

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:

JODI L. FANNING, Respondent

and

CITY OF PALM DESERT, Respondent

Case No. 2018-1253

OAH No. 2019030273

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on August 27, 2019, in San Bernardino, California.

Charles Glauberman, Senior Attorney, represented petitioner Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

James S. Fischer, Attorney at Law, represented respondent Jodi L. Fanning, who was present.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Sept. 17, 2019
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No appearance was made by or on behalf of respondent City of Palm Desert. Based on proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default against City of Palm Desert pursuant to Government Code section 11520.

The matter was submitted on August 27, 2019. Thereafter, the administrative law judge discovered that she knew the plaintiff in the case cited by respondent Fanning in her appeal brief and issued an order advising the parties of that fact and re-opening the record. The parties were given until 5:00 p.m. on September 13, 2019, to file a response. Complainant filed one stating CalPERS did not object to the administrative law judge continuing to preside over the matter. Neither respondent filed a response. The record re-closed on September 13, 2019, and the matter was submitted.

PROTECTIVE ORDER SEALING CONFIDENTIAL RECORDS

Respondent's Exhibits 13 and 14, Ms. Fanning's medical records, were received and contained confidential information. It is impractical to redact the information from these exhibits. To protect her privacy and the confidential personal information from inappropriate disclosure, Exhibits 13 and 14 are ordered sealed. This sealing order governs the release of documents to the public. 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 documents subject to this order, provided that the documents are protected from release to the public.

ISSUE

Was Ms. Fanning permanently disabled or incapacitated from performing her usual and customary duties as an Office Assistant for City of Palm Desert due to her neurological (bilateral feet) condition when she filed her application for disability retirement?

SUMMARY OF DECISION

Ms. Fanning had the burden to prove that she was permanently disabled or incapacitated from performing her usual and customary job duties due to her neurological (bilateral feet) condition. The competent medical evidence introduced at this hearing did not support her claim that she was permanently disabled or incapacitated from performing the regular and customary duties of an Office Assistant due to her condition. Ms. Fanning's claim for disability retirement is denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. Ms. Fanning was employed by City of Palm Desert as an Office Assistant. By virtue of her employment, Ms. Fanning was a local miscellaneous member of CalPERS subject to Government Code section 21150.
2. On June 29, 2018, Ms. Fanning filed a Disability Retirement Election Application with CalPERS. In the "Application Type" section she checked the box marked "Disability Retirement." Ms. Fanning identified her disability as "office assistant,

phones counter, permits, assist fellow coworkers and customers.”¹ Her disability occurred on July 31, 2013, and how it occurred was “unknown.” The limitations/preclusions due to her injury/illness were “cannot sit, stand or walk for any length of time,” and it affected her ability to perform her job because “unable to due to constant pain.” She was not working and identified her primary care physician as her treating physician.

3. CalPERS obtained medical records and documents related to Ms. Fanning’s conditions and selected Khaled Anees, M.D., a board certified neurologist, to perform a disability evaluation. Dr. Anees provided CalPERS with a report containing his findings and conclusions. After reviewing all of those documents, CalPERS determined that when Ms. Fanning filed her application for disability retirement, she was not permanently disabled or incapacitated from performing the usual and customary duties of an Office Assistant.

4. On September 20, 2018, CalPERS notified Ms. Fanning that her application for disability retirement was denied. CalPERS advised her of her right to appeal.

5. On November 15, 2018, Ms. Fanning’s attorney sent a letter to CalPERS appealing its decision.

6. On February 20, 2019, petitioner filed the statement of issues in his official capacity. The statement of issues and jurisdictional documents were served on respondent and this hearing ensued.

¹ It appeared Ms. Fanning misread this section.

Job Description Documents

7. The Physical Requirements of Position/Occupational Title of an Office Assistant, City of Palm Desert, completed by Ms. Fanning and her employer, outlined the physical requirements including the activities and frequency of those activities for that position. The Job Description for an Office Assistant I / II outlined the essential and marginal functions, qualifications, and working conditions of the position.

Dr. Anees relied upon these documents when formulating his opinions.

CalPERS's Independent Medical Evaluation Conducted by Dr. Anees

8. According to his curriculum vitae, Dr. Anees obtained his Doctor of Medicine degree from Mansoura University School of Medicine in Egypt in 2003. He did a Sleep Medicine Research Fellowship at The Cleveland Clinic from 2004 to 2005. He did a Medicine Internship at The Cleveland Clinic from 2005 to 2006. He did a Neurology Residency at The Cleveland Clinic from 2008 to 2009. He did a Neuromuscular Medicine and EMG Fellowship at University of California Los Angeles from 2012 to 2013. He is board certified by the American Board of Psychiatry and Neurology and is board eligible for a neuromuscular medicine subspecialty and a sleep medicine subspecialty. He has active medical licenses in several states and a neurology practice in Southern California.

