ATTACHMENT E

THE PROPOSED DECISION
BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for
Disability Retirement of:

VERONICA HENDERSON,
Respondent,
and

DEPARTMENT OF MOTOR VEHICLES,
Respondent.

Case No. 2018-1040
OAH No. 2019010391

PROPOSED DECISION

Nana Chin, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on March 11, 2019, in Los Angeles, California.

Austa Wakily, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS). Respondent Veronica Henderson (respondent) appeared and represented herself. No appearance was made on behalf of the Department of Motor Vehicles (DMV).

Oral and documentary evidence was received. The medical records of Respondent were marked as Exhibits 8, 10, 12, D, E and F. Exhibits 8, 10, 12, D, E and F were moved into evidence. These exhibits contain confidential information which is protected from disclosure to the public. In order to protect Respondent's privacy and to prevent the disclosure of confidential information, the ALJ on her own motion issued a Protective Order placing the exhibits under seal after its use in preparation of the Proposed Decision. The documents shall remain under seal and shall not be opened, except as provided by the Protective Order. A reviewing court, parties to this matter, their attorneys, and a government agency decision maker or designee under Government Code section 11517 may review the document subject to the Protective Order provided that such document is protected from release to the public.

The record was closed, and the matter was submitted for decision on March 11, 2019.
SUMMARY

Respondent did not submit competent medical evidence to support a determination that she is permanently disabled or incapacitated from performance of her duties as a Motor Vehicle Representative for the DMV on the basis of her orthopedic (bilateral knee and low back) conditions. Therefore, respondent’s appeal of CalPERS’s denial of her application for disability retirement is denied.

FINDINGS OF FACT

Parties and Jurisdiction

1. At the time respondent filed her application for retirement, she was employed as a Motor Vehicle Representative with the DMV. By virtue of her employment, respondent was a state miscellaneous member of CalPERS.

2. On September 6, 2017, respondent signed an application for disability retirement which she then filed with CalPERS. Respondent listed her disabilities as chronic back and knee pain, tumor in her spine and disc degeneration, knee surgery, and swelling on both knees. According to respondent, her injuries were a “hereditary back and knee issue.” (Exhibit 3.)

3. CalPERS obtained or received medical reports concerning respondent’s orthopedic condition from medical professionals. After review of the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of her duties as a Motor Vehicle Representative at the time the application for industrial disability retirement was filed.

4. By letter dated February 22, 2018, respondent and the DMV were notified of CalPERS’s determination and were advised of their appeal rights. Respondent filed an appeal and requested an administrative hearing by letter dated March 20, 2018.

5. On January 7, 2019, Anthony Suine, in his official capacity as Benefit Division Chief, Board of Administration, CalPERS, executed a Statement of Issues against respondent and the DMV.

6. The issue on appeal is limited to whether respondent is permanently disabled or substantially incapacitated from performance of her usual and customary duties as a Motor Vehicle Representative for the DMV based on an orthopedic (bilateral knee and low back) condition.
Duties of a Motor Vehicle Representative

7. CalPERS submitted two exhibits that describe the duties of a Motor Vehicle Representative in the Field Operations Division: (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.

8. The Position Duty Statement provides a general description of the duties of a Motor Vehicle Representative, which include: "a calm, courteous, and tactful approach in providing customer service. . ." (Exhibit 14.)

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

Expert Opinion

10. At the request of CalPERS, Hose Kim, M.D., who is certified with the American Board of Orthopaedic Surgery, conducted an independent medical examination (IME) of respondent and issued a report of his findings. Dr. Kim obtained pertinent medical history, performed a physical examination of respondent on January 23, 2018, and reviewed the documents provided to him by CalPERS. Dr. Kim appeared at hearing and testified as to the contents of his report.

11. The medical records reviewed by Dr. Kim included x-rays to respondent's lumbar and lumbosacral spine, hips and knees; an MRI of her lumbar spine; a bone scan; and progress notes from respondent's treating medical professionals. In his report, Dr. Kim noted that respondent had a medical history that included surgeries to both knees but had not undergone back surgery. Respondent also reported that she had been diagnosed with fibromyalgia in October or November 2017 and that she was seeing a psychiatrist at Kaiser Permanente due to symptoms of depression.

12. Dr. Kim noted that respondent complained of low back pain that is "sharp, stabbing, burning, and cramping with radiation of pain down both legs to the feet, greater on the right side" and numbness and tingling in the low back and down both legs to her feet. (Exhibit 8.) The pain to her low back increased with sitting and standing. Respondent also reported locking, spasms and stiffness of her low back, and weakness in both legs, greater in her right side. With respect to her knees, respondent complained of constant stabbing bilateral knee pain without radiation and tingling. The pain increased with walking and
standing. Dr. Kim also noted that respondent also reported of popping, locking, and swelling in both knees.

13. During the examination, Dr. Kim observed that reduced range of motion to respondent’s lumbar spine on flexion and extension and reduced range of motion to both her knees on flexion. Dr. Kim noted no other significant findings in his examination.

14. Following the examination, Dr. Kim ordered x-rays of respondent’s knees. The x-rays were performed on February 2, 2018. Dr. Kim reviewed the x-rays and noted in his IME report that they revealed good alignment of respondent’s knees with well-maintained joint spaces.

15. Dr. Kim diagnosed respondent with degenerative disc disease of the lumbar spine with lower back pain, bilateral knee chondromalacia patella, and status post osteochondral allograft transplantation to left and right patella.

16. According to Dr. Kim, respondent appeared to be cooperating with the examination but her subjective complaints far outweighed the objective findings as contained in her x-rays. Additionally, he stated that though respondent had significant complaints of pain in her knees and lower back, he found no objective evidence of an orthopedic condition that would explain her subjective complaints. Based on this lack of any objective findings, Dr. Kim opined there were no activities respondent would be physically unable to perform.

17. By letter dated May 24, 2018, Mira Tonis, a retirement program specialist at CalPERS provided Dr. Kim with additional medical records, which included an updated MRI of respondent’s lumbar spine, a copy of the February 2, 2018 x-rays of respondent’s knees and more recent records from respondent’s treating medical professionals. Following his review of these additional records, Dr. Kim issued a Supplemental Orthopedic IME report dated June 5, 2018. Dr. Kim’s opinion regarding respondent’s disability remained unchanged, stressing that “claimant’s subjective complaints are not substantiated by the objective findings.” (Exhibit 10.)

18. On August 27, 2018, CalPERS again contacted Dr. Kim, providing him a report from Arnel Habacon Reyes, M.D. dated August 18, 2018. Dr. Reyes’s report stated that “[respondent] has no chance for meaningful recovery, in my opinion, and is considered permanently disabled from my standpoint.” (Exhibit 12, p. 2, Exhibit F, p. 161.) Following review of Dr. Reyes’s report, Dr. Kim issued a second Supplemental Orthopedic IME report on August 30, 2018, stating that his opinion remained unchanged. Dr. Kim noted that though Dr. Reyes’s examination of respondent’s lumbar spine revealed decreased range of motion, no values were recorded of the decreased range of motion. In addition, though Dr. Reyes noted that respondent had tenderness, pain and spasm in her lumbar spine, these findings were not objective findings. Based on his review, Dr. Kim opined that “Dr. Reyes’

---

1 Respondent’s Kaiser Permanente medical records, which included the progress reports from Dr. Reyes, were admitted as administrative hearsay.
conclusion that the claimant is ‘permanently disabled with no chance for meaningful recovery’ is mostly based on the subjective complaints offered by the claimant rather than any objective findings.” (Exhibit 12, p/ 2.)

Respondent’s Testimony

19. According to respondent, prior to working for DMV, Respondent had been employed with the Los Angeles Unified School District (LAUSD) as a special aid assistant for approximately 18 years. Once she was no longer able to stand, she left the position and took a position with the DMV in September 2014.

20. Respondent testified that she had underwent knee surgery to her left knee. Due to her continuing pain, respondent underwent a unique type of surgery to her right knee. After her surgery, she went back to work at the DMV. The DMV first attempted to accommodate her disability by providing her with ergonomic equipment and then by transferring her to a different station. Due to the severity of her pain, however, her hours were reduced. They were first reduced from eight hours to six and then from six hours to four, the minimum hours DMV was allowed to give her.

21. On October 18, 2016, respondent was examined by Dr. Reyes and placed off work. Since that time, respondent has not returned to work.

22. Respondent did not call any medical experts to testify on her behalf at hearing. The evidence respondent submitted in regards to her medical condition consisted of her medical records from Kaiser Permanente from October 18, 2016, until December 19, 2018, letters from Linda Miller Atkinson, MD., and her testimony. The records, which were admitted as administrative hearsay under Government Code section 11513, subdivision (d), were consistent with respondent’s testimony, in that they indicate that respondent’s complaints of pain to her back and knees are longstanding in nature.

23. At hearing, respondent expressed concerns regarding the accuracy of Dr. Kim’s examination. Respondent’s recollection differed from Dr. Kim’s recollection of the examination. Namely, respondent had concerns that Dr. Kim failed to note that she had a four wheeled walker with her at the time of the examination. Further, Dr. Kim also noted in his report that that respondent was able to ambulate freely with a normal gait and without discernable antalgia and that she was able to assume and arise from a squatting position without difficulty. Respondent denied she had been able to ambulate freely or squat during the examination. Respondent further stated that she had been in pain throughout much of the examination.

//

2 Dr. Atkinson states in her letters that respondent is under her rheumatological care for fibromyalgia.
**Findings Regarding Respondent's Disability**

24. Respondent did not present competent medical evidence to establish that, by reason of an orthopedic condition, she is substantially incapacitated from the performance of her usual duties as a Motor Vehicle Representative employed by the DMV.

**LEGAL CONCLUSIONS**

**Burden and Standard of Proof**

1. An applicant for an industrial disability retirement has the burden of establishing eligibility by a preponderance of the evidence. *(Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1332.)*

2. "Preponderance of the evidence means evidence that has more convincing force than that opposed to it.” [Citations.] . . . The sole focus of the legal definition of "preponderance" in the phrase "preponderance of the evidence" is on the quality of the evidence. The quantity of the evidence presented by each side is irrelevant.” *(Glage v. Hawes Firearms Company (1990) 226 Cal.App.3d 314, 324-325.)*

**Applicable Law**

3. The Public Employees' Retirement Law is set forth in Government Code section 20000 et seq. The general purpose of the public retirement system is "to prevent hardship to state employees who because of age or disability are replaced by more capable employees. The pension system serves as an inducement to enter and continue in state service [citation], and the provisions for disability retirement are also designed to prevent the hardship which might result when an employee who, for reasons of survival, is forced to attempt performance of his duties when physically unable to do so.” *(Quintana v. Board of Administration (1976) 54 Cal.App.3d 1018, 1021.)*

4. Government Code section 21151 provides that state miscellaneous members from designated agencies who are incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, regardless of age or amount of service.

5. Government Code section 20026 defines "disability" and "incapacity for performance of duty” as follows:

"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, 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.
Evaluation

6. Respondent failed to prove by a preponderance of the evidence that she is substantially incapacitated to perform her usual and customary job duties, and is therefore ineligible for a disability retirement. This conclusion is based upon Dr. Kim’s opinion after performing an independent examination of respondent and reviewing medical records provided to him. Dr. Kim’s testimony was credible and forthright. He provided objective observations to substantiate his conclusions that respondent had no significant physical abnormalities during his physical examination. Dr. Kim provided objective finding based upon his physical examination that respondent’s orthopedic complaints to her lower back and knees did not render her substantially incapacitated to perform the duties of her position as a Motor Vehicle Representative.

7. In addition, respondent offered insufficient evidence to controvert Dr. Kim’s testimony that there is no objective medical evidence to establish that she is incapable of performing her required job duties. The evidence provided is insufficient to establish that respondent was substantially incapacitated from performing her usual job duties at the time of her application for disability on September 6, 2017, based on the orthopedic condition of her back and knees.

ORDER

The application for industrial disability retirement of Veronica Henderson is denied.

Dated: April 9, 2019

[Signature]
Nana Chin
Administrative Law Judge
Office of Administrative Hearings