

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:

TERRI L. RAY and

**CALIFORNIA DEPARTMENT OF MOTOR VEHICLES,
Respondents.**

OAH No. 2019040880

CASE No. 2019-0020

PROPOSED DECISION

Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on September 17, 2019, in Sacramento, California.

Helen Louie, Attorney, represented the California Public Employees' Retirement System (CalPERS).

Terri L. Ray (respondent) appeared and represented herself.

There was no appearance by or on behalf of the California Department of Motor Vehicles (Department). CalPERS established that it served the Department with a

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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Notice of Hearing. Consequently, this matter proceeded as a default hearing against the Department pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted on September 17, 2019.

ISSUE

On the basis of a rheumatological (fibromyalgia) condition, is respondent substantially incapacitated from performing her usual and customary duties as a Motor Vehicle Field Representative?

FACTUAL FINDINGS

1. Respondent was employed as a Motor Vehicle Field Representative by the Department. On November 16, 2016, CalPERS received respondent's Disability Retirement Election Application (application) dated November 15, 2016, in which she claimed disability based on fibromyalgia and psychological conditions. By letter dated March 24, 2017, CalPERS denied respondent's application on the basis of her rheumatologic (fibromyalgia) condition. CalPERS stated that the available medical evidence did not "support a disabling type psychiatric condition." Consequently, respondent's psychological conditions were not considered in its evaluation. Respondent filed a timely appeal. This hearing followed.

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Respondent's Application

2. In her application, respondent described her disabilities as: "fibromyalgia, PTS [*sic*],¹ anxiety disorder." She stated that her disability occurred in June 2010, and causes her "to not be able to get out of bed for days on end," which limits her ability to do her job. She also stated that she saw her son killed when he was two years old. These conditions impact her ability to perform her job because her "thinking is not clear, and [she is] in pain all the time."

Respondent retired for service effective November 16, 2016, and has received a retirement allowance since that date. On November 28, 2016, December 19, 2016, October 19, 2017, April 16, 2018, and July 18, 2018, CalPERS sent respondent letters requesting medical records to establish respondent's continuous disability. CalPERS did not receive medical records.

3. In its March 24, 2017 denial letter, CalPERS stated that its review "included the reports prepared by Arthur Fong, M.D., and Scott Anderson, M.D. Ph.D." Based on these reports, CalPERS determined respondent's rheumatological (fibromyalgia) condition was not disabling. Based on a lack of medical evidence, CalPERS did not consider respondent's psychiatric conditions. At hearing, CalPERS stated respondent is not precluded from re-applying for disability retirement on this basis.

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¹ Post-Traumatic Stress Disorder (PTSD).

The March 24, 2017 letter notified respondent that she had 30 days to file a written appeal from the denial. By letter dated May 9, 2017, respondent appealed CalPERS's findings.²

Duties of a Motor Vehicle Field Representative

4. CalPERS submitted two documents that describe the duties of a Motor Vehicle Field Representative: a list of physical requirements of the position and a Duty Statement. Generally, the position is that of a "Call Center Technician" who must have a "broad knowledge of Vehicle Registration and Drivers License Laws and be able to interpret and apply the provisions of the California Vehicle Code and other laws, administrative regulations, policies, and technical procedures via telephone." On November 15, 2016, respondent signed a form entitled: "Physical Requirements of Position/Occupational Title." The pertinent physical tasks of a Motor Vehicle Field Representative are:

Occasionally (up to three hours): reaching above and below shoulder height, simple grasping, repetitive use of hands, keyboard and mouse use, and lifting up to 10 pounds.

Constantly (over six hours): sitting.

Expert Opinion: Dr. Scott Anderson

5. CalPERS retained Scott Anderson, M.D., Ph.D., to conduct an Independent Medical Evaluation (IME) of respondent. Dr. Anderson is a Clinical Professor of Medicine at the University of California, Davis, Division of Rheumatology, Allergy, and

² CalPERS did not contest the timeliness of respondent's appeal.

Clinical Immunology with training and experience in the diagnosis and treatment of rheumatologic conditions. He is certified by the American Board of Internal Medicine in Internal Medicine, Rheumatology, and Geriatric Medicine. Dr. Anderson has performed medical evaluations for a variety of entities, including CalPERS, the Workers' Compensation Appeals Board, and private disability insurance providers. He is also an expert consultant for the Medical Board of California.

6. Dr. Anderson examined respondent on February 17, 2017. The exam consisted of gathering respondent's medical history, reviewing her medical records, and physically examining her. He prepared an IME report dated February 17, 2017. He testified at hearing about the findings in his report.

7. As part of the IME, Dr. Anderson reviewed respondent's job description and the physical requirements of a Motor Vehicle Field Representative. He also reviewed limited medical records related to respondent's conditions.

8. Respondent explained to Dr. Anderson that she is under Dr. Arthur Fong's care for a fibromyalgia diagnosis. Her symptoms include pain in the neck and paraspinal region, as well as in her proximal upper and lower extremities. She has no history of rheumatoid arthritis or systemic lupus. She reported that she is able to drive, walk, cook, shop, and do some physical exercise, though it is limited to walking. Dr. Anderson also learned that respondent has a history of depression and suicidal ideation, including a suicide attempt.

9. Dr. Anderson requested respondent fill out a medical history survey, and respondent checked the boxes for more than 47 symptoms she currently experiences. There are 60 symptoms from which to choose. On a one-to-ten pain level survey, respondent reported she experiences pain between seven and nine all of the time, with

frequent episodes of a ten, which is "excruciating pain." Her pain interferes with all of her daily activities, relationships, and personal hygiene. She reported feeling anxious or worried, depressed, irritable, and her overall mood was "bad." She is more likely than not to fall asleep in most situations, other than driving.

10. Dr. Anderson administered a physical exam of respondent. He looked for inflammation, swollen lymph nodes, tenderness, and muscle atrophy, and found none. He administered a Jamar dynamometer test to determine respondent's grip strength, which was a grip of two pounds on the right and zero on the left. Dr. Anderson observed that respondent put forth no effort on this test, and her level of weakness is not consistent with someone who can function physically, including driving herself to the examination, which respondent did. She complained of pain or tenderness in 18 of 18 "fibromyalgia trigger points."

11. Dr. Anderson reviewed respondent's medical records, which indicate that Dr. Fong, her primary care physician, diagnosed her with fibromyalgia. Between September 2015 and June 2016, Dr. Fong placed respondent on limited duty (part time), or took her off work completely. Dr. Fong treated respondent for "muscle pains, fatigue, headaches, and mentation difficulty." He filled out a CalPERS's "Report on Disability" form, stating respondent is "[u]nable to perform job duties from 07/18/16. [Diagnosis]: Fibromyalgia. Work status: Incapacity will be permanent."

12. Dr. Anderson opined that respondent may have long-term memory impairment and depression. For example, she informed him that she had a two-year-old son who passed away, but could only approximate the date to "between 1989 and 1992." Her speech was slow, which is consistent with depression. He also opined that depression "has manifestations that impact many specialties in medicine," but he deferred to a psychiatrist to assess respondent for psychiatric conditions.

13. Dr. Anderson found that respondent exaggerated her symptoms, did not fully cooperate with the physical examination, and noted her subjective complaints were not consistent with his objective findings. Fibromyalgia "does not cause excruciating pain," and respondent's reports regarding her discomfort and impairment were "out of proportion to what [he] would expect from fibromyalgia," or what he observed on physical examination. He stated that even if respondent has fibromyalgia, it does not preclude her from performing a sedentary job. In conclusion, Dr. Anderson opined that respondent is not substantially incapacitated from performing the duties of a Motor Vehicle Field Representative.

Respondent's Evidence

14. Respondent opted not to testify at hearing. She presented no additional medical documentation.

Discussion

15. The burden was on respondent to offer sufficient competent medical evidence at hearing to support her disability retirement application. Respondent failed to do so. Based on the evidence presented, respondent failed to offer sufficient competent medical evidence to establish that at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a Motor Vehicle Field Representative due to her rheumatological (fibromyalgia) condition. Conversely, Dr. Anderson's testimony and his IME report's findings established respondent was not substantially incapacitated from performing her usual job duties. Respondent failed to challenge Dr. Anderson's findings and opinions. Consequently, her disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Motor Vehicle Field Representative, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150.

2. To qualify for disability retirement, respondent had to prove that, at the time she applied for disability retirement, she was "incapacitated physically or mentally for the performance of [her] duties." (Gov. Code, § 21156.) 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. When all the evidence in this matter is considered, respondent did not establish that her disability retirement application should be granted. She failed to submit sufficient evidence based upon competent medical opinion that, at the time she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual duties of a Motor Vehicle Field

Representative based on her rheumatological (fibromyalgia) condition. As a result, her disability retirement application must be denied.

ORDER

The application of respondent Terri L. Ray for disability retirement is DENIED.

DATE: October 2, 2019

DocuSigned by:
Heather M. Rowan
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HEATHER M. ROWAN

Administrative Law Judge

Office of Administrative Hearings