9. On September 4, 2018, Dr. Anees performed an independent medical evaluation of Ms. Fanning for CalPERS. He also reviewed her medical records and authored a report. Dr. Anees obtained Ms. Fanning's current complaints which included constant bilateral foot pain which she described as "sharp, burning, stabbing, and/or aching." The pain affected both feet and was recently worse on the right side. She had increased sensitivity to her feet and her pain increased with stress and when

she was startled but improved with medications. She had difficulties with her activities of daily living.

Ms. Fanning's pain began in October 2011 when she noted the gradual onset of pain which she thought was due to her Zumba exercise classes. In April 2012 she sought treatment with her primary care physician who referred her to a podiatrist who gave her alcohol and steroid injections. She later came under the care of another treater who also gave her injections. During this time she continued to work full duty. In July 2013 she underwent "exploratory" surgery to both feet and was taken off work but then returned to full duty. In 2014 she underwent a procedure performed by a pain management specialist to "freeze" the nerves in her feet. Ms. Fanning told Dr. Anees that she received no relief from that procedure. In January 2017 she underwent surgery to have a spine stimulator implanted but received no benefit and had the device removed in December 2017. She was taken off work in December 2017 and has not returned in any capacity since that time.

Ms. Fanning also reported undergoing Ketamine infusions, acupuncture, chiropractic treatment and three lumbar epidural steroid injections, all of which provided no benefit. She also underwent a bone density study but did not know the results. Since 2018 she has been under the care of a pain management specialist, receiving medication, and continues to treat with her primary care physician. Ms. Fanning provided a description of her job duties and her occupational history.

Dr. Anees performed a neurological examination. The mental examination showed Ms. Fanning was alert and oriented to time, place and person. The cranial nerve examination was normal. The muscle examination was within normal limits in the upper and lower extremities. Deep tendon reflexes were symmetrical in the upper and lower extremities with no evidence of pathological reflexes. The sensory exam showed

reduced perception to pinprick and temperature in the lower extremities below the knees in a circumferential non-dermatomal distribution. The extremities had normal temperature to touch with no trophic or vasomotor changes noted. Her coordination was normal. Her gait was slow but no obvious ataxia (imbalance) was noted.

Dr. Anees's diagnosis was chronic lower extremity pain. His impression was:

The examinee has a history of chronic lower extremity pain. Her neurological examination showed reduced perception to pinprick and temperature sensation in the lower extremities below the knees and a circumferential non-dermatomal distribution. Otherwise the neurological exam was grossly unremarkable. She had normal mental status, cranial nerve function, motor/strength exam, and coordination and unremarkable gait. There are no trophic or vasomotor changes in the extremities. She also had prior testing including nerve conduction studies of the lower extremities which was essentially unremarkable. There was no evidence of significant objective neurological deficits indicating loss of function or warranting significant physical limitations from a neurological standpoint.

In response to CalPERS's questions, Dr. Anees opined that Ms. Fanning was "not substantially incapacitated for the performance of her physical duties from a neurological standpoint." He noted that she did "have ongoing symptoms of chronic lower extremity pain, but the neurological examination does not show enough

evidence of significant objective² deficits indicating neurological loss of function that would warrant substantial incapacitation." Dr. Anees concluded that based on the history he obtained during his examination, there were "no specific physical job restrictions from a neurological standpoint." He found that his neurological evaluation did "not show enough evidence of significant objective deficits that would warrant specific physical job restrictions." He opined that Ms. Fanning was cooperating with the examination and putting forth her best effort.

10. Dr. Anees testified consistent with his report. He explained that when examining muscles, he looks for atrophy and decreased tone which indicates abnormality and he found none. Although Ms. Fanning complained of decreased sensation to temperature and pinprick, the complaints were in a non-dermatomal pattern which meant they did not follow a specific pattern that could be allocated to a spinal cord level or a specific nerve pattern. This indicated they were unlikely related to any damage or lesion affecting a specific nerve or spinal cord segment. He explained that pain complaints can have a pattern of sensory loss that are not related to anything and a sensory examination is more subjective than other parts of a neurological examination.

