

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:

SARAH M. ROBINSON and

CALIFORNIA HIGHWAY PATROL, Respondents

OAH No. 2019020863

Agency Case No. 2018-1038

PROPOSED DECISION

Sean Gavin, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on July 24, 2019, in Sacramento, California.

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

Sarah M. Robinson (respondent) was present and represented herself.

There was no appearance by or on behalf of respondent California Highway Patrol (CHP). The matter proceeded as a default against CHP pursuant to California Government Code section 11520, subdivision (a).

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED August 26, 2019
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Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on July 24, 2019.

ISSUE

Was respondent, at the time of her application for disability retirement, permanently disabled or substantially incapacitated from the performance of her usual and customary job duties as a Personnel Specialist for CHP based upon her orthopedic (lumbar spine) and/or her psychiatric (depression and anxiety) conditions?

FACTUAL FINDINGS

1. On February 22, 2019, Anthony Suine, Chief, Benefit Services Division, CalPERS, made and filed the Statement of Issues in his official capacity.

2. On January 1, 2018, respondent signed and subsequently filed an application for disability retirement with CalPERS (application), claiming a disability on the basis of orthopedic (lumbar spine) and psychiatric (depression and anxiety) conditions. At the time she filed her application, respondent was employed by CHP as a Personnel Specialist. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150.

Application

3. In her application, respondent indicated her disabilities of "chronic pain, severe depression and anxiety" occurred on August 21, 2014, after she "had a lower level fusion on my back and it failed." She listed her limitation/preclusions as: "I can't sit or stand for more than 10 min before the pain sets in." She reported that her injury

or illness affected her ability to do her job in that she was unable to get up to go to work. She is not currently working in any capacity, having last worked in November 2017.

4. CalPERS reviewed respondent's medical documentation regarding her orthopedic and psychiatric conditions and sent respondent for an Independent Medical Examination (IME) with Debra Templeton, M.D., an orthopedic surgeon, and with Alberto Lopez, M.D., a psychiatrist. Based on the above, on July 13, 2018, CalPERS denied respondent's application on grounds that her conditions were not disabling and she was not substantially incapacitated from the performance of her job duties as a Personnel Specialist with CHP. Respondent filed an appeal on July 23, 2018.

Job Duties

5. With her application, respondent submitted a Physical Requirements of Position/Occupational Title form for her position. The form provides the following information about the physical requirements of the Personnel Specialist position:

- a. Occasional Tasks (up to three hours): walking; bending and twisting at the waist; twisting the neck; reaching above and below shoulder; kneeling; climbing; squatting; repetitive use of hand(s); and lifting/carrying 0-10 pounds.
- b. Frequent Tasks (three to six hours): sitting; standing; bending at the neck; simple grasping; and keyboard and mouse use.

6. In addition, CalPERS submitted a California Department of Human Resources examination bulletin for the Personnel Specialist position within State employment. The bulletin indicates Personnel Specialists must have the ability to: think

logically, multitask, and apply laws, rules, regulations, and bargaining contract provisions concerning personnel transactions; independently interpret and use reference material; give and follow directions; gather data; design and prepare tables, spreadsheets, and charts; advise employees of their rights; consult with supervisors on alternative actions which they may take on various transaction situations; communicate effectively; operate a keyboard/terminal; establish and maintain cooperative working relations with those contacted during the course of the work; organize and prioritize work; create/draft correspondence; and maintain personnel records.

Respondent's Evidence

7. Respondent is 42 years old. Her lower back pain began in 2012 and has gotten progressively worse since then. She reports her pain is usually between a 7 and 9 on a scale of 10. She did not suffer an acute injury that caused the pain; rather, it developed over time. She had a spinal fusion in August 2014, but the surgery did not relieve her pain. As a result of her chronic back pain, she has experienced depression and anxiety.

8. From 2014 through 2017, respondent's primary care physician was James Moore, M.D, a family practitioner. Respondent submitted to CalPERS a report from Dr. Moore as a part of her application, but Dr. Moore did not testify at hearing and his report was not offered into evidence.

9. In approximately January 2019, respondent began to see Jeffery Moy, M.D., a family practitioner who specializes in chronic pain. Respondent testified that Dr. Moy told her she was substantially incapacitated from doing her job, but she never

received his opinion in writing. Dr. Moy did not testify at hearing and none of his reports or chart notes were offered into evidence.

10. Respondent began to see Han Nguyen, M.D., a psychiatrist, in approximately November 2018. Respondent submitted Dr. Nguyen's progress notes, indicating that Dr. Nguyen diagnosed her with Major Depressive Disorder as of November 13, 2018. Dr. Nguyen did not testify at hearing.

CalPERS's Evidence

INDEPENDENT MEDICAL EXAMINATION – DR. DEBRA TEMPLETON, M.D.

11. CalPERS sent respondent for an IME with Dr. Templeton, an orthopedic surgeon with 15 years of experience. She graduated from Stanford University in 1994 with a bachelor's degree in biology. She then graduated from the University of California (UC) San Diego in 1998 with a medical degree. She completed her orthopedic surgery residency at Fort Worth Affiliated Hospitals in Texas from 1998 through 2003.

12. Dr. Templeton is Board Certified by the American Board of Orthopedic Surgery. She is a member of the American Academy of Orthopedic Surgeons, the Pediatric Orthopedic Society of North America, and the Western Orthopedic Society. She is the former director of the Pediatric Orthopedic Fellowship for the Departments of Orthopedic Surgery at UC Davis Health System and Shriners Hospital for Children, and the former Division Chief, Pediatrics, at the UC Davis Health System Department of Orthopedic Surgery. Currently, Dr. Templeton is a pediatric orthopedic surgeon for Shriners Hospital for Children in Sacramento. In addition, she provides orthopedic surgery call coverage for Sutter Medical Center in Sacramento, and she is a volunteer Associate Professor of Clinical Orthopedic Surgery at UC Davis.

13. On May 31, 2018, Dr. Templeton conducted an IME of respondent. Dr. Templeton interviewed respondent, took a medical history and an accounting of respondent's current complaints, reviewed respondent's medical records and job duties, and completed an orthopedic examination of respondent. On May 31, 2018, Dr. Templeton wrote a report. She testified at hearing consistent with her report.

14. Dr. Templeton's physical examination of respondent included: palpation of respondent's spinal region; administration of a Flexion, Abduction, and External Rotation (FABER) test; reflex testing; and general observation of respondent's physical condition and responses to stimuli. Apart from tenderness to palpation over her lumbar spine and both SI [sacroiliac] joints, where the pelvis attaches to the lowest part of the spine, no other tests revealed abnormalities.

15. In Dr. Templeton's assessment, respondent demonstrated: (1) Failed Back Syndrome; (2) Chronic Pain Syndrome; (3) Major Depression; (4) Anxiety; (5) Obesity; and SI dysfunction, bilaterally. Dr. Templeton concluded, based on her clinical examination of respondent and the CalPERS substantial incapacity standard, "I do believe that her complaints of pain are real, but I am unable to provide an anatomic explanation for her degree of pain." Furthermore, "[o]bjectively, I do not find anything in regards to her spine that would preclude [respondent] from performing her job duties."

16. In sum, Dr. Templeton found:

[F]rom the standpoint of her lumbar spine, I do not feel [respondent] is incapacitated from performing her job duties. Her job does require sitting and standing. She would need seating accommodations, and the ability to sit down if

needed. Her job requirements show Occasional lifting of 10 pounds or less, she can lift up to 10 pounds and bend or twist at the waist occasionally. Grasping and keyboard work can be done on a frequent basis.

17. After the IME, CalPERS provided Dr. Templeton with additional records to review regarding respondent's medical condition and symptoms, including records from visits to Dr. Moy and Lily Jhang, a nurse practitioner in Dr. Moore's office. Dr. Templeton reviewed those records and, on July 22, 2019, prepared a supplemental report. After reviewing the additional records provided, Dr. Templeton's opinions were unchanged.

INDEPENDENT MEDICAL EXAMINATION – DR. ALBERTO LOPEZ, M.D.

18. CalPERS also sent respondent for an IME with Dr. Lopez, a psychiatrist with 29 years of experience. Dr. Lopez received his medical degree from Stanford University School of Medicine in June 1979, and his masters of public health degree from UC Berkeley in June 1989. He completed his internship in psychiatry at UC San Francisco (UCSF) Medical Center in 1980, and psychiatry residency at UCSF's Langley Porter Institute in 1983. Dr. Lopez has been a Diplomate of the American Board of Psychiatry and Neurology since 1986, and a Qualified Medical Examiner since 1990. Dr. Lopez has practiced as a psychiatrist from 1990 to the present, both in private practice and through various agencies, including the City and County of San Francisco's Division of Mental Health and Substance Abuse, San Francisco General Hospital, and the UCSF Medical School. He was a volunteer clinical faculty member at UCSF's School of Medicine, Department of Psychiatry, from 1986 through 2012.

19. On June 28, 2018, Dr. Lopez conducted an IME of respondent. Dr. Lopez interviewed respondent, took a medical history and an accounting of respondent's current complaints, reviewed respondent's medical records and job duties, and completed a mental status examination of respondent. On June 28, 2018, Dr. Lopez wrote a report. He testified at hearing consistent with his report.

20. As part of the examination, Dr. Lopez had respondent complete the Minnesota Multiphasic Personality Inventory-II (MMPI-II), a multiple-choice test designed to assess patterns of personality and emotional disturbances, with results "provid[ing] subjective scores and profiles determined from well-documented national norms that were re-standardized in 1989."

21. Dr. Lopez analyzed respondent's MMPI-II scores and found the results "to be generally valid." Respondent's MMPI-II scores revealed:

Her self-description is that of being extremely disturbed.

Elevated scales were those of depression and schizophrenia.

She has diverse interests including those not traditionally associated with her gender.

Interpersonally, she is likely to have problematic relationships. She seems to lack basic social skills and is behaviorally withdrawn. This is a highly introverted individual. She is given to an emotional detachment, which is of longstanding duration.

Testing suggested a depression, such that these individuals are often given psychotropic medications.

She is also likely in need of a great deal of emotional support at this time.

Testing suggested an anxiety disorder, depressive disorder, in the context of schizoid personality.

22. Dr. Lopez opined that respondent "is likely suffering from an anxiety disorder and depressive disorder, and is in need of treatment." He diagnosed her with: (1) Persistent Depressive Disorder; (2) Alcohol Abuse, essentially in remission; and (3) Anxiety Unspecified.

23. Based on his IME, and the CalPERS substantial incapacity standard, Dr. Lopez determined that there were no specific job duties respondent was unable to perform because of a physical or mental condition. He further concluded that respondent was not substantially incapacitated for the performance of her job duties on a psychiatric basis alone.

24. After the IME, CalPERS provided Dr. Lopez with additional records to review regarding respondent's medical condition and symptoms, including records from visits to Dr. Nguyen. Dr. Lopez reviewed those records and, on July 2, 2019, prepared a supplemental report. After reviewing the additional records provided, Dr. Lopez's opinions were unchanged.

Discussion

25. Respondent failed to establish, through competent medical evidence, that she is substantially incapacitated from performing her usual job duties, based on her orthopedic (lumbar spine) and psychiatric (depression and anxiety) conditions. Rather, the persuasive medical evidence established that respondent's orthopedic and

psychiatric conditions do not, and did not at the time of her application, substantially disable her from performing her usual job duties as a Personnel Specialist.

26. Dr. Templeton examined respondent, evaluated her using the CalPERS substantial incapacity standard, and found no anatomical findings consistent with respondent's subjective reports of pain. She found, at most, respondent has SI joint dysfunction, which does not preclude her from performing a Personnel Specialist's job functions. Respondent may have pain, but pain is not the threshold for substantial incapacity. Furthermore, Dr. Templeton noted the disassociation between respondent's subjective reports of pain and the clinical manifestations of limitation or abnormality.

27. Dr. Lopez also examined respondent, evaluated her using the CalPERS substantial incapacity standard, and found psychiatric conditions, but none that preclude respondent's ability to perform her job duties.

28. Respondent's application seeks disability retirement on the basis of orthopedic and psychiatric conditions; however, none of these conditions cause respondent to be unable to perform the essential functions of the Personnel Specialist job, now or at the time of her application.

LEGAL CONCLUSIONS

1. By virtue of her employment, respondent is a state miscellaneous member of CalPERS, pursuant to Government Code section 21150. To qualify for disability retirement, respondent had to prove that, at the time she applied, she was "incapacitated physically or mentally for the performance of [her] duties in the state service." (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.

2. The party asserting the affirmative at an administrative hearing has the burden of proof, including the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) This burden requires proof by a preponderance of the evidence. (Evid. Code, § 115, 500.) Respondent has not met her burden.

3. An applicant must demonstrate her substantial inability to perform her usual duties on the basis of competent medical evidence, and not just the applicant’s subjective complaints of pain. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697; *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854; *Mansperger v. Public Employees’ Retirement System, supra*, 6 Cal.App.3d at pp. 876-877 [fish and game warden’s inability to carry heavy items did not render him substantially incapacitated because the need to perform such task without help from others was a remote occurrence].) And mere discomfort, which may make it difficult to perform one’s duties, is insufficient to establish permanent incapacity from performance of one’s position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; citing, *Hosford v. Board of Administration, supra*, 77 Cal.App.3d at p. 862.)

4. The burden of proof was on respondent to demonstrate that she is permanently and substantially unable to perform her usual duties such that she is permanently disabled. (*Harmon v. Board of Retirement, supra*, 62 Cal.App.3d 689;

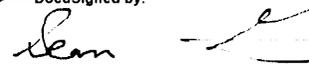
Glover v. Board of Retirement (1980) 214 Cal.App.3d 1327, 1332.) To meet this burden, respondent must submit competent, objective medical evidence to establish that, at the time of her application, she was permanently disabled or incapacitated from performing the usual duties of her position. (*Harmon v. Board of Retirement, supra*, 62 Cal.App.3d at p. 697.)

5. Respondent failed to provide competent medical evidence sufficient to demonstrate that she was substantially incapacitated from performing her normal and usual employment duties as a Personnel Specialist at the time she filed her disability retirement application. Accordingly, as set forth in the Factual Findings and Legal Conclusions as a whole, respondent is not entitled to retire for disability pursuant to Government Code section 21150.

ORDER

The application for disability retirement filed by respondent Sarah M. Robinson is DENIED.

DATE: August 22, 2019

DocuSigned by:

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SEAN GAVIN

Administrative Law Judge

Office of Administrative Hearings