensation claims are not persuasive evidence in a case of industrial disability retirement. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.) In *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, the court addressed the distinction between workers’ compensation laws and CalPERS. The court held that:

A finding by the WCAB of permanent disability, which may be partial for the purposes of workers’ compensation, does not bind the retirement board on the issue of the employee’s incapacity to perform his duties. . . . (Citations.) (*Id.* at 215.)

8. The *Reynolds* court cited *Pathe v. City of Bakersfield* (1967) 255 Cal.App.2d 409 in distinguishing between the workers’ compensation laws and CalPERS. The two systems were distinguished as existing for entirely different reasons and that they were established to attain wholly independent objectives. (*Reynolds, supra*, 126 Cal.App.3d at p. 212.) The *Reynolds* court further held that, although they supplement each other, “The

jurisdiction of the WCAB is exclusive only in relation to its own objectives and purposes and at the very most overlaps the subject matter jurisdiction of the pension board on a single issue of fact only, the issue as to whether an injury or disability is service-connected.” (*Id.* at 213.) Accordingly, a finding of industrial injury under the workers’ compensation system does not entitle an applicant to a disability retirement.

9. Cause exists to deny respondent’s application for disability retirement because respondent failed to prove by a preponderance of the evidence that she is entitled to disability retirement benefits.

10. Respondent’s appeal shall be denied without prejudice to her rights, if any, to reinstatement to her position as a custodian. (Precedential Decision 00-05, *In the Matter of the Application for Industrial Disability Retirement of Ruth A. Keck and Los Angeles County Schools (Glendora Unified School District)* (August 30, 2000).)

ORDER

Respondent’s appeal is denied. CalPERS’s determination that respondent is not disabled or substantially incapacitated from performing her usual job duties is affirmed.

DATED: February 19, 2018

DocuSigned by:

Matthew Goldsby

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MATTHEW GOLDSBY
Administrative Law Judge
Office of Administrative Hearings