² As is discussed in the Legal Conclusions portion of this decision, substantial incapacity to perform usual and customary duties must be based on competent medical opinion. Even though CalPERS's letter to Dr. Anees asked him to make a determination based on his "objective findings," the applicable statutory and case law do *not* state that the competent medical opinion must be based solely on "objective" findings.

Dr. Anees specifically evaluated Ms. Fanning for complex regional pain syndrome (CRPS) because of her treating physician's diagnosis and found no support for it. He explained that 90 to 95 percent of patients with CRPS have that condition following trauma, which Ms. Fanning did not have, and they have pain complaints in a typical pattern, which she also did not have. Further, her 2014 EMG was normal which did not support a diagnosis of neuropathy. Essentially, he concluded that Ms. Fanning was not substantially incapacitated because he could "not corroborate her subjective complaints with any objective tests or testing." Based upon the job description documents he reviewed, there were no tasks she could not perform from a neurological standpoint.

Dr. Anees acknowledged on cross-examination that his report did not list Ms. Fanning's level of pain, although he reported her pain as being "constant." He disagreed with the diagnosis of CRPS because that condition requires specific diagnostic criteria that Ms. Fanning did not meet. He could find no objective evidence to support a finding that Ms. Fanning was substantially disabled.

Ms. Fanning's Testimony

11. Ms. Fanning testified about her employment history and the onset of her foot pain in 2011. She described the various treatments she has undergone, including exploratory bilateral foot surgery, multiple steroid and alcohol injections, and a procedure she described where "they froze the nerves in both feet with nitrous oxide" which "turned the nerves to Jell-O" and was "supposed to regenerate the nerves because nerves regenerate themselves." She described her foot pain as being so intense that she could not concentrate at work. Her feet hurt "when they were down" so she tried elevating them and was given a footrest for under her desk but it did not help. She described her inability to work because of her pain which she described as

"excruciating." The pain affected her concentration and her ability to perform her job. She did not want to stop working as she wanted to work seven more years until her retirement.

Her triggers for pain are walking, sitting, standing and stress. Her pain prohibits walking and activity and wakes her at night. She has been referred to podiatrists and pain specialists and they tried epidurals and a stimulator, which did not provide relief. After the surgery for the stimulator she "lost so much spinal fluid I had a headache and was in bed for six days." She has tried acupuncture, physical therapy and chiropractic treatment, to no avail. She has also tried Ketamine infusions, a pain management treatment that was supposed to alleviate her pain which also did not work. Her pain is still at "a consistent level" and is gradually worsening. She has "changes in atrophy with her muscles deteriorating and her tendons shrinking" which gives her cramps. She takes medication for her pain.

Ms. Fanning's Medical Records

12. Ms. Fanning's Kaiser medical records were received as administrative hearsay pursuant to Government Code section 11513, subdivision (d). Dr. Anees's report referenced some but not all of these records. Dr. Anees was not asked any questions about these records at hearing.

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LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*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.) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

Purpose of CalPERS's Laws

3. The court in *Lazan v. County of Riverside* (2006) 140 Cal App 4th 453, examined the purpose of CalPERS's legislation, noting it serves two objectives: inducing persons to enter and continue in public service, and providing subsistence for disabled or retired employees and their dependents. A disability pension is intended to alleviate the harshness that would accompany termination of an employee who became medically unable to perform his or her duties. Generally, CalPERS's legislation is to be construed liberally in favor of the employee to achieve these objectives. Moreover, eligibility for retirement benefits does not turn upon whether the employer

dismissed the employee for disability or whether the employee voluntarily ceased work because of disability. (*Id.* at p. 459.)

Applicable Code Sections

4. Government Code section 20021 defines "Board" as "the Board of Administration of the Public Employees' Retirement System" (CalPERS).

5. Government Code section 20026 provides:

"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.

6. Government Code section 21150, subdivision (a), provides that a member who is "incapacitated for the performance of duty shall be retired for disability . . ."

7. Government Code section 21151, provides that a state industrial member, such as respondent, who is "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability . . ."

8. Government Code section 21152 sets forth who may make the disability retirement application.

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9. Government Code section 21154 states:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

10. Government Code section 21156 states:

(a)(1) If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency

employing the member, 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, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

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

(b)(1) The governing body of a contracting agency upon receipt of the request of the board pursuant to Section 21154 shall certify to the board its determination under this section that the member is or is not incapacitated.

(2) The local safety member may appeal the determination of the governing body. Appeal hearings shall be conducted by an administrative law judge of the Office of Administrative Hearings pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of this title.

Incapacitated from Performance of Duty

11. Unlike the right to a widow's or widower's pension that accrues upon the employee spouse's death, the right to a disability retirement does not automatically arise upon the happening of an injury. Rather, the injury must result in the employee being so physically or mentally disabled as to render retirement from active service necessary. The illness or injury is not the controlling factor, but, rather, the resulting inability to perform the work. The employer's duty to find the disability does not attach nor is the right to a disability finding created until that further point of time is reached. The disability finding cannot be made without a determination of the results of the injury, the condition of the employee, and the necessity for the retirement. (*Tyra v. Board of Police and Fire Pension Commissioners of City of Long Beach* (1948) 32 Cal.2d 666, 671, citations omitted.)

12. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the public employee is not "incapacitated" and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876-877³; *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1057.)

³ The *Mansperger* decision analyzed the language then contained in Government Code section 21022, the substance of which is now contained in Government Code section 20026 (although there have since been some amendments to section 20026).

In *Mansperger, supra*, there was no dispute that Mansperger, who was a fish and game warden, had suffered an injury that caused him to be unable to engage in heavy lifting. The sole issue in dispute was whether his physical limitations amounted to "incapacity for the performance of duty." (*Mansperger, supra*, at p. 876.) After concluding that "incapacity for the performance of duty" meant the substantial inability to perform an applicant's usual duties, the appellate court assessed the facts in that case as follows (*Id.* at pp. 876-877):

While it is clear that petitioner's disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do occur in petitioner's job, they are not a common occurrence for a fish and game warden. A fish and game warden generally supervises the hunting and fishing of ordinary citizens. Petitioner testified that, since his accident, he was able to perform all his required duties except lifting a deer or lifting a lobster trap out of kelp.

13. A similar result was reached in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854. In that case, a California Highway Patrol (CHP) officer applied for industrial disability retirement, claiming he feared his back injuries placed in him danger of further injury if he was required to overpower someone resisting arrest. CalPERS's determination that he was not substantially incapacitated from performing the usual duties of his job was upheld on appeal. The appellate court determined that

the fact that an injury increases an individual's chances of further injury does little more than demonstrate that the injury is prospective, hence, speculative, and presently not in existence. (*Id.* at p. 862-863.) Accordingly, fear of further injury or fear of aggravation of an existing injury is insufficient to support a finding of disability. (*Ibid.*)

14. Complainant asked that official notice be taken of a precedential decision. Government Code section 11425.60 authorizes agencies to designate decisions as precedential that contain "a significant legal or policy determination of general application that is likely to recur." Precedential decisions may be expressly relied upon by the administrative law judge and the agency. Official notice was taken of *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Ruth A. Keck* (OAH No. L-1990 9120097). In *Keck*, the *Mansperger* and *Hosford* cases were discussed, and it was determined that Keck was able to substantially perform her usual duties as a school clerk typist and secretary despite her orthopedic (neck and back) conditions. In *Keck*, the medical evidence consisted of the testimony and written report of petitioner's medical expert and written medical reports by doctors who had evaluated Keck's condition. Keck did not offer any expert testimony at the hearing. (Factual Finding 10.)⁴ In the proposed decision adopted by CalPERS, the administrative law judge found that competent expert testimony established petitioner exaggerated her symptoms (Factual Finding 21); petitioner failed to present any expert testimony to controvert petitioner's expert's opinions (Factual Finding 22); Keck's doctors' written reports evaluating her condition did not specifically

⁴ Because Precedent Decision 00-05 does not contain page numbers, references are made to the factual finding and legal conclusion paragraph numbers in that decision.

apply the "CalPERS disability standard" set forth in the *Mansperger* and *Hosford* cases (Factual Finding 22); and the Social Security Administration's Decision regarding Keck's application for social security disability benefits was not relevant (Factual Finding 26). The decision concluded Keck failed to present sufficient competent medical evidence to establish that her orthopedic conditions prevented her from performing the usual duties of her position as a clerical typist and secretary. (Legal Conclusion 8.)

The *Keck, supra*, decision also stated (Legal Conclusion 2):

In *Hosford, supra*, the court held that in determining whether an individual was substantially incapacitated from his "usual duties", [*sic*] the court must look to the duties actually performed by the individual, and not exclusively at the job descriptions. In determining eligibility for disability retirement, the actual and usual duties of the applicant must be the criteria upon which any impairment is judged. Generalized job descriptions and physical standards are not controlling nor are actual but infrequently performed duties to be considered.

Competent Medical Opinion

15. CalPERS makes its determination whether a member is disabled for retirement purposes based upon "competent medical opinion." That determination is based on the evidence offered to substantiate the member's disability. (*Lazan v. County of Riverside* (2006) 140 Cal. App. 4th 453, 461, distinguished on other grounds.)

16. Evidence Code section 801 provides:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

17. The determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the trier of fact in the search for the truth, and "no hard and fast rule can be laid down which would be applicable in every circumstance." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 37-38.)

18. A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact but the expert's opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the

opinion has no evidentiary value and does not assist the trier of fact. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 529-530.)

19. Government Code section 11513, subdivision (d), provides in part: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

20. Unless admissible over objection in civil actions, hearsay evidence shall not be sufficient in itself to support a finding in an administrative proceeding. (*Carl S. v. Commission for Teacher Preparation & Licensing* (1981) 126 Cal.App.3d 365, 371.)

21. Hearsay evidence is not competent evidence that can independently support a finding. (*Furman v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 416, 420.)

22. Determining both the nature of Ms. Fanning's medical condition, and whether that condition incapacitated her physically or mentally for the performance of her duties, is sufficiently beyond common experience that expert testimony is required. Ms. Fanning called no expert witnesses. None of her treating physicians testified in this hearing and all of her medical records were received solely as administrative hearsay. Thus, they were only considered to the extent they supplemented and/or explained other non-hearsay evidence.

Ms. Fanning's Appeal Letter

23. In his letter appealing CalPERS's decision, Ms. Fanning's attorney outlined her medical history and set forth a "Statement of Applicable Law." Counsel cited federal case law regarding the weight to be given treating physician's opinions in

social security disability proceedings. The cases cited were ones decided under the Social Security Act applying the Code of Federal Regulations. Because those proceedings differ from a CalPERS disability proceeding, the cases cited in Ms. Fanning's appeal letter were not determinative of the issues in this matter.

As set forth in 20 Code of Federal Regulations part 404.1520, in social security disability proceedings, there is a five-step sequential evaluation process to determine whether an applicant qualifies as disabled. There is no similar five step analysis in CalPERS disability cases. Additionally, 20 Code of Federal Regulations part 404.1527 provides the weight to be given treating and evaluating physicians' opinions in federal disability cases. There is no such provision in the Government Code. CalPERS disability cases do not require that the treating physician's opinions be given more weight or deference than the evaluating physician's opinions. The sole requirement in CalPERS disability cases is that the findings regarding disability be based on "competent medical opinion." Thus, *Cartwright-Ladendorf v. Berryhill*, No. 17-CV-1920-BAS-JMA, 2018 WL 4252132 (S.D. Cal. Sept. 6, 2018) and the other federal cases cited by Ms. Fanning in her appeal letter, which were decided under federal disability regulations, are not controlling here. Moreover, unlike the evaluating experts in *Cartwright-Ladendorf v. Berryhill*, the CalPERS expert who examined Ms. Fanning is a specialist in the area of medicine (neurology) at issue in this hearing.

Evaluation

24. In order to qualify for a disability retirement, Ms. Fanning must demonstrate, based on competent medical opinion, that she was permanently disabled or incapacitated from performing the regular and customary duties of an Office Assistant when she filed her application. The evidence demonstrated that Ms. Fanning has been treated for her neurological complaint (bilateral feet), has received

treatment, and is currently undergoing treatment, but no competent medical opinion was offered that established that she was permanently disabled or incapacitated from performing her regular and customary job duties because of her condition.

Ms. Fanning did not introduce any competent medical opinions to support her claim. None of her treating physicians testified and she called no expert witness. All of her medical records were received, but only as administrative hearsay, which did not constitute "competent medical opinion" and were insufficient to refute the testimony and opinions of Dr. Anees. Thus, Ms. Fanning failed to meet her burden of proof and her application must be denied. Petitioner's determination that she was not permanently disabled or incapacitated from performance of her duties is affirmed.

Cause Exists to Deny the Application

25. Cause exists to deny Ms. Fanning's application for disability retirement. Ms. Fanning failed to prove by a preponderance of the evidence that her disability was of a permanent or extended duration that incapacitated her from performing her duties as an Office Assistant as a result of her neurological (bilateral feet) condition when she filed her application for disability retirement with CalPERS.

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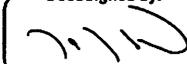
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ORDER

The application for disability retirement filed by Jodi L. Fanning with the California Public Employees' Retirement System is denied. CalPERS's denial of Ms. Fanning's application is affirmed.

DATE: September 16, 2019

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MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings