

**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:**

**DENISE SERRANO, Respondent**

**and**

**BANTA ELEMENTARY SCHOOL DISTRICT, Respondent**

**Case No. 2019-0270**

**OAH No. 2019060438**

**PROPOSED DECISION**

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on October 21, 2019, in Sacramento, California.

Kevin Kreutz, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Denise Serrano represented herself.

No one appeared for or on behalf of respondent Banta Elementary School District (District), its default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520 as to the District only.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED Nov. 8 20 19

*Chavez*

Evidence was received, the record was closed, and the matter was submitted for written decision on October 21, 2019.

## **SUMMARY**

The sole issue on appeal is whether Ms. Serrano was substantially incapacitated for the performance of her usual and customary duties as a Secretary with the Banta Elementary School District (District) on the basis of a neurological (brachial plexus disorder, neck, arms, hands) condition at the time she applied for disability retirement. Ms. Serrano did not call any medical experts to testify at hearing, and it was unclear what standard the physician whose medical reports were introduced at hearing used to conclude "Ms. Serrano's pain and clinical findings preclude her from employment in the open labor market." Therefore, Ms. Serrano did not meet her burden of producing competent medical evidence that she was substantially incapacitated at the time she applied for disability retirement, and her application is denied.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. Ms. Serrano signed a Disability Retirement Election Application on April 18, 2018, which CalPERS received the following week. The application seeks disability retirement due to "brachial plexus disorders. Neck, arms, hands." Ms. Serrano indicated her disability occurred on August 26, 2009, "over years/time of repetitive use of hands, neck, arms."

2. Ms. Serrano indicated she "cannot use arms or hands for long periods, cannot look down due to neck, chronic pain." She further indicated her disability affects her ability to perform her job because she "cannot use or grab or hold items for very long. Cannot sit, stand for very long periods [illegible]. Use of hands or neck cause extreme pain and may last for long periods."

3. CalPERS denied the application, and Ms. Serrano timely appealed the denial. Anthony Suine, Chief of CalPERS's Benefit Services Division, signed the Statement of Issues on June 6, 2019, solely in his official capacity.

### **Employment History**

4. Ms. Serrano began working for the District as a Secretary in 1994. She was initially put on "light duty" through the workers' compensation system due to her alleged disability, but was eventually taken off work and never returned. Her last day of actual work was August 28, 2009, and her last day on payroll was September 10, 2010. She retired for service, and has been receiving her service retirement allowance since January 17, 2019.

### **Physical Requirements of a Secretary**

5. A Physical Requirements of Position/Occupational Title for the position of Secretary completed by the District's Business Manager and signed by Ms. Serrano indicates a person in that position performs the following physical requirements with the following frequency:

Constantly: Fine Manipulation, Repetitive Use of Hand(s).

Frequently: Sitting, Bending (neck), Twisting (neck), Twisting (waist), Keyboard Use, and Mouse Use.

Occasionally: Standing, Walking, Kneeling, Climbing, Squatting, Bending (waist), Reaching (above shoulder), Reaching (below shoulder), Pushing & Pulling, Power Grasping, Simple Grasping, Lifting/Carrying up to 25 pounds, Walking on uneven ground, Driving, Exposure to excessive noise, Operation of foot controls or repetitive movement, and Working with bio hazards (e.g. blood borne pathogens, sewage, hospital waste, etc.).

Never: Running, Crawling, lifting/Carrying more than 25 pounds.<sup>1</sup>

## **Medical Evidence**

### **MICHAEL M. BRONSHVAG, M.D.**

6. At CalPERS's request, Dr. Bronshvag, a board-certified internist and neurologist, performed an independent medical examination (IME) of Ms. Serrano on September 26, 2018. He prepared a report documenting his IME, which was admitted into evidence. He also testified at hearing.

7. At the IME, Ms. Serrano told Dr. Bronshvag she had worked as a school secretary for about 15 years. She described her job as involving "a heavy workload," and said she had "no help." She was performing keying, inputting, and writing when she began experiencing pain in her neck and arms. She estimated her symptoms

---

<sup>1</sup> "Constantly" is more than six hours, "frequently" is three to six hours, and "occasionally" is three hours or less.

began in March 2009 and gradually worsened in August 2009. She reported being unable to perform repetitive tasks, lift heavy objects, or perform "effortful" tasks.

8. Dr. Bronshvag explained at hearing that his physical examination of Ms. Serrano on September 26, 2018, led to "normal" results. His musculoskeletal examination did not reveal any overt abnormalities of her temporomandibular joints. She complained of discomfort in her neck upon palpation, but the range of motion of her neck was full and without tone change. She had a full range of motion in both shoulders, and her rotary shoulder motions were normal. She performed the thoracic outlet maneuver without any pulse deficit, bruit, or vascular changes. Her elbows, wrists, arms, and hands were normal, and her hips, knees, legs, and feet were unremarkable. Examination of her thoracic and low back spine was normal.

9. Dr. Bronshvag reviewed Ms. Serrano's medical records for an approximate 10-year period prior to the date of the IME. He explained at hearing that all of the reports, except for one, documented the same physical findings that he made. In other words, his physical examination of Ms. Serrano on September 26, 2018, was consistent with other physicians' examinations during the previous 10 years, except for one.

10. Based on his physical examination of Ms. Serrano and review of her medical records, Dr. Bronshvag concluded she was not substantially incapacitated for the performance of her usual and customary duties as a Secretary for the District due to a neurological (brachial plexus disorder, neck, arms, hands) condition. While he acknowledged her subjective complaints of pain, he explained there were no objective findings upon examination to support or explain those complaints.

## **WLADISLAW ELLIS, M.D.**

11. Dr. Ellis was the one physician whose physical findings upon examination of Ms. Serrano differed from Dr. Bronshvag's findings. Dr. Ellis is a neurologist who treated Ms. Serrano through the workers' compensation system.

12. Dr. Ellis performed a physical examination of Ms. Serrano on June 30, 2011. Examination of her cranial nerves and deep-tendon reflexes revealed "a slow reflex bilaterally in the upper extremities at 1+, but consistent and symmetric throughout." She had a "definite decrease in sensation," mostly in her ulnar distribution, "significantly worse on the right than the left." The palms of both hands were mottled, and she showed clear signs of swelling in both forearms, hands, and supraclavicularly.

13. Dr. Ellis concluded "there is no question that Ms. Serrano has bilateral thoracic-outlet syndrome." He based his conclusion on "the positive clinical findings noted above, the relatively typical clinical course, and the lack of responsiveness to usual interventions." Based on his diagnosis, he also concluded "there is no question that the extent of Ms. Serrano's pain and clinical findings preclude her from employment in the open labor market." He did not describe having any understanding of Ms. Serrano's occupation or the physical requirements of her position. He did not explain the standard he used for determining Ms. Serrano could not work "in the open labor market."

14. On August 11, 2011, Dr. Ellis wrote:

I examined and evaluated Ms. Denise Serrano for clear-cut and what appears to be entirely work-related thoracic-outlet syndrome. She has been through the treatment mill

in regard to this condition. The salient findings include exquisite sensitivity supraclavicularly with flagrant swelling in the same location; positive Tinel's at the elbows, coracoacromial spaces, and supraclavicularly; as well as multiple tender areas in the upper quadrants, much like a fibromyalgic state. Virtually any activities that involve repetitive, above-the-shoulder, or forced movement result in significant flare-ups.

15. Dr. Ellis did not testify at hearing. His June 30, 2011 and August 11, 2011 reports were admitted at hearing because Dr. Bronshvag reviewed them as part of his medical records review during his IME.

16. At hearing, Dr. Bronshvag explained he did not find the opinions and conclusions Dr. Ellis expressed in his June 30, 2011 and August 11, 2011 reports to be persuasive, because they were based, in part, on Ms. Serrano's subjective symptoms. In addition, Dr. Bronshvag was unable to duplicate Dr. Ellis's physical findings during his September 26, 2018 physical examination. Similarly, none of Ms. Serrano's other physicians documented physical findings corresponding with Dr. Ellis's findings. This lack of any corroborating data indicated Dr. Ellis's findings were unreliable.

## **Discussion**

17. Ms. Serrano has the burden of producing sufficient competent medical evidence to establish she was substantially incapacitated for the performance of her usual and customary duties as a Secretary for the District due to a neurological (brachial plexus disorder, neck, arms, hands) condition at the time she applied for

disability retirement. She did not meet her burden. She did not call any medical experts to testify at hearing.

Dr. Ellis's opinion in his June 30, 2011 report that Ms. Serrano is precluded "from employment in the open labor market" was not persuasive because he treated her as part of the workers' compensation system, and there was no evidence he applied the proper standard for determining Ms. Serrano's supposed substantial incapacity in a CalPERS disability matter. (Compare *Coca-Cola Bottling Company v. Superior Court* (1991) 233 Cal.App.3d 1273, 1284 ["[A] compensable injury [under workers' compensation] is one which causes disability or need for medical treatments"] with *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877 ["We hold that to be 'incapacitated for the performance of duty' within section 21022 means the substantial inability of the applicant to perform his usual duties"].)

18. By contrast, CalPERS offered Dr. Bronshvag's expert testimony and IME report to establish by competent medical evidence that Ms. Serrano is not substantially incapacitated. Dr. Bronshvag's explanation why he found Dr. Ellis's opinions and conclusions unpersuasive was well-reasoned and supported by evidence of his objective findings after physically examining Ms. Serrano for the IME. His opinion that Ms. Serrano was not substantially incapacitated was persuasive and supported by competent medical evidence.

## **LEGAL CONCLUSIONS**

### **Applicable Burden/Standard of Proof**

1. Ms. Serrano has the burden of proving she qualifies for disability retirement, and she must do so by a preponderance of the evidence. (*McCoy v. Board*

*of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5 ["As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence"].) This evidentiary standard requires Ms. Serrano to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, she needs to prove it is more likely than not that she was substantially incapacitated for the performance of the usual and customary duties of a Secretary with the District when she applied for disability retirement benefits.

### **Applicable Law**

2. Ms. Serrano is a miscellaneous member of CalPERS subject to Government Code section 21150, subdivision (a), by virtue of her employment with the District. That statute specifies that "a member incapacitated for the performance of duty shall be retired for disability . . . if he or she is credited with five years of state service, regardless of age."

3. To qualify for disability retirement, Ms. Serrano must 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, subd. (a).) Government Code section 20026 defines "disability" and "incapacity for performance of duty" as a "disability of permanent or extended an uncertain duration, as determined by the board . . . on the basis of competent medical opinion."

4. The courts have interpreted the phrase "incapacitated for the performance of duty" to mean "the substantial inability of the applicant to perform his

usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) It is not necessary that the person be able to perform any and all duties since public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County Employees' Retirement Association* (1983) 142 Cal.App.3d 957, 961.) Instead, the frequency with which the duties she cannot perform are usually performed as well as the general composition of duties she can perform must be considered. (*Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d at pp. 876-877 [while applicant was unable to lift or carry heavy objects due to his disability, "the necessity that a fish and game warden carry a heavy object alone is a remote occurrence".].)

5. Discomfort, which may make it difficult for one to perform her duties, is insufficient to establish permanent incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207 [mere discomfort which makes it difficult to perform one's job does not constitute a permanent incapacity]; citing, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

## **Conclusion**

6. Ms. Serrano did not produce persuasive medical evidence to establish she was substantially incapacitated for the performance of her usual duties as a Secretary with the District due to a neurological (brachial plexus disorder, neck, arms, hands) condition when she applied for disability retirement. Therefore, her Disability Retirement Election Application seeking disability retirement is denied.

## ORDER

Respondent Denise D. Serrano's Disability Retirement Election Application dated April 18, 2018, is DENIED.

DATE: November 8, 2019

DocuSigned by:  
*Coren D. Wong*  
F42876F5E756451...

COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings