

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Disability Retirement of:

MYRIAM L. ZECH

Respondent,

and

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

Respondent.

Agency Case No. 2019-0559

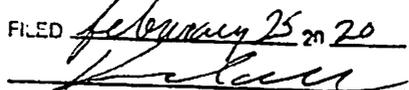
OAH No. 2019081142

PROPOSED DECISION

Administrative Law Judge Regina Brown, State of California, Office of Administrative Hearings, heard this matter on January 27, 2020, in Oakland, California.

Rory J. Coffey, Senior Staff Attorney, represented complainant California Public Employees' Retirement System (CalPERS).

Stanley R. Apps, Attorney, represented respondent Myriam L. Zech, who was not present at the hearing.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED February 25, 2020


David Rose, Staff Counsel, represented respondent California State Water Resources Control Board.

The matter was submitted for decision on January 27, 2020.

FACTUAL FINDINGS

Jurisdictional Matters

1. In approximately 1999, respondent Myriam L. Zech (respondent) was employed by respondent California State Water Resources Control Board (CSWRCB) as a water resource control engineer. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150. She has the minimum service credit necessary to qualify for retirement.

2. On September 19, 2018, respondent signed a disability retirement application with CalPERS based on a "neurological (neuritis on left side of body) condition." On March 28, 2019, CalPERS denied the application because it had determined that respondent was not permanently disabled or incapacitated from performance of her duties as a water resource control engineer with CSWRCB at the time the application was filed.

3. Respondent filed a timely appeal and requested an administrative hearing.

4. Keith Riddle filed the Statement of Issues in his official capacity as Chief of CalPERS's Disability and Survivor Benefits Division.

Job Duties

5. Respondent's job duties as a water resource control engineer with CSWRCB, among other things, included: managing projects primarily within the Departments of Defense and Energy cleanup program and the Site Cleanup Program; performing engineering and other technical work related to overseeing the investigation and cleanup of pollutants in soil and water; reviewing, evaluating, and commenting on the acceptability of the subsurface investigations remediation system performance effectiveness; attending regular meetings and consulting with other agencies; inspecting sites; presenting at public meetings; and conducting enforcement activities.

Respondent's Neurological Condition

6. For the past decade, respondent has had a history of multiple outbreaks of shingles (herpes zoster virus (VZV)) on her right torso and leg, with no specific diagnosis. In April 2018, she had a severe outbreak of VZV, on the left side of her chest, upper abdomen and hip area and experienced severe pain. She was unable to work due to extreme pain evoked by sensitivity to light touch (allodynia). She was treated with antivirals and an anticonvulsant. The rash went away; but the allodynia persisted and she was pain-free only if no one or nothing touched her skin. Respondent's condition was diagnosed as recurrent "post herpetic neuralgia (PHN)" after VZV. She has been evaluated and/or treated by her general practitioner, an acupuncturist, a neurology specialist, and an allergy specialist, and she has had thoracic epidural injections and other procedures with no change in her condition.

IME Conducted by Neurologist Michael M. Bronshvag, M.D.

7. On March 12, 2019, neurologist Michael M. Bronshvag, M.D., conducted an independent medical examination of respondent, at the request of CalPERS, and submitted a report. Dr. Bronshvag also testified at hearing.

8. During the physical examination of respondent, Dr. Bronshvag did not observe active VZV; however, respondent requested that he not palpate or rub the left side of her abdomen or left hip area because of the allodynia. The skin appeared normal to Dr. Bronshvag and he noted no sensory or motor neurological deficits. Dr. Bronshvag found respondent's description of her condition to be credible, plausible, and believable.

9. Dr. Bronshvag diagnosed respondent with, among other things, the following: (1) Episode of left-sided thoracoabdominal skin disease – 2018, which certainly “looks exactly” like VZV; (2) history of previous recurrent skin rash diagnosed as VZV and apparently cultured as such –shingles/VZV- largely involving the right side of the abdomen over the past ten years; and (3) allodynia which respondent has described as having been present with previous attacks – the allodynia characteristically “goes away” in a delayed fashion, but the VZV returns the next year. Dr. Bronshvag did not have a basis for specifically making a diagnosis of a demonstrable underlying disease for the VZV or allodynia.

10. Dr. Bronshvag opined that, at the time of the examination, respondent was only able to work up to two hours per day because of her allodynia. After reviewing the physical requirements of her job description, Dr. Bronshvag opined that respondent could only stand, walk, kneel, bend, twist, reach, push, pull, perform fine

manipulation and repetitive use; lift, and carry for up to two hours. He concluded that respondent was unable to perform her full job duties at the time.

11. In his report, as to the issue of whether respondent's condition is substantially incapacitating, Dr. Bronshvag concluded that she was incapacitated by the VZV and allodynia from April to August 2018, and at the time of the hearing, she remained incapacitated by the residual PHP and post herpetic allodynia which persisted. Dr. Bronshvag opined that respondent would be able to return to work in three months; but he could not estimate whether she would have a recurrence. Dr. Bronshvag acknowledged that he did not have all of respondent's medical records which, "would be of importance relevant" to the question of her future permanent incapacity. Also, Dr. Bronshvag wrote that with future attention to her disorder by her treating doctors they might come up with a treatment because there are "some medicines" in the news that prevent recurrent zoster in a percentage of the public. Dr. Bronshvag concluded that, "it is at the very least premature to state that [respondent] will not be able to return to work within the next three to six months."

12. At hearing, Dr. Bronshvag acknowledged that respondent was substantially incapacitated from April to August 2018; she continued to be substantially incapacitated during his examination on March 12, 2019, and she was not able to return to work for at least two additional months thereafter. Therefore, she would have met the definition of being disabled for 12 consecutive months. However, Dr. Bronshvag opined that it is reasonable to expect someone with a neurological condition, such as respondent, to make a complete recovery.

Dr. Bronshvag also recognized respondent's treating physician, identified below, as an expert in this field.

Treating Neurologist Michael Charles Rowbotham, M.D.

13. Michael Charles Rowbotham, M.D., is the former Scientific Director and Senior Scientist and Chief Research Officer for California Pacific Medical Center Research Institute, Sutter Health (Sutter Health). Dr. Rowbotham obtained his M.D. from the University of California, San Francisco, in 1979. He became board certified in neurology in 1989. His specialization is chronic pain management due to nerve damage and he has conducted extensive research and written several articles on PHN. Dr. Rowbotham testified at hearing.

14. Dr. Rowbotham began treating respondent in the Summer of 2019. He described respondent as having a severe case of PHN with substantial nerve damage. Dr. Rowbotham explained that PHN causes a deep and superficial burning and a feeling of an electric shock to the skin with an extreme sensitivity to light touch. Dr. Rowbotham compared it to having a continuous bad sunburn where wearing any clothes over the area is intolerably painful and one has to keep the area uncovered and avoid anything touching the skin. According to Dr. Rowbotham, the damage is to the nerve of the skin of the affected area and it can affect the entire length of the nerve.

15. Dr. Rowbotham opined that respondent is substantially incapacitated from the performance of her duties and she is not capable of working six hours a day because it would increase her pain to work. Her sensory damage is permanent and

stationary and she will not get better. Dr. Rowbotham further opined that if there is a new treatment, then respondent might get better; but no treatment currently exists.¹

16. Respondent never returned to work after April 2018. Dr. Rowbotham prescribed lidocaine patches and she wears six at a time which provides temporary relief. She spends much of her day unclothed.

Ultimate Factual Finding

17. Dr. Rowbotham and Dr. Bronshvag agree that respondent suffers from PHN and allodynia caused by her most recent outbreak of VZV, which impacted her ability to work. They appear to disagree on whether her condition is permanent. The evidence is clear that after Dr. Bronshvag's examination, respondent continued to suffer from her debilitating condition for more than 12 months. In addition, Dr. Rowbotham, a preeminent expert in this area, testified that due to her neurological condition, respondent cannot perform her job duties and she will not get better without a new treatment which does not yet exist. Therefore, respondent has provided persuasive medical opinion to establish that her neurological condition substantially incapacitated her from the performance of her usual and customary duties as a water

¹ In 2007, Dr. Rowbotham co-authored a clinical note entitled, "Relief of Post-Herpetic Neuralgia by Surgical Removal of Painful Skin: 5 Years Later." Dr. Rowbotham reported on a PHN patient's results of post-surgery evaluations over a five-year period. Initially, they reported evidence of benefit in the form of reduced pain by surgically removing the painful skin as a treatment for chronic PHN. However, over time, the pain increased and exceeded the pre-surgery levels despite increased medication use.

resource control engineer with CSWRCB, and her disability is expected to last at least 12 consecutive months.

LEGAL CONCLUSIONS

1. A CalPERS member who becomes "incapacitated for the performance of duty" shall be retired if she possesses the required credited service. (Gov. Code, § 21150.) The terms "disability" and "incapacitated for performance of duty" as a basis of retirement under the Public Employees' Retirement Law means "disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death . . . on the basis of competent medical opinion." (Gov. Code, § 20026.) To determine whether an applicant is "incapacitated for performance of duty," the courts look to whether the applicant is disabled from performing the substantial range of his or her usual duties. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.) A finding of incapacity for duty must be made "on the basis of competent medical opinion." (Gov. Code, § 21026.) The member has the burden of proving incapacity.

2. Competent medical opinion established that applicant's neurological condition substantially incapacitated her from the performance of her usual and customary duties as a water resource control engineer with CSWRCB within the meaning of Government Code section 20026, and the condition has lasted at least 12 consecutive months since respondent filed her application for disability retirement.

3. Cause exists to reverse CalPERS's denial of respondent's disability retirement application, as set forth in Factual Findings 5 through 17.

ORDER

The application of Myriam L. Zech for CalPERS disability retirement is granted.

DATE: February 24, 2020

DocuSigned by:
Regina Brown
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REGINA BROWN

Administrative Law Judge

Office of Administrative Hearings