

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Reinstatement from Industrial Disability

Retirement of:

**CARLY S. HESSEL and CALIFORNIA HIGHWAY PATROL,
Respondents**

Agency Case No. 2019-0235

OAH Case No. 2019060230

PROPOSED DECISION

Wim van Rooyen, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on October 21, 2019, in Sacramento, California.

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

Respondent Carly S. Hessel (Hessel) appeared at the hearing and represented herself.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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Respondent California Highway Patrol (CHP) did not appear at hearing. CHP was duly served with a Notice of Hearing. The matter proceeded as a default against CHP pursuant to Government Code section 11520, subdivision (a).

Evidence was received, and the record was left open until December 20, 2019, to allow CalPERS to submit supplemental evidence regarding Hessel's work requirements. On November 19, 2019, CalPERS filed its supplemental evidence, which was marked as Exhibit 27. Although given the opportunity, Hessel failed to file any response or objection to that supplemental evidence. Consequently, on December 20, 2019, Exhibit 27 was admitted, the record closed, and the case submitted for decision.

ISSUE

Is Hessel still substantially incapacitated for performance of the usual job duties of a CHP Public Safety Dispatcher due to neurological (cervical and lumbar) conditions (neurological conditions)?

FACTUAL FINDINGS

Background and Procedural History

1. Hessel was employed by CHP as a Public Safety Dispatcher from approximately August 2005 through September 2016. By virtue of her employment, Hessel was a state safety member of CalPERS.
2. On July 29, 2016, Hessel submitted an application for industrial disability retirement (IDR), identifying her specific disabilities as cervical and lumbar trauma, anxiety, and a somatic disorder causing muscle spasms. On October 21, 2016, she

requested to cancel that application, and in a letter dated October 27, 2016, CalPERS confirmed that the application had been cancelled.

3. On October 20, 2016, CHP submitted an employer-originated application for IDR on Hessel's behalf. That application identified her specific disabilities as cervical and lumbar conditions affecting her upper and lower extremities.

4. On January 3, 2017, Hessel underwent an independent medical evaluation (IME) by Dr. Robert Ansel, a neurologist. He prepared a report following the IME, which is discussed below.

5. On February 1, 2017, CalPERS approved the employer-originated application, finding that Hessel was substantially incapacitated for the performance of her usual duties as a CHP Public Safety Dispatcher based on her neurological conditions.

6. In a June 14, 2018 letter, CalPERS notified Hessel that it was reviewing whether she continued to meet the qualifications to receive IDR. It requested Hessel to have her treating physician(s) complete and submit a re-evaluation of her current disability status to CalPERS, along with her medical records.

7. On July 31, 2018, Hessel informed CalPERS that she did not have any current treatment providers. Subsequently, Hessel was scheduled for an IME with Dr. Stephen Owen Dell on November 6, 2018. She attended the IME, and Dr. Dell prepared two reports following the IME, which are discussed below.

8. In a December 7, 2018 letter, CalPERS notified Hessel that, after review of all the medical evidence, it determined that she was no longer substantially incapacitated for the performance of her job duties as a CHP Public Safety Dispatcher

due to her neurological conditions, and that she would be reinstated to her former position. Hessel timely appealed that decision based, in part, on CalPERS' failure to consider her anxiety as part of the reevaluation.

9. In a February 1, 2019 letter, CalPERS acknowledged receipt of Hessel's appeal. It advised Hessel that no determination regarding her anxiety condition was previously made, and that if she wished to add the anxiety condition to her appeal, she would need to submit to CalPERS a physician's report concerning that condition, along with any medical records dating back to September 2016. The letter cautioned that if the requested information was not submitted by March 1, 2019, CalPERS would not be able to consider the anxiety condition with the appeal.

10. On May 20, 2019, Anthony Suine, Chief of CalPERS' Benefit Services Division, acting in his official capacity, filed the Accusation for purposes of the appeal. The matter was then set for an evidentiary hearing before an Administrative Law Judge of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

11. In a July 5, 2019 letter, CalPERS renewed its request for Hessel to submit a physician's report concerning her anxiety condition, along with any medical records dating back to September 2016. That letter cautioned that if the requested information was not submitted by August 5, 2019, CalPERS would not be able to consider the anxiety condition with the appeal. Additionally, on July 5, 2019, CalPERS requested any additional medical records dating back to November 2016 from the State Compensation Insurance Fund (SCIF), with which Hessel had previously filed a worker's compensation claim.

12. By the date of the administrative hearing, CalPERS had not received the requested information concerning Hessel's anxiety. CalPERS did not send Hessel for a mental health IME as part of the IDR reevaluation, because it had never previously made a determination regarding any mental health condition. Hessel's individual IDR application referenced mental health conditions, but Hessel later cancelled that application. The subsequent employer-originated application did not reference any mental health condition, nor did Hessel ever provide a physician's report and medical records documenting treatment for anxiety or any other mental health condition.

Hessel's Employment at CHP

13. CHP Public Safety Dispatchers generally perform communications center duties, including receiving and transmitting reports of accidents and requests for assistance; answering telephone requests for road and other information; operating radio, automated telephone, and computer-related equipment; dispatching appropriate personnel and resources to specified points; screening and taking appropriate action on incoming calls from officers, the public, media, and other allied agencies; typing entries into computer terminals; and processing reports and records.

14. All Public Safety Dispatchers with the CHP Sacramento Communications Center presently work either a four-day, 10-hour shift work week schedule or a three-day, 12-hour shift work week schedule, based on seniority. The position has the following physical requirements for a 10-hour shift: frequent (for three to six hours) sitting, bending and twisting of the neck, fine manipulation, simple grasping, repetitive use of the hands, keyboard use, mouse use, and operation of foot controls or repetitive movement, as well as occasional (up to three hours) standing, walking, bending and twisting at the waist, reaching above and below the shoulder, pushing, pulling, and lifting/carrying up to 10 pounds.

15. Public Safety Dispatchers on the four-day, 10-hour shift work week schedule are given two 20-minute breaks and one 30-minute lunch break, whereas Public Safety Dispatchers on the three-day, 12-hour shift work week schedule are given three 15-minute breaks and one 30-minute lunch break. Under either schedule, breaks are taken every one and a half to two and a half hours. Thus, none of the physical requirements for the position have to be continuously performed for three to six hours.

16. Notwithstanding the above, all Public Safety Dispatchers also have sit/stand workstations. Consequently, they can opt to sit the entire day, stand the entire day, or apportion time between sitting and standing as they desire, without any reasonable accommodations request.

MEDICAL OPINIONS

17. On May 18, 2016, Hessel's former treating neurologist, Dr. Jonathan Rutschik, completed a Physician's Report on Disability. He diagnosed Hessel with cervical and lumbar radiculopathy resulting in pain, based on an April 28, 2015 cervical MRI revealing multilevel degenerative changes; an April 28, 2015 lumbar MRI revealing a central disc protrusion; and limited twisting of the neck and lumbar spine upon examination. He opined that Hessel was substantially incapacitated for performance of her usual duties at CHP, because she was limited to sitting for 30 minutes or less, typing for 30 minutes or less, and driving for 15 minutes or less. However, he observed that her incapacity was not permanent and expected to last only approximately six months to one year.

18. Dr. Ansel issued a report dated January 3, 2017. As part of his IME, he reviewed Hessel's medical records and the physical requirements of her job at CHP;

interviewed her; and performed a physical examination. Upon his examination, Dr. Ansel noted a moderate degree of sustention tremor,¹ primarily in her right upper extremity. He diagnosed Hessel with chronic spinal pain associated with degenerative changes and disc herniation, both at the cervical and lumbar spine, with secondary headache; intermittent, non-physiologic tremors of the upper, and to a lesser degree, lower extremities; and anxiety and depression. He opined that Hessel was substantially incapacitated for the performance of her duties based on a combination of her pain, impaired coordination, and tremors. Her incapacity was likely to be permanent.

19. Dr. Dell issued a report dated November 6, 2018; issued a supplemental report dated September 27, 2019; and testified at hearing. He has been board certified by the American Board of Neurological Surgery since 1982 and the American Board of Neurological and Orthopedic Medicine and Surgery since 1985. He still maintains an active patient practice and has been performing IMEs for CalPERS for just under 10 years. He is familiar with CalPERS' Medical Qualifications for Disability Retirement, which he considered and applied in forming his opinion concerning Hessel.

At the time of Dr. Dell's IME, Hessel was 35 years old. As part of the IME, he reviewed Hessel's medical records and the physical requirements of her job at CHP; interviewed her; and performed a physical examination. He noted the April 2015 MRI studies discussed by Dr. Rutschik as well as Hessel's unremarkable electrodiagnostic studies. Upon his examination, Dr. Dell did not observe any evidence of a tremor. Hessel's cervical range of motion was relatively normal, her thoracic and lumbar range

¹ A sustention tremor occurs while maintaining a posture against gravity.

of motion were “very good,” she was neurologically intact, and her musculoskeletal examination was normal.

Dr. Dell diagnosed Hessel with cervical and lumbar strain/sprain. He also noted her complaints of diffuse upper trunk and upper extremity pain, and diffuse stocking-like distribution of hypesthesia² bilaterally from the elbow distally, but emphasized at hearing that those complaints were based on alleged symptoms and did not correspond to any medical diagnosis. He further noted that, although Hessel is somewhat credible, her “degree of impairment, as reported, appears exaggerated . . . by comparison with the physical and neurological examination and laboratory findings presented at this time.” He acknowledged that external stress could potentially impact a person’s neurological system and increase perception of pain.

Dr. Dell ultimately concluded that Hessel was not substantially incapacitated for the performance of her duties at CHP due to her neurological conditions. She could perform the physical requirements of her position with the regularly-scheduled breaks, as outlined above.

Hessel’s Evidence

20. Hessel testified at hearing. She enjoyed working as a CHP dispatcher, and it was painful when she had to leave her job. However, she strongly believes that she is presently unable to perform the position physically or mentally.

21. Hessel testified that the position requires a lot of sitting or standing in one spot, which would be uncomfortable and impossible to maintain given her spinal

² Hypesthesia is reduced sensation.

problems. According to Hessel, dispatchers often are not able to take their scheduled breaks, and she is doubtful that CHP would be able to reasonably accommodate her. Indeed, she is concerned that CHP would not even be willing to reinstate her. Nevertheless, Hessel has made concerted efforts to maintain her physical wellness. She previously took Zumba classes, and currently participates in swimming and water therapy at her gym. She has no regular treating physician for her spinal issues and does not take any prescription medication, but uses over-the-counter and homeopathic medicines.

22. The CHP dispatcher position is also mentally challenging, because it requires dealing with serious emergencies, multi-tasking between various incidents, and managing significant stress. Hessel's anxiety would preclude her from working in such an environment. She presently receives counseling, but does not take any psychiatric medications. She concedes that she never requested her counselor to complete any form for CalPERS documenting her treatment for anxiety. Nevertheless, she contends that CalPERS should have considered her anxiety as part of its reevaluation process, because it had notice of the condition from her initial individual IDR application. Moreover, SCIF purportedly accepted her anxiety condition in the worker's compensation case.

23. Hessel does not currently work, but otherwise lives a relatively independent life. She drives and has a current driver's license. She has a five-year-old son and a three-year-old daughter, has 50/50 joint custody of her children with the children's father, and takes care of their needs when they are with her. Around the time of her IME with Dr. Dell, she was going to school part time, taking about three classes, but subsequently dropped out.

24. Hessel requests that CalPERS be directed to properly consider her anxiety in the reevaluation process. Alternatively, she requests an order mandating CHP to reinstate her to her former position.

Discussion

25. Dr. Dell's opinion that Hessel is no longer substantially incapacitated due to neurological conditions is persuasive. His IME report documented a thorough review of Hessel's medical records and a detailed physical examination, and persuasively explained the factual bases for his conclusions and opinion. He testified consistently with his report. Although Dr. Ansel found Hessel to be permanently and substantially incapacitated in January 2017, Dr. Dell's more recent November 2018 evaluation is more probative of Hessel's present capacity. Moreover, Dr. Dell's opinion was consistent with the opinion of Dr. Rutschik, Hessel's former treating neurologist, who opined in May 2016 that her incapacity was expected to last only approximately six months to one year.

Hessel's contention that CalPERS improperly failed to consider her anxiety condition is unpersuasive. CalPERS never made any determination regarding her anxiety condition when it granted her IDR, and to date, she has not provided CalPERS with a physician's report and medical records documenting treatment for her anxiety or any other mental health condition. Additionally, it is irrelevant that SCIF accepted her anxiety in the worker's compensation case in light of the different standards applicable to worker's compensation benefits and disability retirement benefits. Finally, although Hessel suggests that CHP may not be willing to reinstate her, she provided no evidence of a refusal to reinstate; nor did CHP appear in this case to appeal CalPERS' decision. If CHP ultimately refuses to reinstate Hessel, she may well have a

remedy in another forum. However, any speculation regarding such potential action by CHP does not affect the propriety of CalPERS' reinstatement determination.

LEGAL CONCLUSIONS

1. CalPERS has the burden of proving by a preponderance of the evidence that Hessel is no longer substantially incapacitated for the performance of her usual job duties as a CHP Public Safety Dispatcher, and should therefore be reinstated in her former position. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (January 22, 2000) CalPERS Precedential Dec. 99-03) <<https://www.calpers.ca.gov/docs/99-03-starnes-chp.pdf>>.)

2. Once Hessel retired for industrial disability, CalPERS' Board of Administration had authority to require her to undergo medical evaluation at any time prior to her reaching the minimum age for voluntary retirement for service. (Gov. Code, § 21192.) "If the determination pursuant to Section 21192 is that [she] is not so incapacitated for duty in the position held when retired for disability . . . and . . . her employer offers to reinstate [her], . . . her disability retirement allowance shall be canceled immediately . . ." (Gov. Code, § 21193.) The minimum age for voluntary retirement for service applicable to Hessel is 50, and based on Factual Finding 19, she had not reached that age at the time of Dr. Dell's IME. (Gov. Code, § 21060, subd. (a).)

3. The analysis of whether a recipient of IDR is "still incapacitated" for the performance of her usual job duties under Government Code section 21192 "is limited to determining whether the conditions for which disability retirement was granted continue to exist." (*California Department of Justice v. Board of Administration of California Public Employees' Retirement System* (2015) 242 Cal.App.4th 133, 141 [the

analysis of “still incapacitated” is limited to consideration of the disability for which disability retirement was originally granted, and any substantial incapacity due to a different disability is irrelevant].) And the outcome of that analysis must be based on competent medical evidence. (Gov. Code, § 21192.)

4. The courts have interpreted the phrase “incapacitated for the performance of duty” to mean “the substantial inability of the applicant to perform [her] 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, because public policy supports employment and utilization of the disabled. (*Schrier v. San Mateo County Employees’ Retirement Association* (1983) 142 Cal.App.3d 957, 961.) Furthermore, mere discomfort, which may make it difficult for one to perform her duties, is insufficient to establish incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

5. Based on the Factual Findings as a whole, and specifically Factual Finding 25, CalPERS established by competent and persuasive medical evidence that Hessel is no longer substantially incapacitated for the performance of her usual job duties as a CHP Public Safety Dispatcher due to neurological conditions. Therefore, her appeal should be denied.

ORDER

1. The appeal of respondent Carly S. Hessel is DENIED.
2. CalPERS’ determination that Hessel is no longer substantially incapacitated for the performance of her usual job duties as a CHP Public Safety

Dispatcher due to neurological (cervical and lumbar) conditions, and that she should be reinstated to her former position, is AFFIRMED.

DATE: January 17, 2020

DocuSigned by:
Wim van Rooyen
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WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings