

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 Industrial Disability

Retirement of:

LINDA J. ALVAREZ, Respondent

and

DEPARTMENT OF INDUSTRIAL RELATIONS, Respondent

Agency Case No. 2018-0886

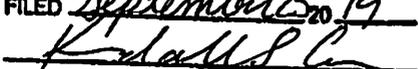
OAH No. 2018100638

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 26, 2019, in San Bernardino, California.

Rory J. Coffey, Senior Attorney, represented complainant, Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System, State of California (CalPERS).

There was no appearance by respondent Linda J. Alvarez.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED September 25, 2019


There was no appearance by or on behalf of respondent Department of Industrial Relations (department).¹

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 26, 2019.

ISSUE

Is Ms. Alvarez substantially incapacitated from performing the usual and customary duties of a Special Investigator?

FACTUAL FINDINGS

Background

1. Ms. Alvarez is 61 years old. Until her service retirement effective December 30, 2017, she worked as a Special Investigator for the department. By virtue of such employment, Ms. Alvarez is state safety member of CalPERS.
2. On April 10, 2018, CalPERS received Ms. Alvarez's application for industrial disability retirement. The application contained the following response describing Ms. Alvarez's specific disability:

¹ On proof of compliance with Government Code sections 11505 and 11509, this matter proceeded as a default pursuant to Section 11520.

**RIGHT SHOULDER, RIGHT NECK, RIGHT HAND, RIGHT SIDE
OF FACE, RIGHT ARM, RIGHT WRIST, LOWER BACK DUE TO
REPETITIVE JOB DUTIES**

Ms. Alvarez wrote that the disability occurred from repetitive job duties while typing on a computer, phone work, extensive writing, and computer research. She wrote that she was in pain to the degree that her performance was impacted. She was placed on modified duty requiring her to get up every hour from her computer and walk. She has been unable to pursue employment after her service retirement.

3. On June 27, 2018, Ms. Alvarez underwent an Independent Medical Examination (IME) conducted by orthopedic surgeon Robert Kolesnik, M.D. By letter dated July 16, 2018, CalPERS notified Ms. Alvarez that based on a review of her medical records and report by Dr. Kolesnik, CalPERS determined that her orthopedic condition was not disabling and her application for disability retirement was denied.

4. Ms. Alvarez timely appealed the decision. This hearing ensued.

Duties of a Special Investigator

5. A job posting for the position of Special Investigator with the department states that a Special Investigator is responsible for performing workers' compensation investigations in the field and in the office. Duties include preparing correspondence and reports; obtaining and compiling legal, medical, and employment records; conducting interviews; and issuing subpoenas.

6. A list of the physical job requirements was not provided. However, in conducting the IME, Dr. Kolesnik reviewed a list of physical activities a Special Investigator must perform and classified the frequency of the activities. Dr. Kolesnik

summarized the list as follows: constant activities (over six hours) were simple grasping, repetitive use of hands, and keyboard/mouse use; frequent activities (three to six hours) were sitting, bending (neck), twisting (neck/waist), lifting/carrying 0-10 pounds; and occasional activities (up to three hours) were standing, walking, kneeling (infrequent), squatting, bending (waist), reaching (above/below) shoulder, pushing/pulling, power grasping, and lifting/carrying 11 to 25 pounds.

Dr. Kolesnik's Independent Medical Examination

7. Dr. Kolesnik completed a report on June 27, 2018, and a supplemental report on May 10, 2019. The following is a summary of his testimony and the reports: Dr. Kolesnik completed his residency in orthopedic surgery at the University of Southern California in 1984. After completing a fellowship in hand and microvascular surgery, Dr. Kolesnik became board-certified in orthopedic surgery in 1985. He has been practicing general orthopedics for the past 30 years until retiring in 2017. His practice is now limited to performing workers' compensation and CalPERS evaluations. He has multiple professional memberships relating to orthopedics and has made numerous professional presentations concerning orthopedics in academic settings. He is also published in a peer-reviewed journal. Based on his training and experience, Dr. Kolesnik was well qualified to render an expert opinion in this matter.

8. Dr. Kolesnik performed an IME of Ms. Alvarez for CalPERS on June 27, 2018. Dr. Kolesnik's evaluation of Ms. Alvarez's condition was based on a review of medical records, consideration of the occupation description, a physical exam, and an interview of Ms. Alvarez. He concluded that Ms. Alvarez was not substantially incapacitated from the performance of her usual and customary work duties of a Special Investigator.

9. Ms. Alvarez reported that on September 6, 2017, she was at work seated at her computer when she heard a “pop” around her right shoulder blade. She noted immediate pain about the shoulder blade, with radiation into her neck, head, and right arm. She reported the injury to her employer who referred her to U.S. HealthWorks for an evaluation. Ms. Alvarez was seen at U.S. HealthWorks six weeks later. She was diagnosed with a neck sprain and prescribed acetaminophen and ketoprofen. X-rays of her right shoulder blade and clavicle were unremarkable except for mild osteoarthritis of the acromioclavicular joint.

Ms. Alvarez received acupuncture and physical therapy, which provided fair but temporary relief. Due to the persistence of her complaint of pain, she underwent an evaluation by Aaron Coppelson, M.D., a physical medicine specialist. He diagnosed Ms. Alvarez with cervical strain, right shoulder supraspinatus tendinitis and subacromial bursitis, right cubital tunnel syndrome versus flexor tendinitis, carpal tunnel syndrome, and possible C6 radiculopathy. He recommended magnetic resonance imaging (MRI) and an ergonomic evaluation of her workstation.

In January 2018, Ms. Alvarez obtained legal representation and began treating with Tiffany Nguyen, D.C. MRI imaging of the right shoulder on February 14, 2018, revealed supraspinatus tendinitis and a “probable small, partial thickness, undersurface tear of the suprapinatus” in addition to acromioclavicular arthritis.

Humberto Galleno, M.D., performed an orthopedic panel qualified medical evaluation on April 18, 2018. He obtained an MRI of the lumbar spine that revealed left lumbar scoliosis and “very slight” spondylolisthesis at L3-L4. There was disc desiccation, disc space narrowing, bilateral facet arthritis, small disc bulges, and bilateral neural foramen narrowing at all levels. An MRI study of the cervical spine showed 2-3 mm disc bulges with foramen narrowing at multiple levels. Finally, nerve

conduction studies and an electromyogram of the right arm were entirely normal, with no evidence of cervical radiculopathy, peripheral neuropathy, or peripheral nerve compression. Dr. Galleno was of the opinion that Ms. Alvarez's condition was not permanent and stationary in regard to her right upper extremity, for which he diagnosed tendinitis and carpal tunnel syndrome, but was permanent and stationary with regard to the thoracic and lumbar spine.

10. At the time of Dr. Kolesnik's examination, Ms. Alvarez reported constant, sharp, burning, and aching pain about the right side of her neck, right scapula, and right clavicle. She stated the pain radiated into the right side of her head, with associated headaches, and the anterior and superior aspects of the right shoulder and right upper arm. The pain was diminished with topical gel and rest, but increased with any motion, use, and lifting. Ms. Alvarez reported constant, aching pain involving the entirety of the right upper extremity, especially severe about the right shoulder and right wrist. She noted intermittent numbness and tingling of all of the digits of the right hand. She complained of intermittent, stabbing pain in her lumbar spine, and said her lower back "locks" so that she could not move. She complained of intermittent pain into the buttock and posterior aspect of the thigh.

Ms. Alvarez reported she could only carry and lift objects of light to medium weight. She experienced pain with sitting, standing, and walking more than 30 minutes at a time, and was unable to sit, stand, or walk for more than two hours at a time. She complained of difficulty and significant pain with driving, shopping, cooking, and performing housework.

11. Dr. Kolesnik performed a physical exam of Ms. Alvarez's cervical spine; shoulders; upper arms and elbows; forearms, wrists, and hands; lumbar spine; lower extremities; hips and thighs; and knees, calves, ankles, and feet.

12. Dr. Kolesnik provided the following diagnoses: cervical pain, multilevel cervical degenerative disc disease, right shoulder supraspinatus tendinitis with "probable" partial thickness tear, right shoulder acromioclavicular arthritis, chronic lumbar pain, multilevel lumbosacral degenerative disc disease, multilevel lumbosacral osteoarthritis, and left lumbar scoliosis (per MRI study).

13. Based on his exam, his review of medical records, and review of the physical requirements of a Special Investigator, Dr. Kolesnik determined that there were no specific duties as a Special Investigator that she could not perform and that Ms. Alvarez was not substantially incapacitated to perform the usual and customary duties of a Special Investigator.

14. After Dr. Kolesnik completed his evaluation, CalPERS sent him additional medical records from Dr. Nguyen, results of an MRI of Ms. Alvarez's right wrist, and another evaluation by Dr. Galleno. Review of the additional information did not change Dr. Kolesnik's opinion that Ms. Alvarez's orthopedic conditions did not cause impairment rising to the level of substantial incapacity. Dr. Kolesnik noted that there was no nerve root impairment at any level of the spine and the nerve conduction studies were within normal limits with no evidence of peripheral nerve compression, peripheral neuropathy, or cervical radiculopathy. Dr. Kolesnik's physical examination showed no neurologic deficits or atrophy in either the upper or lower extremities. Although Ms. Alvarez demonstrated decreased range of motion, Dr. Kolesnik did not believe she put forth maximal effort.

LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving that he or she is entitled to it by a preponderance of the evidence. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332; Evid. Code, § 115.) In this matter, Ms. Alvarez is seeking a disability retirement. For that reason, Ms. Alvarez has the burden of establishing that she is substantially incapacitated from performing the usual and customary duties of a Special Investigator.

Applicable Statutes

2. Government Code section 20026 provides in part:

“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. An application to the Board of Administration (board) for retirement of a member for disability may be made by the governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency. (Gov. Code, § 21152.) On receipt of an application for disability retirement of a 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.

4. Government Code section 21156, subdivision (a), provides in part:

(1) If the medical examination and other available information show to the satisfaction of the board . . . 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 . . .

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

Appellate Authority

5. "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 customary duties, even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887.)² Mere

² The applicant in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and to apprehend violators; issuing warnings and serving citations; and serving warrants and making arrests. He suffered injury to his right arm while arresting a suspect. There was evidence that Mr. Mansperger could shoot a gun, drive a car, swim, row a boat (but with some difficulty), pick up a bucket of clams, pilot a boat, and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry the prisoner away. The

difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854.)³ Further, respondent must

court noted that although the need for physical arrests did occur in Mr. Mansperger's job, they were not common occurrences for a fish and game warden. (*Id.* at p. 877.) Similarly, the need for him to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding the applicant was not incapacitated for the performance of his duties, the court noted the activities he was unable to perform were not common occurrences and he could otherwise "substantially carry out the normal duties of a fish and game warden." (*Id.* at p. 876.)

³ In *Hosford*, the court held that in determining whether an individual was substantially incapacitated from his usual duties, the courts must look to the duties actually performed by the individual, and not exclusively at job descriptions. *Hosford*, a California Highway Patrol Officer, suffered a back injury lifting an unconscious victim. In determining eligibility for a disability retirement, the court evaluated *Hosford*'s injuries according to the job duties required of his position as a sergeant, as well as the degree to which any physical problem might impair the performance of his duties. Thus, 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. The *Hosford* court found that although *Hosford* suffered some physical impairment, he could still substantially perform his usual duties. The court also rejected *Hosford*'s contention that he was substantially incapacitated from performing his usual and customary duties because his medical conditions created an increased risk of future injury.

establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Id.* at 863.)

Evaluation

6. Respondent had the burden of proving she is substantially incapacitated from performing the usual and customary duties of a Special Investigator. Respondent did not appear and thus, did not meet her burden.

CalPERS presented competent medical evidence showing respondent was not substantially incapacitated from performing the usual and customary duties of a Special Investigator. Dr. Kolesnik noted that Ms. Alvarez complained of orthopedic pain in multiple areas, but there was no objective evidence that would render her substantially incapacitated for the performance of her duties as a Special Investigator.

ORDER

The application for disability retirement filed by respondent, Linda J. Alvarez, is denied.

DATE: September 24, 2019

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ADAM L. BERG

Administrative Law Judge
Office of Administrative Hearings