ATTACHMENT A

THE PROPOSED DECISION

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BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for Disability Retirement of:

SHELLEY KATHLEEN LIPE,

Respondent,

and,

SALINAS CITY ELEMENTARY SCHOOL DISTRICT,

Respondent.

Case No. 2019-0153

OAH No. 2019040856

PROPOSED DECISION

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter on September 4, 2019, in Oakland, California.

Charles H. Glauberman, Senior Attorney, represented complainant Anthony Suine, Chief of the Benefit Services Division, California Public Employees' Retirement System.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Sept. 18, 2019
SMS

Paul Hart, Attorney at Law, Moncrief & Hart, PC, represented respondent Shelley Kathleen Lipe, who was present.

There was no appearance by or on behalf of respondent Salinas City Elementary School District.

The record closed and the matter was submitted for decision on September 4, 2019.

FACTUAL FINDINGS

1. Respondent Shelley Kathleen Lipe was employed as a Health Aide by respondent Salinas City Elementary School District. By virtue of her employment, respondent is a local miscellaneous member of California Public Employees' Retirement System (CalPERS) pursuant to Government Code section 21150. Respondent has the minimum service credit necessary to qualify for retirement.

2. On January 29, 2017, respondent signed an application for disability retirement which she submitted to CalPERS. In her application, respondent cited disability on the basis of "Heart Attack, Carotid Stenosis, [I]schemic Cardiomyopathy," and named the following limitations/preclusions due to those conditions: "mental disturbances, physical symptoms, edema, chest pain, poor circulation, depression."

3. Following review of the medical evidence submitted, CalPERS notified respondent on June 28, 2017, that her application for disability retirement was denied and notified her of her employment options and appeal rights. Respondent timely filed an appeal from the denial.

4. Following respondent's appeal, CalPERS agreed to consider two additional conditions as disabling: a stroke respondent suffered after treatment for carotid stenosis in 2019, and a back condition. CalPERS found the medical evidence submitted on the stroke insufficient to establish a continuing disabling condition, and found the medical evidence submitted on the back condition insufficient for the making of a determination. CalPERS issued a letter of denial regarding these conditions on February 4, 2019.

5. On April 10, 2019, complainant Anthony Suine, Chief of the Benefit Services Division, filed a statement of issues. The statement of issues lists the issue on appeal as the following:

> The issue on appeal is limited to whether at the time of the application, on the basis of psychiatric (depression) and cardiology (carotid stenosis, edema) conditions, respondent Lipe is substantially incapacitated from the performance of her duties as a Health Aide for respondent Salinas City Elementary School District.

By its letter of February 4, 2019, CalPERS expanded the scope of this proceeding to consider whether respondent is substantially incapacitated on the basis of a stroke that resulted from treatment for the carotid stenosis, and a back condition.

Respondent's Medical History

6. In 2015 respondent was diagnosed with two serious medical conditions. Following a heart attack on May 23, 2015, respondent was diagnosed with multi-vessel coronary artery disease with profound depression in left ventricular systolic function. In addition, it was determined that she had a total occlusion of the right carotid artery,

and a high grade lesion in the left carotid artery. The determination was made to address the heart condition, and to not address the carotid artery stenosis, which was not symptomatic at that time.

7. On May 26, 2015, Respondent underwent urgent three-vessel coronary bypass surgery. She initially had bouts of atrial fibrillation post-surgery. Over time, that condition resolved and her left ventricular function improved. An echocardiogram performed on August 31, 2016, showed the ejection fraction of the left ventricle to have improved from 10 percent to 77 percent.

8. In October 2016, respondent underwent a CT angiogram of the neck, which determined that she had a 100 percent occlusion of the right carotid artery, and 80 percent stenosis of the left carotid, asymptomatic. Respondent was advised to have carotid artery surgery. On November 29, 2017, respondent underwent an endarterectomy of the left carotid artery. Following the procedure, respondent suffered a stroke.

Respondent's Evidence

9. Respondent has worked in various capacities for Salinas Elementary School District since 1983. Her last position was as a Health Aide. She worked 3.5 hours per day in this position. As a Health Aide, respondent assisted the Health Care Aide Coordinator in implementing the school health program, and performing clerical and first aid duties. Respondent was expected to tend to injured or sick children on the playground, in the gym, cafeteria and elsewhere on the school campus. She estimated that she sat for about 40 minutes of her shift, and the remainder of the time she was on her feet, standing or walking, and sometimes running.

10. The physical requirements of a full-time position included standing, sitting or running occasionally up to three hours per day, and walking three to six hours frequently. As respondent worked less than four hours per day, those duties would be less than one-half of those amounts.

11. Following recovery from her heart surgery, respondent entered the second phase of a cardiac rehabilitation program in September 2015. After completing eight weeks of this program, respondent's cardiologist released her to return to work.

12. Respondent returned to work in November 2015. She reported that after about two hours on the job, she had swelling in both feet and both legs, and she limped when walking. She decided to stop working in January 2016.

13. Respondent applied for disability retirement in January 2017. In connection with her application for disability retirement, respondent submitted medical records and CalPERS Physician Report on Disability forms completed by two physicians. One was completed by cardiac surgeon Gregory S. Spowart, M.D., dated March 31, 2017. Dr. Spowart recorded that he last examined respondent on September 27, 2016, and that he diagnosed her with carotid stenosis/disease. Dr. Spowart testified at hearing. The second form was completed by respondent's primary care physician Robert Fernandez, M.D. Dr. Fernandez recorded that he last examined respondent on February 3, 2017. Dr. Fernandez diagnosed respondent with "CAD, CHF, Ischemic Cardiomyopathy." Dr. Fernandez did not testify at hearing.[1]

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[1] The treating records of Dr. Fernandez were submitted to CalPERS and were considered by the Independent Medical Examiner in rendering his opinion. Because Dr. Fernandez did not testify at hearing, both his treating records and his Physician's

14. At the time he completed the Physician Report on Disability form in March 2017, Dr. Spowart had performed the heart surgery but had not performed the right carotid endarterectomy. On the form, Dr. Spowart diagnosed respondent with carotid stenosis but did not render a diagnosis based on her heart. He determined that respondent was substantially incapacitated from the performance of her duties because of an inability to stand for extended periods of time "due to chronic back issues and lower extremity edema." Dr. Spowart did not identify the cause of the "chronic back issues" or the "lower extremity edema." He did not specify whether the conditions were separately incapacitating, and/or jointly incapacitating.

By the time of the hearing, Dr. Spowart had completed the right carotid endarectomy. It is not known if Dr. Spowart had examined or evaluated respondent after the surgery. Dr. Spowart was unaware that respondent had suffered a stroke following the surgery.

Dr. Spowart maintained at hearing that respondent was substantially unable to perform her duties, but modified the basis for his opinion that it was due to an incomplete recovery from both surgical events. Dr. Spowart did not explain at hearing what he meant by this. With respect to the finding of disabling back pain, Dr. Spowart accepted respondent's report to him that she had developed a back pain problem and that it hindered her ability to stand. Dr. Spowart did not know the medical basis for respondent's back pain, and stated that such a diagnosis would fall to an orthopedic surgeon or neurologist. With respect to edema, Dr. Spowart testified that he had

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Report on Disability were admitted as hearsay only. As such, they cannot be relied upon to a make a finding of fact in this proceeding. (See Gov. Code, § 11513, subd. (d).)

observed the condition during his examination of respondent on September 27, 2016. He accepted respondent's report to him at that time that the edema made it painful for her to stand. Dr. Spowart did not report that he had observed edema since September 2016.

Independent Medical Examination

15. At the request of complainant, respondent underwent an Independent Medical Examination by James M. Schmitz, M.D. Dr. Schmitz is board certified in Internal Medicine and Cardiovascular Disease and has an active practice. Dr. Schmitz examined respondent on May 25, 2017, reviewed her medical records, and wrote a report of his findings of that date.

Following respondent's endarterectomy and stroke, Dr. Schmitz was asked by complainant to review additional medical records, and write a supplemental report regarding his findings. Dr. Schmitz wrote a supplemental report dated September 1, 2018. In issuing this report, Dr. Schmitz did not re-examine respondent. Dr. Schmitz testified at hearing.

16. In Dr. Schmitz's opinion, respondent is not substantially incapacitated from the performance of her usual duties as a Health Aide by reason of her heart, cardiovascular system, or carotid stenosis. With respect to her heart, respondent underwent a significant recovery from her bypass surgery and the complications she experienced post-surgery. Dr. Schmitz found that as a result of bypass surgery, respondent had significant improvement in her left ventricular systolic function to the point that her overall ventricular function was normal. On examination in May 2017, respondent had a normal cardiovascular system. Dr. Schmitz said he did not see any signs of congestive heart failure. He did not see any edema in her lower extremities.

Two of respondent's complaints to Dr. Schmitz were edema in her lower left extremity and breathlessness with activity.

Respondent reported to Dr. Schmitz that she was able to walk between 45 and 60 minutes at a time most days of week, and that she was aware of her breathing after 15 minutes of walking. Dr. Schmitz found it significant that respondent did not describe her breathlessness as severe, and that respondent could continue to walk for up to another 45 minutes.

Respondent reported to Dr. Schmitz that she had swelling in her lower left leg but that it had improved. On the day he examined her, Dr. Schmitz did not observe any edema in either lower extremity. His observation of no edema was consistent with the observation of respondent's primary treating physician, Dr. Fernandez, in his progress notes of November 3, 2016, February 3, 2017, June 14, 2017, and October 16, 2017.[2] Dr. Schmitz attributed any edema respondent had to the removal of the saphenous vein in her left leg for use in the bypass grafts and not to congestive heart failure. Dr. Schmitz noted that lower extremity edema is a known consequence from removing the vein, and the condition is generally transitory, and improves with time.

Dr. Schmitz reviewed respondent's job description and its physical requirements for standing and walking. Dr. Schmitz concluded that respondent was temporarily unable to perform the duties of her position from the time of the heart attack in May 2015 through her recovery, but by January or February 2016 she had recovered. As of

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[2] Dr. Fernandez reported trace pedal edema in his progress note of March 24, 2017. Trace pedal edema is not significant edema.

that date, there were no duties associated with her three and one-half hour work day as a Health Aide that she could not perform as a result of her heart condition.

With respect to the carotid stenosis, Dr. Schmitz did not find that condition disabling when he evaluated her in May 2017. His opinion did not change following a review of the medical records associated with the November 2018 endarterectomy and stroke. This procedure did not involve the heart, and it did not cause a perioperative heart attack. The medical records reviewed by Dr. Schmitz showed that respondent did not suffer any residual deficits in neurological function as a result of the stroke.

Notwithstanding the difficult course that respondent has endured, in Dr. Schmitz's opinion, respondent is not incapacitated from the performance of her duties as a result of the medical conditions of coronary artery disease, carotid stenosis, or stroke.

Analysis

17. The medical evidence presented by respondent fails to establish that she is permanently incapacitated from the performance of her duties as a Health Aide by reason of edema associated with her heart or carotid stenosis. Dr. Schmitz's opinion that respondent's edema was the byproduct of the vein removal in her leg and not due to congestive heart failure was persuasive, as was his opinion that the condition is transitory and improves over time. While Dr. Spowart observed edema in September 2016, he did not report observing it after that time. Respondent was evaluated subsequently by Dr. Schmitz in May 2017, and Dr. Schmitz did not observe any edema. There is no other medical evidence in the record to support a determination that respondent has ongoing edema associated with either medical condition. In sum, the medical evidence does not establish that the medical condition of edema, if

incapacitating to respondent initially, was a condition of a permanent or extended nature.

18. The medical evidence does not establish that respondent's medical conditions of carotid stenosis or stroke precludes respondent from being able to substantially perform the duties of a Health Aide.

19. The medical evidence does not establish that respondent has a psychological condition (depression) that precludes her from being able to substantially perform the duties of a Health Aide.

20. The medical evidence does not establish that respondent has a back condition that precludes her from being able to substantially perform the duties of a Health Aide. Dr. Spowart did not purport to diagnose respondent with a back condition.

LEGAL CONCLUSIONS

1. A member of CalPERS who becomes "incapacitated for the performance of duty" and has five years of service is entitled to be retired for disability. (Gov. Code, § 21150.) The term "incapacitated for the performance of duty" is defined by the Public Employees' Retirement Law to mean "disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, . . . on the basis of competent medical opinion." (Gov. Code, § 20026.) To determine whether an applicant is "incapacitated for the performance of duty," the courts look to whether the applicant is substantially disabled from performing her usual duties. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876; accord *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860

2. It was not established by competent medical opinion that respondent was substantially incapacitated for performance of duty physically or mentally as a Health Aide when she retired by reason of a medical or psychological condition of an extended and uncertain duration. (Findings 17 to 20.) Respondent has failed to establish cause to be retired for disability.

ORDER

The application of Shelley Lipe for an ordinary disability retirement is denied.

DATE: September 17, 2019

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Melissa G. Crowell
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MELISSA G. CROWELL
Administrative Law Judge
Office of Administrative Hearings