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:

LORI D. BRANDT,
Respondent,

and

CALIFORNIA DEPARTMENT OF PARKS
AND RECREATION,
Respondent.

Case No. 2018-1124
OAH No. 2018120479

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, Office of Administrative Hearings, State of California, on March 25, 2019, in Sacramento, California.

The California Public Employees' Retirement System (CalPERS) was represented by Cynthia Rodriguez, Senior Attorney.

Respondent Lori D. Brandt was present at the hearing and represented herself.

There was no appearance by or on behalf of the California Department of Parks and Recreation (Department). The Department was duly served with Notice of Hearing. The matter proceeded as a default against the Department, pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on March 25, 2019.

ISSUE

The issue on appeal is whether at the time respondent filed her application for disability retirement on the basis of her myasthenia gravis condition, was she permanently
disabled or substantially incapacitated from the performance of her duties as an Office Technician (OT) for the Department?

FACTUAL FINDINGS

Procedural History

1. Respondent was employed by the Department from 2009 until 2012, when she took a position at the California Highway Patrol. In 2016, she returned to the Department and worked as an OT until May 2018. On May 1, 2018, respondent signed and thereafter filed an application for service retirement pending disability retirement (application) with CalPERS. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150. Respondent was 56 years old when she filed her application.

2. In filing the application, respondent claimed disability on the basis of myasthenia gravis, a neurological condition that causes muscle weakness, fatigue and other symptoms. Respondent wrote that the onset of her condition was in December 2017. The cause was unknown. Respondent wrote that she suffered from “double-vision, unclear speech, difficulty swallowing and breathing, [and] rapid fatigue in the face [and] neck.” She also suffered from stomach issues due to the medication she took to treat the condition. Respondent explained that the condition affected her ability to focus, interact with the public and staff, and speak due to the fatigue.

3. In support of her application respondent submitted to CalPERS two “Physician’s Report on Disability” forms. The first form, dated May 8, 2018, was completed by Donald Iverson, M.D., a neurologist, who noted that respondent was diagnosed with myasthenia gravis based on a clinical examination and “positive antibodies.” He also noted that “Thymoma pathology” was pending. Thymoma is a tumor in the thymus gland located behind the upper sternum, that is associated with myasthenia gravis.

Dr. Iverson marked the “yes” box in response to the question of whether respondent was “substantially incapacitated from the performance of the usual duties” of her position with the Department. He wrote that the specific job duty respondent was unable to perform was “reading.” Dr. Iverson wrote that it was “uncertain” whether respondent’s incapacity would be permanent. He wrote that the answer to the question depended on her response to a thymectomy, which is the removal of the thymoma.

Respondent also submitted a Physician’s Report on Disability form from Phillip Scheel, M.D., a family practice physician, dated June 28, 2018. Dr. Scheel also noted that respondent was substantially incapacitated from the performance of the usual duties of her position with the Department based on her myasthenia gravis condition. He noted that respondent was precluded from significant exertion, activities that required coordination, and “visual focus.” However, Dr. Scheel also indicated he had not reviewed respondent’s duty
statement. He marked the “no” box in response to the question of whether the incapacity was permanent. He marked in the “yes” box indicating the incapacity would last more than 12 months.

4. CalPERS obtained medical records and reports from Dr. Iverson, David Mark Jablons, M.D., Dr. Scheel, and Michael Bronshvag, M.D., who conducted an Independent Medical Evaluation (IME) of respondent concerning her myasthenia gravis condition. On September 10, 2018, CalPERS notified respondent that her application for disability retirement was denied. CalPERS stated that after reviewing the medical evidence submitted, CalPERS determined that respondent was not substantially incapacitated from the performance of her job duties as an OT for the Department. Specifically, CalPERS stated respondent’s condition “does not meet [CalPERS] duration requirement, which is a disability expected to last at least 12 consecutive months or will result in death.” Respondent was advised of her appeal rights. Respondent filed an appeal and request for hearing by letter dated October 1, 2018.

5. On December 13, 2018, Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, made and thereafter filed the Statement of Issues.

Background

6. Starting in 2016, respondent worked as an OT at Humboldt Redwood State Park, which is part of the Department’s North Coast Redwoods District. In approximately December 2017, respondent and her husband began noticing she was experiencing various symptoms, including problems with her vision, muscle fatigue in her face, overall fatigue and difficulty swallowing and speaking.

7. In approximately March 2018, respondent was diagnosed with myasthenia gravis. A thymoma tumor was discovered. Respondent was placed on medication and waited to learn about the removal of the tumor. Respondent intended to wait until July 4, 2018, to retire, but was physically unable to work past May 9, 2018. On May 30, 2018, the tumor was removed. Respondent never returned to work.

Duties of an OT for the Department

8. As set forth in the OT Duty Statement dated June 2013, respondent’s duties as an OT included administrative duties related to budget, accounting, purchasing, personnel including preparing hiring and separation documents, clerical, and public interaction. The position required respondent to use a computer, answer the telephone and maintain the functioning of the office.

9. Respondent signed a “Physical Requirements of Position/Occupational Title” (Physical Requirements) for her position on May 2, 2018, which was submitted to CalPERS. According to the Physical Requirements, when working as an OT, respondent:
(1) constantly (over six hours per day) engaged in fine manipulation, repetitively used her hands, and used a keyboard and mouse; (2) frequently (three to six hours per day) sat, bent her neck, twisted her neck and waist, reached above and below her shoulders, pushed and pulled and engaged in simple grasping; (3) occasionally (up to three hours) stood, walked, kneeled, climbed, squatted, bent at the waist, carried between 26 and 50 pounds, walked on uneven ground, drove, and was exposed to excessive noise, extreme temperature, humidity and wetness, dust, gas, fumes and chemicals; and (4) never ran, crawled, worked with heavy equipment, worked at heights, operated foot controls, made repetitive movements, used special visual or auditory protective equipment, or worked with biohazards.

Respondent's Evidence

10. On May 30, 2018, respondent had surgery to remove the thymoma. Her recovery from surgery was difficult, and she was placed in the intensive care unit for several days. Respondent has a blood-clotting disorder that made the surgery more complicated. Respondent was informed by her physicians that some individuals with myasthenia gravis go into remission after undergoing a thymectomy. However, symptoms can be worse for several years after the thymectomy. Respondent has not gone into remission. She takes three medications to treat her symptoms, including pyridostigmine. Although the medication has elevated some of her symptoms, she suffers from significant gastrointestinal side effects.

11. In approximately October 2018, respondent moved to Oregon with her husband in order to obtain medical insurance. Respondent submitted two letters from her treating physicians concerning her condition. Stephen Chung, M.D., a neurologist, wrote a letter dated March 20, 2019, in which he confirmed that respondent “currently remains symptomatic.” He also confirmed she was taking pyridostigmine “for the symptomatic relief of her symptoms of generalized weakness and fatigue, drooping eye lids, and face, slurred speech, and sometimes shortness of breath, but with incomplete relief.” He also wrote that he sees respondent every six months for follow-up on her condition and that she requires yearly CT scans to ensure the thymoma does not reoccur. Dr. Chung did not opine as to whether respondent was permanently disabled or substantially incapacitated from the performance of her duties with the Department.

Respondent also submitted a letter from Kelsey Eliza Allen, D.O., a primary care physician, dated March 19, 2019. Dr. Allen also confirmed that respondent’s condition has not gone into remission. Dr. Allen explained respondent’s various symptoms, including fatigue and gastrointestinal reactions from the medication respondent takes to treat the symptoms. Dr. Allen also did not opine as to whether respondent was permanently disabled or substantially incapacitated from the performance of her duties with the Department.

12. No doctor has informed respondent that she could not return to her position with the Department. However, she was told that she needed to reduce her stress and take care of herself. As a result, she made the decision that in order to cope with her condition, she needed to retire.
Independent Medical Evaluation by Michael Bronshvag, M.D.

13. On August 20, 2018, at the request of CalPERS, Dr. Bronshvag conducted an IME of respondent and issued a report. Dr. Bronshvag testified at hearing. He is board-certified in internal medicine by the American Board of Internal Medicine and in neurology by the American Board of Neurology and Psychology. He obtained his medical degree from Columbia University in 1964. Thereafter, he completed residencies in internal medicine and neurology. Since 1981, Dr. Bronshvag has operated a private practice where he treats patients. He is an Assistant Clinical Professor at the University of California, Davis. He is a Qualified Medical Evaluator and also performs IMEs for CalPERS.

14. As part of respondent’s IME, Dr. Bronshvag interviewed respondent, obtained a medical history and conducted a physical examination. He reviewed respondent’s Duty Statement and the physical requirements of an OT for the Department. Dr. Bronshvag also reviewed respondent’s medical records related to her myasthenia gravis condition.

RESPONDENT’S COMPLAINTS AND HISTORY OF ILLNESS

15. Respondent informed Dr. Bronshvag that she was unable to work because her myasthenia gravis condition caused double-vision, fatigue, shortness of breath and difficulty swallowing. Respondent explained that her symptoms began in December 2017. She underwent testing and was diagnosed with the condition in February or March 2018. She did not undergo any electrodiagnostic studies. Respondent also reported that the thymoma was removed in May 2018, and afterwards her symptoms worsened.

16. Respondent reported that at the time of the examination, her current complaints were double vision, difficulty swallowing, facial and breathing issues, and weakness in her arms and legs. Respondent explained that she took Mestinon, also referred to as pyridostigmine, to treat the symptoms, but that her symptoms vary each day. She had difficulty climbing stairs and carrying objects weighing more than a few pounds due to her muscle weakness.

PHYSICAL EXAMINATION

17. Dr. Bronshvag conducted a physical examination of respondent. He noted that her neurological, motor, and muscle examination, “does not demonstrate localized weakness or myasthenic weakness (weakness on repetitive efforts).” Dr. Bronshvag conducted a “single muscle” test “electrically with repetitive stimulation.” Dr. Bronshvag explained that the electrodiagnostic test given to patients with active myasthenia gravis will show muscle weakness with the testing. The test will be positive even if there is “waxing and waning” of symptoms. Respondent’s test results showed “no initial or eventual decrement.” The test results were normal, which Dr. Bronshvag opined was consistent with his physical findings.
REVIEW OF MEDICAL RECORDS

18. Dr. Bronshvag reviewed respondent’s medical records from Dr. Iverson related to respondent’s condition, treatment and surgery. He noted that the medical records listed information concerning “[m]yasthenia gravis in the setting of thymoma.” He also noted that respondent had a “[l]ong history of pulmonary embolisms.”

DIAGNOSES AND OPINIONS

19. Based on Dr. Bronshvag’s evaluation of respondent, his diagnoses were thymoma and myasthenia gravis. He also opined “fatigue symptoms noted, but actual fatigability (an electrodiagnostic fact) is not.” Dr. Bronshvag explained that he observed “no myasthenic or myoathic abnormality.” He also noted that respondent’s reported “levels of difficulty” do not “match up” with his physical examination findings.

20. In response to the question posed by CalPERS to Dr. Bronshvag concerning whether there were specific job duties that respondent was unable to perform because of a physical or mental condition, Dr. Bronshvag stated that based on his physical findings “there are no preclusions indicated relevant” to respondent’s job duties. He opined that there were no objective findings of myasthenia gravis. However, he opined that respondent had been unable to do her job for a period of time after her surgery until January 31, 2019, while she was recovering. He opined that after that date, respondent is not permanently disabled or substantially incapacitated from the performance of her duties as an OT due to her myasthenia gravis condition.

Discussion

21. Respondent presented compelling evidence that her condition has caused her numerous challenging symptoms, including fatigue, muscle weakness and vision issues. While medication gives her relief from many of her symptoms, she is faced with the challenge of gastrointestinal problems related to the medication. After undergoing surgery to remove a tumor, respondent understandably chose to follow her physician’s advice and take care of herself, with the hope that her condition will go in remission.

While respondent submitted letters from her treating physicians confirming her diagnosis and related symptoms, neither physician opined that respondent was permanently disabled or substantially incapacitated for the performance of her duties as an OT for the Department, based on her myasthenia gravis condition. Additionally, because the authors of the correspondence were not available at hearing for cross-examination, their opinions were admitted only as administrative hearsay and cannot be relied upon, standing alone, to support any findings as to respondent’s condition. (Gov. Code, § 11513, subd. (d).)

22. Dr. Bronshvag was the only physician at hearing to provide an opinion regarding the issue of whether respondent was permanently disabled or substantially incapacitated from the performance of her duties as an OT. His opinion that respondent was
not permanently disabled or substantially incapacitated from the performance of her usual and customary duties as an OT for the Department, based upon her myasthenia gravis condition, was persuasive. Dr. Bronshvag based his opinion on his review of respondent’s job description, the physical requirements of the job, medical records and a physical examination. While there was a period of time between May 2018 and January 31, 2019, when respondent was temporarily unable to perform her job duties while she recovered from surgery, Dr. Bronshvag opined that after January 31, 2019, she was able to return to work.

23. Respondent did not present competent medical evidence to support her assertion that at the time she filed her application she was permanently disabled or substantially incapacitated from the performance of her usual and customary duties as an OT for the Department based upon the legal criteria applicable in this matter. Consequently, respondent did not establish that her disability retirement application should be granted based upon her myasthenia gravis condition.

LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21150, subdivision (a), which provides, in pertinent part, that “[a] member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age . . . .”

2. To qualify for disability retirement, respondent must prove that, at the time she applied, she was “incapacitated physically or mentally for the performance of his or her duties . . . .” (Gov. Code, § 21156, subd. (a)(1).) 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 duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

4. The burden of proof is on respondent to prove, by a preponderance of the evidence, that she is permanently and substantially unable to perform her usual duties such that she is permanently disabled. (McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044; Evid. Code, 500; 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. Respondent did not present competent, objective medical evidence to establish that she was permanently disabled or substantially incapacitated from performance of her duties as an OT for the Department at the time she filed her disability retirement application. Therefore, based on the Factual Findings and Legal Conclusions, respondent is not entitled to retire for disability pursuant to Government Code section 21150.

ORDER

Respondent Lori D. Brandt’s application for disability retirement is DENIED.

DATED: April 8, 2019

MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings