

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:

**TIFFANY S. ESTRADA-PEREZ and CITY OF LATHROP,
Respondents.**

Case No. 2018-0537

OAH No. 2018090525

PROPOSED DECISION

Marcie Larson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on May 29, 2019, in Sacramento, California.

Cynthia Rodriguez, Senior Attorney, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

Tiffany Estrada-Perez (respondent) appeared at the hearing and represented herself.

Juliana Kresse, Attorney, represented respondent City of Lathrop (City).

Oral and documentary evidence was received. The record remained open to allow the parties to file written closing briefs. On July 1, 2019, CalPERS's and the City's

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED August 1, 2019
Kathy Pasley

closing briefs were received, the record was closed and the matter was submitted for decision.¹

ISSUE

The issue on appeal is whether at the time respondent filed her application for disability retirement on the basis of her right shoulder tendinitis, right lateral and medial epicondylitis² (orthopedic conditions), was she substantially incapacitated from the performance of her duties as a Senior Animal Services Officer (Officer) for the City?

FACTUAL FINDINGS

Procedural History

1. Respondent was employed by the City as an Officer from November 2014, until November 3, 2017, when she was placed on leave. On November 14, 2017, respondent signed and thereafter filed an application for disability retirement (application) with CalPERS. By virtue of her employment, respondent is a local miscellaneous member of CalPERS subject to Government Code section 21150. Respondent was 43 years old when she filed her application.

¹ CalPERS closing brief was marked as Exhibit 11. The City's closing brief was marked as Exhibit Q. The briefs were admitted as argument. Respondent did not submit a closing brief.

² Tendinitis on the outside (lateral) and inside (medial) of the elbow.

2. In filing the application, respondent claimed disability on the basis of tendinitis and bursitis of her right shoulder and right lateral and medial epicondylitis. Respondent wrote that the onset of her condition was "on or about" February 21, 2017. Respondent stated that her disability occurred from "repetitive heavy lifting" with her right arm at work. Respondent further stated that she noticed "pain, swelling and weakness that progressively worsened overtime." Respondent wrote that she could not "lift, carry, push or pull over 25 pounds with [her] right arm." She further stated that her job is "very physical" and she was no longer able to perform the "essential functions of [her] occupation."

3. CalPERS obtained medical records and reports from Zhiqiang Chen, M.D., and Robert Henrichsen, M.D., who conducted an Independent Medical Evaluation (IME) of respondent concerning her orthopedic conditions. On April 24, 2018, CalPERS notified respondent and the City that respondent's 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 Officer for the City. Specifically, CalPERS stated respondent's condition "does not meet [CalPERS's] 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. The City filed an appeal and request for hearing by letter dated May 21, 2018.

4. On September 14, 2018, Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, made and thereafter filed the Statement of Issues.

Duties of an Officer for the City

5. As set forth in the Officer class specification dated March 2015, respondent's duties as an Officer required her to serve as a "lead officer to personnel" and lead "a variety of animal services including the enforcement of local and state laws governing licensing, impounding, treatment and disposal of animals." Respondent was responsible for "supervising, planning, scheduling, assigning, evaluating and monitoring daily activities of Animal Services staff." She also oversaw the "daily operations of animal services activities and field work."

The physical requirements of the position include "sitting, running, standing, walking on level and slippery surfaces, reaching, twisting, turning, kneeling, bending, stooping, squatting, crouching, grasping, repetitive hand movement, climbing fences, and possible crawling in the performance of daily duties." Respondent was also required to "lift, carry and push animals and supplies weighing 100 pounds or more."

6. On October 26, 2017, Juliana Burns, Human Resources Manager for the City signed a "Physical Requirements of Position/Occupational Title" (Physical Requirements) for respondent's position. According to the Physical Requirements, when working as an Officer respondent: (1) constantly (over six hours per day) repetitively used her hands; (2) frequently (three to six hours per day) sat, used a keyboard and mouse, and drove; (3) occasionally (up to three hours) stood, ran, walked, crawled, kneeled, climbed, squatted, bent and twisted at the neck and waist, reached above and below the shoulders, pushed and pulled, engaged in fine manipulation, power and simple grasped, carried between 0 and over 100 pounds, walked on uneven ground, was exposed to excessive noise, extreme temperature, humidity and wetness, dust, gas, fumes and chemicals, worked at heights, used special

visual or auditory protective equipment and worked with worked with biohazards; and (4) never worked with heavy equipment, or operated foot controls.

7. Respondent also submitted a written attachment to the Physical Requirements form, explaining the physical requirements of her position. She testified at hearing consistent with the written information she submitted. Respondent explained her position is "physically demanding and inherently dangerous even for someone in peak physical condition." Respondent further stated that the City received 6,000 calls for service in 2016. Approximately 800 animals were impounded. The field work she performs often requires her to lift and carry heavy animals. Additionally, she wears equipment that weighs approximately 16 pounds. Respondent engaged in repetitive motions when deploying her baton, which requires her to use a "cross-body motion, coupled with some considerable force to get the baton open."

8. Cari James, Finance Director for the City, supervises the Animal Control Department. She described respondent's duties as an Officer for the City. Ms. James explained the City has a senior position held by respondent, one Animal Control position, and one Animal Services Assistant. Ms. James explained that respondent's duties include 85 to 90 percent of the time responding to service calls and traveling to the field. The remaining time is spent in the office answering the telephone and using the computer to update case information. Ms. James also explained that respondent's duties include handling large, aggressive animals, including large dogs, pigs, cows, and horses. Respondent must be able to catch and load the animals into a truck for transporting to a shelter or veterinarian.

Additional Evidence from the City and Respondent

HISTORY OF INJURY AND EFFECT ON DUTIES

9. Respondent explained that there was no specific injury that triggered her orthopedic conditions. In February 2017, she noticed pain in her right elbow that did not resolve. She continued to work but the pain increased. In April 2017, she began having issues with her right shoulder, which she had previously injured. Respondent took ibuprofen, but she continued to have pain. Respondent reported her injuries to the City. In May 2017, respondent sought treatment with Dr. Chen, a physician at Kaiser.

10. Respondent saw Dr. Chen at least eight times between May and September 2017. Dr. Chen placed her on restricted duty and recommended respondent treat her orthopedic conditions with ice, anti-inflammatory medication, and a muscle relaxer. Dr. Chen also gave respondent an injection in her right elbow that gave a slight relief. Respondent completed a few sessions of physical therapy, which aggravated her pain, so she quit attending. Respondent also had six sessions with a chiropractor and tried acupuncture. She only received temporary relief from the treatments. Dr. Chen also gave respondent the option of seeing an orthopedic surgeon, but respondent declined because she has diabetes that is not controlled, which she believes prevents her from undergoing surgery. She also does not believe surgery will enable her to perform at the same level as before she was injured.

11. Respondent explained that she is not able to lift over 25 pounds with her right arm, but she could lift with her left arm. She has trouble expanding her retractable baton and opening car doors, and difficulty handling animals on a leash because of the pain she experiences. Respondent explained that her shoulder

symptoms have not resolved, and she still has significant pain in her shoulder. She also experiences numbness in her arm, and has trouble holding things over head. She experiences pain in her right shoulder when she drives.

12. Ms. James explained that the City accommodated respondent's restriction that she not lift over 25 pounds. Another Animal Control Officer responded to calls and accompanied respondent on service calls that that required lifting over 25 pounds. Ms. James contended that the City does not have the ability to continue to accommodate respondent's lifting restriction because there is not always a second officer available to respond to service calls.

TREATMENT BY DR. CHEN

13. Dr. Chen is a physician at Kaiser in Manteca. He specializes in Occupational Medicine. Dr. Chen testified at hearing concerning his treatment of respondent's orthopedic conditions. Dr. Chen also prepared reports and progress notes regarding his treatment. Dr. Chen explained that he treats patients for work-related injuries.

14. Dr. Chen first treated respondent for her orthopedic conditions on May 8, 2017. He saw respondent every two to three weeks for four months. During the initial visit, Dr. Chen obtained a history from respondent and conducted an examination. Respondent explained the history of her orthopedic conditions and also shared information about her job duties. Dr. Chen placed respondent on light duty, with a restriction from lifting more than 25 pounds. He advised respondent to use ice on the affected areas and to perform home exercise. Respondent was suffering from muscle spasms, so he prescribed her a muscle relaxer.

15. During the course of treatment, Dr. Chen ordered x-rays and an MRI of respondent's right shoulder and elbow. No bone or joint abnormality was seen on the x-rays. The MRI of the right shoulder showed "mild subdeltoid bursitis and possible mild distal supraspinatus tendinopathy lateral to the osseous outlet." There was also "central degeneration of the superior labrum" and "possible mild inflammatory AC joint acromioclavicular atrophy."

The MRI of the right elbow showed "[t]hickening and signal alteration of the common extensor tendon at the lateral epicondyle." Additionally, noted was "[i]nsetion consistent with an age-indeterminate lateral epicondylitis without definite tearing." Also "[t]hickening and increased T2 signal suggest a possible ulnar neuropathy causes posterior and distal to the medial epicondyle."

16. Dr. Chen diagnosed respondent with tendinitis and bursitis of the right shoulder and right lateral and right medial epicondylitis. In addition to ordering physical therapy for respondent, he advised continued use of anti-inflammatory medication and a muscle relaxer, and gave respondent a steroid injection in her right elbow that gave her "slight improvement." Respondent also had chiropractic treatment with limited relief. Despite the treatments, Dr. Chen opined that respondent's orthopedic conditions have persisted because her injuries are cumulative and repetitive, which can necessitate a longer recovery time. Also, respondent has uncontrolled diabetes, which slows recovery.

17. After four months of treatment, Dr. Chen determined respondent's condition was permanent and stationary because she made limited progress. Dr. Chen opined that respondent has a restriction from lifting, carrying, pushing or pulling over 25 pounds with her right arm. She has no other restrictions. Dr. Chen explained that he

is not familiar with CalPERS's disability retirement standards. He completes permanent and stationary ratings based on the Workers' Compensation rating system.

18. Dr. Chen offered to provide respondent a referral to an orthopedic surgeon to obtain an opinion concerning whether surgical intervention was an option. Respondent stated she was not interested in surgery. Dr. Chen did not provide any further treatment for respondent after September 2017. He opined that her condition would resolve in "a year or so," but the condition can last years on some patients. Dr. Chen did not offer any opinion as to whether at the time respondent filed her application on the basis of her orthopedic conditions, was she substantially incapacitated from the performance of her duties as an Officer for the City.

Independent Medical Evaluation by Robert Henrichsen, M.D.

19. On January 30, 2018, at CalPERS's request, Dr. Henrichsen conducted an IME of respondent and issued a report. Dr. Henrichsen testified at hearing. He obtained his medical degree from Loma Linda University in 1967. Thereafter, he completed an orthopedic residency. In 1974, he obtained board certification in orthopedics. Dr. Henrichsen operated an orthopedic private practice and performed surgery until 2011. Currently, approximately 40 percent of his time is spent treating patients. He also works as a Qualified Medical Evaluator and performs IMEs for CalPERS.

20. As part of respondent's IME, Dr. Henrichsen interviewed respondent, obtained a medical history, and conducted a physical examination. He reviewed respondent's classification specification and the physical requirements of an Officer for the City. Dr. Henrichsen also reviewed respondent's medical records related to her orthopedic conditions.

RESPONDENT'S HISTORY AND COMPLAINTS

21. Respondent explained to Dr. Henrichsen that her orthopedic conditions were a "gradual cumulative injury and not a specific incident." Respondent explained she worked as an Officer for the City and that she responded to service calls involving animal issues. Her position required frequent physical activity and lifting up to 100 pounds.

22. Respondent explained that in September 2015, she was injured when she was using a "catch pole," a device placed around an animal's neck. The animal would often try to get away and the yanking motion injured her right arm and shoulder. She was treated at Kaiser for the injury, which included injections. She was on modified duty and returned to full duty in between March and June 2016, without any symptoms. In February 2017, her symptoms returned. Initially, her symptoms were more in her elbow than shoulder. Repetitive motion aggravated her symptoms.

23. Respondent explained her history of treatment with Dr. Chen. She also explained that in August 2017, she suffered some low back pain and was off work again. She returned to work on modified duty until November 3, 2017. She stopped working because the City could not accommodate her restrictions.

24. Respondent explained that she suffered from "numbness in the right upper extremity with tingling in the right arm, shoulder and hand." She has reduced mobility in her right shoulder. She also feels weakness and reduced strength. She has pain in her right arm, shoulder, and neck. Respondent reported that she took Motrin as needed and Flexeril, a muscle relaxer, up to three times per day.

PHYSICAL EXAMINATION

25. Dr. Henrichsen conducted a physical examination of respondent's neck and upper extremities. During the range of motion testing of the right shoulder, respondent did not have any impingement, but with active abduction, she had some subtle "clicking." Respondent also had some decrease in range of motion. She had anterior shoulder pain in the right shoulder and right elbow when Dr. Henrichsen tested the areas with several maneuvers.

26. Dr. Henrichsen evaluated respondent's elbows and she had no restriction on range of motion. There was some tenderness on the right olecranon without swelling or crepitus, which is grinding. There was also tenderness to the lateral epicondyles on both the right and left elbows. Respondent reported tenderness of the medial epicondyle of the right elbow, but less than the lateral tenderness. She also reported right lateral elbow pain with resistance.

REVIEW OF MEDICAL RECORDS

27. Dr. Henrichsen reviewed respondent's medical records from Dr. Chen related to her orthopedic conditions and treatment. Dr. Henrichsen disagreed "a little" with how Dr. Chen diagnosed respondent, because Dr. Chen relied on respondent's subjective reports of pain and tenderness, rather than objective findings obtained from imaging studies or physical examination.

IMPRESSIONS AND OPINIONS

28. Based on Dr. Henrichsen's evaluation of respondent, his impressions of respondent's orthopedic conditions were that she had "biceps 'tendinitis' right shoulder" and "tendinitis right and left elbows." Dr. Henrichsen explained his opinion

was "consistent with Dr. Chen's evaluations in that there is some tenderness and some mild restriction in mobility of the right shoulder." However, Dr. Henrichsen opined that respondent does not have muscle atrophy. Her right elbow had evidence of "typical elbow tendinitis." He further opined that respondent has "some shoulder contracture." However, "[i]t does not appear that she has any significant intraarticular pathology of the shoulder joint and she does have active elbow tendinitis, more on the right than the left." Dr. Henrichsen opined that all of respondent's orthopedic conditions are "treatable, with treatments being directed exactly at the specific area."

29. Dr. Henrichsen opined that respondent had not reported any significant improvement in her orthopedic conditions since the time she went off work, "which suggests that the diagnosis of overuse syndrome is not the major problem of her persistent symptoms."

30. Dr. Henrichsen opined in his report that because of her right shoulder tendinitis, respondent is not able to "reach above shoulder level more than one-third of her workday." She also cannot lift or carry more than 50 pounds more than one-third of her workday." Dr. Henrichsen added at hearing, that respondent cannot perform repetitive, palm down grasping, because of her right elbow condition. As a result of these restrictions, Dr. Henrichsen opined that respondent was substantially incapacitated from the performance of her duties as an Officer for the City. He opined that "[w]ith appropriate treatment and hard work on her part, the medical findings presently demonstrate that her incapacity will last less than 12 months" and is temporary. He explained respondent's condition should "improve dramatically on its own" with time off work and avoiding "palm-down grasping."

31. At hearing, Dr. Henrichsen clarified his report and explained that respondent's orthopedic conditions are inflammatory not mechanical. As a result,

respondent's restrictions are prophylactic to prevent further inflammation so the conditions can improve. Dr. Henrichsen opined respondent's orthopedic conditions are not intractable or incurable, and should have resolved within 12 months of the date when she left work on November 3, 2017. Dr. Henrichsen further explained that CalPERS does not consider prophylactic restrictions to be permanently disabling.

SUPPLEMENTAL REPORT

32. On April 13, 2018, CalPERS sent Dr. Henrichsen a letter requesting clarification regarding his opinion that with appropriate treatment respondent's incapacity would last less than 12 months. Specifically, Dr. Henrichsen was asked to assume that if respondent had no additional treatment, would she be substantially incapacitated for more than 12 months.

33. On April 17, 2018, Dr. Henrichsen issued a Supplemental Report responding to CalPERS's question. He opined that without additional treatment and if respondent does not "abuse her shoulder" then "she should be able to return to work and would not be substantially incapacitated for more than 12 months."

Discussion

34. Respondent and the City failed to establish that at the time respondent filed her application she was permanently disabled or substantially incapacitated from performing the usual duties of an Officer for the City. Dr. Henrichsen 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 Officer, applying the CalPERS standard. His opinion that respondent has an inflammatory condition that is not permanent and that she was only substantially incapacitated from the performance of her usual and customary duties as an Officer

for the City as a result of prophylactic restrictions, was persuasive. As Dr. Henrichsen noted, prophylactic restrictions designed to prevent further injury are not sufficient to support a finding of disability under the CalPERS standard.

35. While Dr. Chen treated respondent for a four-month period and determined her condition was permanent, he applied the Workers' Compensation standard in rendering his opinion. He offered no opinion as to whether respondent was permanently disabled or substantially incapacitated from the performance of her duties as an Officer, applying the CalPERS standard.

36. Neither respondent nor the City presented competent medical evidence to support the assertion that at the time respondent filed her application she was permanently disabled or substantially incapacitated from the performance of her usual and customary duties as an Officer for the City based upon the legal criteria applicable in this matter. Consequently, neither respondent nor the City established that respondent's disability retirement application should be granted based upon her orthopedic conditions.

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 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.)

4. In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, the court explained that prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. The applicant, a sergeant, in *Hosford* had suffered injuries to his left ankle and knee, and had strained his back. The court noted that the sergeant "could sit for long periods of time but it would 'probably bother his back;' that he could run but not very adequately and that he would probably limp if he had to run because he had a bad ankle; that he could apprehend persons escaping on foot over rough terrain or around and over obstacles, but he would have difficulty and he might hurt his back; and that he could make physical effort from the sedentary state but he would have to limber up a bit." (*Id.* at p. 862.) Following *Mansperger*, the court in *Hosford* found that the sergeant:

... is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of time in a patrol car would "probably hurt his back," does not mean that in fact he cannot so sit; ... [¶] As for the more strenuous activities, [a doctor] testified that Hosford could run, and could apprehend a person escaping over rough terrain. Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function, renders [the doctor's conclusion that Hosford was not disabled] well within reason. (*Ibid.*)

In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that "this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing." (*Hosford, supra*, 77 Cal.App.3d at p. 863.)

5. In *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff was not permanently incapacitated for the performance of his duties, finding, "[a] review of the physician's reports reflects that aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant's condition are dependent on his subjective symptoms."

6. The burden of proof is on respondent and the City to demonstrate that respondent is substantially incapacitated from the performance of her usual and customary duties such that she is permanently disabled. (*Harmon v. Board of*

Retirement of San Mateo County, supra, 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) To meet this burden, respondent and the City must submit competent, objective medical evidence to establish that, at the time respondent filed her application she was permanently disabled or incapacitated from performing the usual duties of her position as an Officer for the City. (See *Harmon v. Board of Retirement, supra*, 62 Cal.App.3d at 697.)

7. Findings issued for the purposes of workers' compensation are not evidence that respondent's injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa*, (2004) 120 Cal.App.4th 194, 207; *English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego*, (1989) 214 Cal.App.3d 563.)

8. When all the evidence is considered in light of the courts' holdings in *Mansperger*, *Hosford*, and *Harmon*, neither respondent nor the City established that respondent's disability retirement application should be granted. Specifically, they failed to establish through competent, objective medical evidence that respondent was permanently disabled or substantially incapacitated from the performance of her usual and customary duties of her job as an Officer for the City, based on her orthopedic conditions. Consequently, her disability retirement application must be denied.

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ORDER

Respondent Tiffany Estrada-Perez's application for disability retirement is
DENIED.

DATE: July 31, 2019

DocuSigned by:
Marcie Larson
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MARCIE LARSON

Administrative Law Judge

Office of Administrative Hearings