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 Industrial 
Disability Retirement of: 

TONJA L. TRENT, 

Respondent, 

and 

DEPARTMENT OF HOUSING AND 
COMMUNITY DEVELOPMENT, 

Respondent. 

PROPOSED DECISION 

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State 
of California, heard this matter on July 25, 2018, in Sacramento, California. 

Cynthia A. Rodríguez, Senior Attorney, represented the California Public Employees’ 
Retirement System (CalPERS). 

Respondent Tonja L. Trent did not appear at hearing and no one appeared on her behalf. Her default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520. 

No one appeared for or on behalf of respondent Department of Housing and 
Community Development (HCD). HCD’s default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520. 

Evidence was received, the record was closed, and the matter was submitted for decision on July 25, 2018.
SUMMARY

The sole issue on appeal is whether Ms. Trent was substantially incapacitated for the performance of her duties as a District Representative I with HCD due to orthopedic (right shoulder tendinitis with impingement, cervical and lumbar degenerative disc disease, right hip sprain, and vertebrogenic headaches) conditions at the time she applied for industrial disability retirement. No medical evidence establishing Ms. Trent was substantially incapacitated at that or any other time was produced by or on behalf of her. Therefore, her application for industrial disability retirement is denied.

FACTUAL FINDINGS

Procedural Background

1. On February 16, 2017, Ms. Trent signed a Disability Retirement Election Application seeking a service pending industrial disability retirement, which CalPERS received five days later. She requested a retirement effective date of "Expiration of Benefits."

2. Ms. Trent identified her specific disabilities as: "Right Shoulder Tendinitis with impingement. Chronic painful cervical and lumbar degenerative disc disease. Lingering symptoms of Right Hip sprain without synovitis or pathology on imaging. Vertebrogenic headache." (Spelling in original.) She indicated her disabilities were caused by "cumulative trauma due to work activities" when "reported CT 9-11-14."

3. Ms. Trent indicated her disabilities precluded her from heavy lifting, prolonged movements of her neck, repetitive use of her right arm at or above shoulder level, and prolonged walking over uneven ground. Her ability to perform her job has been affected because "constant chronic pain" prevents her from driving and using a mobile phone excessively, typing without shoulder support, writing reports in her car, and walking, reaching, gripping, climbing, and crawling over uneven surfaces.

4. On October 17, 2017, CalPERS sent Ms. Trent correspondence denying her application for industrial disability retirement (her application for service retirement was previously approved with a retirement date of June 27, 2017). Ms. Trent timely appealed CalPERS's denial. Anthony Suine, Chief of the Benefit Services Division of CalPERS, signed the Statement of Issues solely in his official capacity on December 15, 2017.

Employment History

5. According to a report prepared by a medical expert retained by CalPERS, Ms. Trent was employed by HCD as a District Representative I from January 2007 to December 2015, although her last day of actual work was reported to have been September 30, 2014. She reported being "laid off" because her employer could not accommodate her increasing
work restrictions. There was no evidence of her specific restrictions, other than a vague reference to limitations on driving and sitting, and a requirement that she use ergonomic equipment. After respondent left State service, she worked for Eagle Point, Oregon, as a permit technician processing building plans from January through June 2016. She purportedly resigned her employment due to personality conflicts with her coworkers.

**History of Injuries**

6. According to CalPERS’s medical expert’s report, Ms. Trent explained that her job duties as a District Representative I required her to travel by car throughout a three-to-five-county area inspecting mobile homes, mobile home parks, and certain buildings used for employee housing to ensure compliance with applicable federal and state statutes and regulations. She carried a folding ladder in her car, and would sometimes climb onto and crawl across roofs of mobile homes. She described her disabilities as occurring due to cumulative injuries beginning in September 2014.

**Physical Requirements of a District Representative I**

7. A Physical Requirements of Position/Occupational Title completed by an HCD representative indicates that a District Representative I is required to perform the following physical activities for the following durations during an eight-hour shift:

   - **Frequently:** Sitting, repetitive use of hand(s), keyboard use, mouse use, driving, and operation of foot controls or repetitive movement.
   - **Occasionally:** Standing, walking, crawling, kneeling, climbing, squatting, bending (neck), bending (waist), twisting (neck), twisting (waist), reaching (above shoulder), reaching (below shoulder), pushing and pulling, fine manipulation, power grasping, simple grasping, lifting/carrying up to 50 pounds, and walking on uneven ground.
   - **Never:** Running and lifting/carrying greater than 50 pounds.

**Medical Evidence**

**CalPERS’s Evidence**

8. At CalPERS’s request, Robert Henrichsen, M.D., a board-certified orthopedic surgeon, performed an independent medical examination (IME) of Ms. Trent on September 13, 2017. He prepared a report documenting his IME, which was admitted into evidence. He also testified at hearing.

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1 “Frequently” is three to six hours, and “occasionally” is up to three hours.
9. At the time of the IME, Ms. Trent reported constant pain in her shoulder, right hip, and low back. She further reported that the pain prevented her from getting restful sleep and from finding a comfortable position in bed. She was unable to play softball, racquetball, or frisbee, and she could not swim, hike, run, fish, lift weights, rollerblade, water ski, snow ski, camp, or travel. Pain interfered with her activities of daily living such as bowel function, bathing, dressing, writing, standing, climbing stairs, lifting, driving, and sexual activity.

10. Physical examination of Ms. Trent's lumbar spine revealed a range of motion that was within acceptable limits upon flexion, extension, and lateral bending. Lateral bending to the right elicited subjective complaints of shoulder pain, and lateral bending to the left elicited subjective complaints of right hip pain. She also reported flexion to be more painful than extension.

11. Prone examination of the lumbar spine revealed no trigger point spasms or nodules. Ms. Trent had tenderness around the right paraspinal muscles across the right sacroiliac joint and into the right buttoc, but it did not go below the lesser trochanter and there was only a small amount of tenderness over the right greater trochanter. Her left side was asymptomatic.

12. Supine examination of the lumbar spine revealed a reduced ability to straight leg raise on the right and reports of hip pain, but a normal ability to straight leg raise on the left and no complaints of pain. Range of motion of her right hip was slightly reduced upon flexion, abduction, and external rotation when compared to the left. Pushing on the right hip caused some symptoms, but pulling relieved them. There was no clicking or catching of either hip upon range of motion.

13. Knee range of motion was equal bilaterally and within normal limits, as was ankle range of motion. There was no knee or ankle effusion, and the joints were stable.

14. Sitting examination revealed Ms. Trent's ability to straight leg raise to full knee extension without radicular symptoms, bilaterally. She was able to accomplish hip abduction and adduction with resistance at the knees well and without undue pain, bilaterally. She had no peroneal nerve tenderness in either leg.

15. Examination of the cervical spine was insignificant. Range of motion of her neck was within normal limits, although slightly reduced on the left upon lateral bending and on the right upon rotation. Movement did not produce radicular syndrome. Upward pulling on her jaw relieved cervical symptoms, but downward pressure created some sensation of pressure. Neither reproduced referred symptoms. The anterior, lateral, and posterior cervical musculature was soft, but there was some tenderness in the mid part of the cervical spine posteriorly and near the posterior mastoid processes.

16. Evaluation of parascapular muscle function showed no atrophy of the parascapular muscles, and Ms. Trent was able to shrug her shoulders and abduct the scapulae. There was no scapular instability or scapular muscle loading, and crepitus of the
scapulothoracic junction was absent. The left shoulder was asymptomatic, but Ms. Trent had significant tenderness over the right AC joint and the anterior acromion. She had slight tenderness over the lateral acromion, but none posteriorly over the right shoulder.

17. Range of motion of the shoulders was within normal limits, although there was a slight reduction upon extension and internal rotation of the right. There were no signs of clicking or catching on either side, and the deltoid muscle was intact and showed no signs of atrophy. The bulk of Ms. Trent's upper extremity musculature was normal to inspection.

18. Range of motion of both elbows was equal and within normal limits. She did not have active olecranon bursitis, and there was no swelling or tendon rupture on either the flexor or extensor side of either wrist. She was able to touch her thumb to the tip and the base of her small finger, bilaterally. She also was able to bring her fingertips to the distal palmar crease, bilaterally.

19. Dr. Henrichsen's IME also included his review of medical records of Ms. Trent's treatment between September 16, 2014, and July 7, 2017. None of those records included a medical opinion that she was substantially incapacitated from the performance of her job duties as a District Representative I, except a March 8, 2017 Physician Report of Disability completed by Terrance Foster, M.D., and a July 7, 2017 letter from CalPERS to Dr. Foster seeking clarification of his opinions. Neither Dr. Foster's report nor CalPERS's correspondence was produced at hearing, and Dr. Henrichsen's description of either document did not provide a basis for evaluating the persuasiveness of Dr. Foster's opinion about substantial incapacity. Additionally, there was no evidence of Dr. Foster's medical specialty, if any.

20. Based on his physical examination of Ms. Trent, review of her medical records, and understanding of the duties of a District Representative I, Dr. Henrichsen concluded there were no specific job duties Ms. Trent was unable to perform due to a physical or mental incapacity. Therefore, he opined she was not substantially incapacitated for the performance of her duties as a District Representative I. He further opined that while she was cooperative during her IME, she reported more subjective symptoms than he could support based on his objective findings on examination or the objective findings of other physicians as reflected in the medical records.

21. Dr. Henrichsen testified at hearing in a manner consistent with his report. Additionally, he explained she had some reduced range of motion of her cervical spine and some tenderness in her right shoulder and low back, but "she looked very good" from an objective standpoint. His review of her medical records did not reveal any objective evidence to support a finding that she was substantially incapacitated.

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MS. TREN'T’S EVIDENCE

22. As previously explained, Ms. Trent did not appear at hearing, and no one appeared on her behalf. Dr. Henrichsen’s IME report and hearing testimony was the only medical evidence offered.

Discussion

23. Ms. Trent has the burden of producing sufficient competent medical evidence to establish she was substantially incapacitated from the performance of her duties as a District Representative I due to orthopedic (right shoulder tendinitis with impingement, cervical and lumbar degenerative disc disease, right hip sprain, and vertebrogenic headache) conditions. As previously discussed, the sole medical evidence introduced at hearing was Dr. Heinrichsen’s IME report and hearing testimony, and he concluded she was not substantially incapacitated.

24. While Dr. Henrichsen reviewed a Physician Report of Disability containing Dr. Foster’s opinion that Ms. Trent was substantially incapacitated, there was insufficient evidence of the basis for that opinion to evaluate its persuasiveness. Additionally, there was no evidence of Dr. Foster’s medical specialty, if any. On the other hand, Dr. Henrichsen is a board-certified orthopedic surgeon. His conclusion and opinions were supported by the results of his physical examination of Ms. Trent, and he provided a detailed and thorough explanation for his conclusion and opinions in his report. His testimony was comprehensive, and he persuasively explained the bases for his conclusion and opinions.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Ms. Trent has the burden of proving she qualifies for industrial disability retirement, and she must do so by a preponderance of the evidence. (McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5 ["As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence"].) This evidentiary standard requires Ms. Trent to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (People ex rel. Brown v. Tri-Union Seafoods, LLC (2009) 171 Cal.App.4th 1549, 1567.) In other words, she needs to prove it is more likely than not that she was substantially incapacitated for the performance of her duties as a District Representative I with HCD when she applied for industrial disability retirement. (Lillian F. v. Superior Court (1984) 160 Cal.App.3d 314, 320.)
Applicable Statutes

2. Ms. Trent is a state safety member of CalPERS subject to Government Code section 21151, subdivision (a), by virtue of her employment with HCD. That statute provides the following with regard to her eligibility for disability retirement:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

3. Government Code section 20026 provides, in pertinent part:

"Disability" and "incapacity for performance of duty" as the 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. Government Code section 21156, subdivision (a), provides, in pertinent part:

(1) If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability . . . .

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

5. The courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform his usual duties." (Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 877.) It is not necessary that the person be able to perform any and all duties since public policy supports employment and utilization of the disabled. (Schrier v. San Mateo County Employees' Retirement Association (1983) 142 Cal.App.3d 957, 961.) Instead, the frequency with which the duties she cannot perform are usually performed as well as the general composition of duties she can perform must be considered. (Mansperger v. Public Employees' Retirement System, supra, 6 Cal.App.3d at pp. 876-877 [while applicant was unable to lift or carry heavy objects due to his disability, "the necessity that a fish and game warden carry a heavy object alone is a remote occurrence"].)
6. Discomfort, which may make it difficult for one to perform her duties, is insufficient to establish permanent incapacity. (Smith v. City of Napa (2004) 120 Cal.App.4th 194, 207 [mere discomfort which makes it difficult to perform one's job does not constitute a permanent incapacity]; citing, Hosford v. Board of Administration (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (Hosford v. Board of Administration, supra, 77 Cal.App.3d. at p. 863.)

Conclusion

7. Ms. Trent did not produce persuasive medical evidence to establish she was substantially incapacitated for the performance of her duties as a District Representative I with HCD due to orthopedic (right shoulder tendinitis with impingement, cervical and lumbar degenerative disc disease, right hip sprain, and vertebrogenic headache) conditions when she applied for industrial disability retirement. Therefore, her Disability Retirement Election Application seeking industrial disability retirement is denied.

ORDER

Respondent Tonja L. Trent's Disability Retirement Election Application dated February 16, 2017, seeking an industrial disability retirement is DENIED.

DATED: August 3, 2018

COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings