

**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:**

**STEPHANIE L. ORTIZ, Respondent**

**and**

**CALIFORNIA HIGHWAY PATROL, Respondent**

**Agency Case No. 2019-0293**

**OAH No. 2019071146**

**PROPOSED DECISION**

Jeremy Cody, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on January 9, 2020, in Los Angeles.

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

Stephanie L. Ortiz (respondent) was present and represented herself.

No appearance was made by or on behalf of California Highway Patrol.

PUBLIC EMPLOYEES RETIREMENT SYSTEM  
FILED Jan. 30 20 20  


Oral and documentary evidence was received. The record was held open until January 17, 2020, to allow respondent to submit a medical report and to allow complainant to file objections to that evidence. Respondent timely filed the medical report, which was marked as exhibit A. Complainant timely filed an objection, which was marked as exhibit 16. Exhibit A was entered into evidence under Government Code section 1113, subdivision (d).<sup>1</sup>

The record was closed and the matter was submitted for decision on January 17, 2020.

## **SUMMARY**

Respondent appeals a decision by CalPERS to deny her application for disability retirement. Respondent was employed as a Public Safety Dispatcher II when she applied for industrial disability retirement based on her claim of orthopedic (neck, wrists and right shoulder) conditions. After reviewing medical reports concerning respondent's condition, CalPERS determined that respondent was not substantially incapacitated from the performance of her duties as a Public Safety Dispatcher II. At the hearing, CalPERS presented its medical expert who testified regarding his conclusions; respondent did not present a medical expert. Based on the evidence presented, respondent failed to meet her burden to establish by competent medical

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<sup>1</sup> Over CalPERS's objections, the ALJ finds that exhibit A, a 2019 report prepared by Michael C. Luciano, M.D., supplements the Supplemental Report and testimony of Lincoln S. Yee, M.D. (exhibit 10), in which Dr. Yee discussed and summarized Dr. Luciano's earlier medical opinion expressed in a 2018 report. (See Factual Finding 19.)

evidence that she is substantially incapacitated from the performance of her duties as a Public Safety Dispatcher II. Therefore, respondent's appeal is denied.

## **FACTUAL FINDINGS**

### **Parties and Jurisdiction**

1. Anthony Suine made and filed the Statement of Issues for complainant in his official capacity as Chief of the Benefits Services Division of CalPERS.

2. On May 22, 2018; respondent submitted an application for industrial disability retirement based on her claim of disability due to orthopedic conditions involving her neck, wrists and right shoulder.

3. At the time respondent filed her application for industrial disability retirement, she was employed as a Public Safety Dispatcher II for the California Department of Highway Patrol (CHP). By virtue of her employment, respondent was a state safety member of CalPERS subject to Government Code section 21151.

4. CalPERS obtained medical reports concerning respondent's orthopedic conditions from competent medical professionals. After reviewing the reports, CalPERS determined that respondent was not permanently disabled or substantially incapacitated from the performance of her usual and customary duties as a Public Safety Dispatcher II at the time she filed her application for disability retirement.

5. By letter dated September 18, 2018, Mr. Suine notified respondent of his determination and advised her of her appeal rights.

6. In October 2018, respondent filed an appeal, requesting a hearing. CalPERS accepted the appeal as timely.

7. This appeal is limited to the issue of whether, as of the date of the application, respondent was substantially incapacitated from the performance of her duties as a Public Safety Dispatcher II on the basis of an orthopedic condition.

### **Job Duties of a Public Safety Dispatcher**

8. The position of Public Safety Dispatcher II is a fast-paced job that requires the dispatcher to work with three keyboards, two telephones and five computer screens. The dispatcher uses these devices to communicate with CHP officers in the field who need assistance. For example, one task involves assisting CHP officers in the field to perform a criminal records check of a driver's license or vehicle registration. After a CHP officer sends the license number to the dispatcher, the dispatcher inputs the number into a database and performs a search, then relays that information back to the officer.

9. Communications are handled over the internet using computer keyboards, or by means of radio or telephone connections. In the course of a 12-hour work shift, a dispatcher sits, types, stands, walks, bends, twists and turns to look at different computer screens, moves herself from one work station to another and back again, and is required to work with all devices (keyboards, radio phones and cell phones) in an efficient, timely manner. The amount of time that a dispatcher spends on each activity varies on a daily basis.

10. The Duty Statement regarding the position of Public Safety Dispatcher (Ex. 11), lists three essential functions of the job: (1) operating voice radio and MDC's (20% of time); (2) operating a service desk position that includes answering the call

box and monitoring the CBX Remote Messaging Computer (CHP-911), Allied Agency, and public information calls, documenting pertinent information on the CAD system, and receiving incident log requests from other personnel (20%); and (3) operating a CAD console position which includes receiving and documenting on the CAD (or radio cards if necessary) verbal messages, requests for information from field units, and taking appropriate action to fulfill those requests (20%). The dispatcher also spends 10 percent of her time receiving requests for emergency and routine calls from CHP field personnel and the public via the Service Desk. Other infrequent duties include: monitoring Channel 2 during unusual incidents (5%), maintaining an up-to-date status of all mobile units and assigned tow trucks (5%), making inquiries into the California Law Enforcement Telecommunications System when requested (2%), relaying relevant All Points Bulletins to all mobile units (2%) and providing on the job training for new hires (2%).

11. Respondent testified that her job as a Public Dispatcher II required her to sit for many hours while using keyboards, to constantly use her hands, wrists and fingers to type on keyboards, to bend and twist her neck to view multiple computer screens for information, to turn her upper body to read at or below shoulder level and to move across the room from one desk to another to perform multiple tasks.

12. According to respondent, she was allowed to take two 20-minute breaks and one 30-minute meal break during her 12-hour shift. Respondent contends that any more frequent breaks are not feasible given the fast-paced nature of the job.

## **Background**

13. The Independent Medical Examiner's Supplemental Report (ex. 10), prepared by Lincoln S. Yee, M.D., summarized respondent's medical records as set forth below.

14. Respondent began working for CHP as a Public Safety Dispatcher in 2007. In 2013, she began experiencing pain in her right wrist and hand while typing on the job. Over many months, respondent's pain spread to her right shoulder, neck and right elbow. Respondent missed work for several months at a time during 2015 and 2016 while she sought medical treatment for various types of persistent pain. In late 2016 and early 2017, respondent worked at CHP for several months, but then stopped working sometime in 2017, and has not returned to work at CHP.

15. In 2015, respondent had two surgeries in an attempt to improve her condition: ulnar nerve relocation (anterior transposition) in her right elbow and arthroscopic surgery with decompression of her right shoulder. The surgery on respondent's ulnar nerve resulted in lasting reduction of pain in respondent's elbow. The surgery of respondent's right shoulder was not entirely successful but did lessen the pain and stiffness in her right shoulder to some degree.

16. In 2016, respondent received monthly orthopedic assessments from Hamid Rahman, M.D. while complaining of pain in her right shoulder, arm, forearm and wrist and weakness in her upper extremities.

17. In December 2016, respondent filed a Workers' Compensation claim, alleging that her persistent pain was a work-related injury.

18. In June 2017, respondent began pain management treatment with Atef E. Rafla, M.D. The doctor listed respondent's complaints as "severe neck pain with limited range of motion and spasms as well as occasional radiating tingling and numbness in the arms. She has headaches with blurry vision." (Ex. 10, p. 12.) Dr. Rafla requested authorization for physical therapy and prescribed Norco (5/325 mg.) for pain and Flexeril (10 mg.) as a muscle relaxant. Respondent testified that the prescribed medications lessened her symptoms but she could not take the medication while at work because it affected her ability to think and drive.

19. In June 2018, respondent was given an orthopedic evaluation for an "industrial continuous trauma" by Michael C. Luciano, M.D. (2018 Luciano Report). Respondent complained to Dr. Luciano of pain in her neck with symptoms radiating down her right upper extremity; pain, loss of motion and loss of strength in her right shoulder; pain in her right elbow; weakness in her right arm; and pain and stiffness in her right wrist. Respondent stated that her symptoms increase with "grasping, pushing and household chores such as opening jars." (Ex. 10, p. 16.) On the subject of vocational rehabilitation, Dr. Luciano wrote that "patient is able to perform work duties compatible with work restrictions." The doctor listed the restrictions as: avoiding repetitive quick motion of the neck, heavy lifting, prolonged posturing of the neck, lifting above shoulder level, forceful pushing and forceful twisting of the right arm and elbow, and repetitive power grasping with right wrist. (*Id.*)

### **CalPERS's Medical Evidence**

20. The medical evidence in support of CalPERS's decision consists of: (a) the testimony of Dr. Yee; (b) Dr. Yee's report entitled "Independent Medical Evaluation" (Medical Evaluation) at exhibit 9; and (c) Dr. Yee's report entitled the "Independent Medical Examiner's Supplemental Report" (Supplemental Report) at exhibit 10.

21. At the request of CalPERS, Dr. Yee performed a medical orthopedic evaluation of respondent on August 23, 2018. Dr. Yee is board certified in orthopedic surgery. He has practiced orthopedic medicine for more than 30 years.

22. In his Medical Evaluation, dated August 23, 2018, Dr. Yee memorialized his findings and conclusions regarding his examination of respondent. Dr. Yee had respondent complete a written questionnaire, he interviewed respondent to obtain respondent's medical and occupational history, he reviewed a document that listed a dispatcher's job duties (ex. 11), and he performed an orthopedic examination of respondent's cervical and lumbar spine. Dr. Yee also reviewed medical records, x-rays and an MRI provided by respondent. At the conclusion of the report, Dr. Yee issued a medical opinion about respondent's orthopedic condition and whether that condition substantially incapacitates respondent from performance of her usual and customary job duties as a Public Safety Dispatcher.

23. Dr. Yee reported that at the time of the examination respondent complained of neck pain and right shoulder pain and stated that the pain was very severe at that moment. Respondent reported that she had frequent, severe headaches and severe pain in her neck which prevented her from reading, working, driving for any length of time, or doing any recreational activities.

24. Dr. Yee examined respondent's cervical spine and found that she demonstrated a full range of painless cervical motion. There was no spasm or tenderness, no asymmetry, and no pain with cervical traction or contraction. Respondent demonstrated full flexion, extension, left and right lateral bending – all within normal range; however, Dr. Yee did note some limitation in the right lateral rotation. Dr. Yee performed a physical and neurological examination of respondent's upper extremities and found that respondent did have some diminished sensation as

well as pain and weakness in her right upper extremities but the doctor saw no muscular atrophy. Dr. Yee examined respondent's shoulder and noted well-healed arthroscopic scars; he noted that respondent's shoulders had full range of motion at a normal level. Dr. Yee examined respondent's elbow, wrist and hand and found that each demonstrated normal range of motion, no gross asymmetry, no effusion and no particular areas of tenderness. (Ex. 9., pp. 4-7.)

25. Based on his examination of respondent, his review of records, documents, x-rays, and an MRI, Dr. Yee opined that respondent is not substantially incapacitated in the performance of her usual duties as a Public Safety Dispatcher. The doctor wrote that there were no objective clinical findings that would preclude respondent from returning to work as a dispatcher. Dr. Yee's opinion is based on his physical examination of respondent which, in his opinion, resulted in no objective findings to substantiate her subjective complaints.

26. Dr. Yee testified that he did consider that respondent might experience some pain and numbness with prolonged repetitive use of certain muscles, but he found no structural abnormalities that would prevent her from doing her job and he noted that pain is difficult to measure objectively. Dr. Yee further surmised that certain work-related limitations and restrictions might be appropriate for respondent; however, he concluded, based on his examination and his review of medical records, that respondent was not substantially incapacitated such that she was entirely unable to perform her usual job duties.

27. On February 4, 2019, Dr. Yee prepared a Supplemental Report, after he was provided additional medical records related to respondent's workers' compensation claim. After reviewing those additional records, including the June 19, 2018 medical report of Dr. Luciano (Factual Finding 18), Dr. Yee wrote that his initial

medical opinion remained unchanged. Dr. Yee repeated that there were no clear objective findings that would preclude respondent from returning to work as a dispatcher. In particular, he noted that Dr. Luciano had written in his medical evaluation on June 19, 2018, that respondent "is able to perform work duties compatible with work restrictions." (Ex. 10, p. 16.) The restrictions recommended by Dr. Luciano had included avoiding repetitive quick motions of the neck, heavy lifting, repetitive above-shoulder-level activity, forceful pushing or twisting of the right elbow, and power grasping with the right wrist. (Ex. 10, pp. 16-17.) Dr. Yee wrote that "[n]one of these activities is noted to be contradictory with respect to the [respondent's] work as a dispatcher for the California Highway Patrol." (Ex. 10, p. 19.)

### **Respondent's Evidence**

28. Respondent's evidence consisted of her testimony as to her condition and a medical report (2019 Luciano Report) prepared by Dr. Luciano after he examined respondent on July 30, 2019 (exhibit A).

29. Respondent testified that her physical complaints as of the date that she filed for disability – May 22, 2018 - were neck pain with radiation to the arms and fingers, shoulder pain that radiated to the lower back, and pain in her right wrist. Respondent stated that her neck condition gives her excruciating headaches if she sits upright for more than two hours. When she walks, her wrists and fingers swell to the point where she can't bend her wrist and cannot move her fingers.

30. Respondent testified that the last time she attempted to work for any length of time as a dispatcher in 2017, she could only work for two hours before she was forced to stop because of the excruciating pain and inflammation that she experienced in her upper extremities. Although her pain medication is helpful to some

extent in alleviating pain, respondent said she cannot take the medication while she works or drives because it affects her concentration.

31. Respondent testified that the pain in her neck, arms, fingers, wrists and shoulder continue until the present. She is considering surgery on her hand to relieve carpal tunnel pain in her right wrist. Respondent does not presently intend to return to work as a dispatcher, although she wishes that her health would improve to the point where she would be able to work again.

32. The 2019 Luciano Report supplements and explains respondent's testimony regarding her orthopedic symptoms and the manner in which she experiences recurring pain and sensitivity in her upper extremities. The report also supplements the 2018 Luciano Report, which was summarized by Dr. Yee in his Supplemental Report.

33. The 2019 Luciano Report is only marginally relevant to the ultimate issue on appeal, given that Dr. Luciano rendered no medical opinion as to whether respondent was substantially incapacitated for performance of her usual and customary duties as a dispatcher. At the conclusion of the 2019 Luciano Report, Dr. Luciano wrote that he would not render an opinion on the "feasibility of [respondent] returning to usual and customary duties" until he had a job description that included the physical requirements of respondent's usual and customary position. (Ex. A, p. 26) Lacking that job description, Dr. Luciano declined to render a medical opinion regarding respondent's capacity to return to her usual and customary duties as a Public Safety Dispatcher.

34. Dr. Luciano did not state in his 2019 Luciano Report whether he had reviewed or considered Dr. Yee's Medical Evaluation or his Supplemental Report, which

reports form the basis of CalPERS denial of disability to respondent. In addition, both the 2018 Luciano Report and the 2019 Luciano Report appear to have been prepared in connection with Worker's Compensation proceedings and therefore, addressed issues such as causation, impairment ratings, and "qualified injured worker" status which are not comparable or relevant to the "CalPERS disability standard" that governs this case. (See Legal Conclusions 9-11.)

## **LEGAL CONCLUSIONS**

1. An applicant for disability retirement has the burden of establishing eligibility by a preponderance of the evidence. (Evid. Code, §§ 115 and 500; see *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.]" (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324-325.)

### **Applicable Statutory Authority**

2. Government Code section 20026 provides:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, . . . on the basis of competent medical opinion.

3. Government Code section 21151, subdivision (a) states, in pertinent part:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for

the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

4. Government Code section 21154 provides in pertinent part:

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.

5. Government Code section 21156, subdivision (a)(1), states, in pertinent part:

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 . . . .

### **Case Law Regarding Incapacity for Performance of Duty**

6. To establish entitlement to disability retirement, an employee must show that he or she is "incapacitated for the performance of duty," which courts have interpreted as the "substantial inability of the applicant to perform his usual duties," as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration*

(1978) 77 Cal.App.3d 854.) An increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of present disability. (*Hosford, supra*, 77 Cal.App.3d at pp. 862-863.)

7. In *Mansperger, supra*, the applicant, who worked as a game warden, suffered an injury to his right arm while arresting a suspect, and medical evidence established reduced strength in his right arm. However, relative to his job duties, he could shoot a gun, drive a car, swim, row a boat, pilot a boat, pick up a bucket of clams, and apprehend a prisoner, all with some difficulty. However, he was unable to lift heavy weights or carry the prisoner away. The court noted that "although the need for physical arrests do occur in petitioner's job, they are not a common occurrence for a fish and game warden." (*Id.* at p. 877.) Similarly, the need to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding that the applicant was not incapacitated for the performance of his duties, the *Mansperger* court noted that the activities he was unable to perform were not common occurrences and that he could otherwise "substantially carry out the normal duties of a fish and game warden." (*Id.* at p. 876.)

8. In *Hosford, supra*, the applicant, who worked as a state traffic officer with the California Highway Patrol, established that he could run, but inadequately, and that his back would probably hurt if he sat for long periods of time, or apprehended a subject escaping on foot over rough terrain or over and around obstacles. The court found that this was insufficient to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d at pp. 862-863.)

9. The *Mansperger* and *Hosford* cases were discussed in *The Matter of the Application for Disability Retirement of Ruth A. Keck and Los Angeles County Schools*

(*Keck*) (2000) CalPERS's Precedent Decision 00-05. In that case, it was determined that Ms. Keck was able to substantially perform her usual duties as a school clerk typist and secretary despite her orthopedic (neck and back) conditions. In *Keck*, the medical evidence consisted of the testimony and written report of CalPERS's medical expert and written medical reports by doctors who had evaluated Keck's condition. Keck did not offer any expert testimony at the hearing. (*Keck*, at Factual Finding 9.)<sup>2</sup> In the proposed decision adopted by CalPERS, the administrative law judge found that competent expert testimony established petitioner exaggerated her symptoms (*Keck*, at Factual Finding 21); petitioner failed to present any expert testimony to controvert CalPERS's expert's opinions (*Keck*, at Factual Finding 22); Keck's doctors' written reports evaluating her condition did not specifically apply the "CalPERS disability standard" set forth in the *Mansperger* and *Hosford* cases (*Keck*, at Factual Finding 22); and the Social Security Administration's Decision regarding Keck's application for social security disability benefits was not relevant (*Keck*, at Factual Finding 26). The decision concluded Keck failed to present sufficient competent medical evidence to establish that her orthopedic conditions prevented her from performing the usual duties of her position as a clerical typist and secretary. (*Keck*, at Legal Conclusion 8.)

10. A workers' compensation ruling or settlement is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Summerford v. Board of Retirement*

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<sup>2</sup> Because Precedent Decision 00-05 does not contain page numbers, references are made to the factual finding and legal conclusion paragraph numbers in that decision.

(1977) 72 Cal.App.3d 128, 132.) In *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, the court addressed the distinction between workers' compensation laws and PERS: "A finding by the WCAB [Workers' Compensation Appeals Board] of permanent disability, which may be partial for the purposes of workers' compensation, does not bind the retirement board on the issue of the employee's incapacity to perform his duties. . . . (Citations.)" (Id. at 215.)

11. In workers' compensation proceedings, the injured employee may be given an impairment rating which may be used to determine an award for compensation and future medical treatment. But these disability ratings are not dispositive of whether the employee is substantially incapacitated from the performance of his usual duties for purposes of disability retirement. (*Petrillo v. Bay Area Rapid Transit District* (1988) 197 Cal.App.3d 798, 812, reh'g. den.) Accordingly, a finding of industrial injury and work limitations under the workers' compensation system does not automatically entitle an applicant to a disability retirement.

12. In this case, respondent failed to prove by a preponderance of the evidence that she was substantially incapacitated from performing the usual duties of a public safety dispatcher at the time she applied for disability retirement. CalPERS introduced into evidence Dr. Yee's medical opinion, which was persuasive and supported by the evidence. Respondent failed to provide expert medical testimony or medical evidence to controvert Dr. Yee's opinion. While respondent may have received an impairment rating in Workers' Compensation proceedings, that rating is not dispositive of whether she is substantially incapacitated from the performance of his usual duties for purposes of disability retirement. Moreover, the doctor on whom respondent relied, Dr. Luciano, found in June 2018 that respondent was able to perform her work duties as a dispatcher for the CHP under certain work restrictions.

(Factual Finding 19.) Whether the employer could accommodate respondent's restrictions was not fully developed by either party. In any event, the issue in this case is not whether respondent's employer could provide accommodation but, rather, whether respondent is substantially incapacitated for the performance of her duties.

13. The various medical reports respondent offered in support of her application, which were summarized by CalPERS's medical expert, did not specifically apply the CalPERS disability standard set forth in the *Mansperger* and *Hosford* cases. The one medical report that respondent did enter into evidence, the 2019 Luciano Report, was one in which the doctor specifically stated he was not rendering a medical opinion regarding whether respondent was capable of performing her usual and customary work duties.

## **Disposition**

14. Respondent failed to sustain her burden of establishing by competent medical evidence that she is incapacitated physically for the performance of her usual job duties, as required under Government Code sections 20026 and 21150. (See Factual Findings 1 through 34, and Legal Conclusions 1 through 13.) Therefore, the application for industrial disability retirement of respondent Stephanie L. Ortiz was properly denied.

## ORDER

CalPERS's determination to deny respondent Stephanie L. Ortiz's application for disability retirement is affirmed. The appeal filed by respondent Stephanie L. Ortiz is denied.

DATE: January 30, 2020

DocuSigned by:  
*Jeremy Cody*  
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JEREMY CODY

Administrative Law Judge

Office of Administrative Hearings