

**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:**

**VIVIAN A. HOGGE and ELK GROVE UNIFIED SCHOOL  
DISTRICT, Respondents**

**Agency Case No. 2020-1082**

**OAH Case No. 2021010059**

**PROPOSED DECISION**

On May 26, 2021, Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference from Sacramento, California.

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

Respondent Vivian A. Hogge (Hogge) appeared and represented herself.

Michelle Drake, Director of Food and Nutrition Services, Elk Grove Unified School District (EGUSD) appeared on behalf of respondent EGUSD.

Evidence was received and the record left open until May 27, 2021, to allow CalPERS' counsel to file, as a courtesy only, respondent Hogge's Exhibit Nos. A

through C. On May 27, 2021, CalPERS' counsel filed Exhibit Nos. A through C, which were admitted as administrative hearsay for the reasons stated on the record at hearing.

On May 27, 2021, the record was closed and the matter submitted for decision.

## **ISSUE**

Is Hogge permanently and substantially incapacitated from the performance of her usual job duties as a "Lead Food and Nutrition Services – Secondary" for EGUSD on the basis of an orthopedic (spine) condition?

## **FACTUAL FINDINGS**

### **Procedural History**

1. Hogge was employed by EGUSD for approximately 30 years, most recently as a "Lead Food and Nutrition Services – Secondary." By virtue of her employment, Hogge was a school miscellaneous member of CalPERS.

2. On December 23, 2019, Hogge signed and thereafter filed an application for service pending disability retirement, claiming disability on the basis of an orthopedic (spine) condition. Hogge retired for service effective March 3, 2020, and has been receiving service retirement benefits since April 1, 2020.

3. After obtaining and reviewing Hogge's available medical records and the report of an independent medical examination (IME), CalPERS determined that Hogge was not permanently and substantially incapacitated from the performance of her

usual job duties as a "Lead Food and Nutrition Services – Secondary" for EGUSD on the basis of an orthopedic (spine) condition. Thus, in an August 13, 2020 letter, CalPERS denied Hogge's application for disability retirement. By letter dated August 30, 2020, Hogge appealed CalPERS' denial.

4. On December 9, 2020, Keith Riddle, Chief of CalPERS' Disability and Survivor Benefits Division, in his official capacity, signed and thereafter filed the Statement of Issues for purposes of the appeal. The matter was then set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

### **Hogge's Work History and Injuries**

5. In 2010, Hogge injured her back at work while lifting a case of chili. She underwent spinal fusion surgery (anterior fusion of L5-S1), recovered at home for approximately six to eight weeks, and then returned to work. Although she continued to have residual back pain, she was able to perform her usual work duties.

6. On November 13, 2018, Hogge "stepped off" her job at EGUSD due to increased back pain and pain "going down [her] legs." Subsequently, on December 10, 2018, she fell at home and fractured the tibia bone in her left leg, necessitating surgery. That leg injury has since healed and does not cause her any current limitations. However, her back impairment persists, for which she has received consistent treatment from Sarah Zichella, P.A.,<sup>1</sup> who is affiliated with the practice of

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<sup>1</sup> P.A. is an abbreviation for Physician Assistant.

Dennis Michael Hembd, M.D.<sup>2</sup> Hogge was referred for physical therapy sessions, but has not received any additional back surgeries or pain injections since she stopped working. She never returned to work at EGUSD and ultimately applied for service pending disability retirement, as noted above.

### **Hogge's Present Symptoms**

7. Hogge is 60 years old. She testified to continued severe back pain, limiting her ability to lift, bend, squat, twist, or stoop. She also cannot sit for long periods of time before she has to get up and move around. She takes daily muscle relaxers and pain medication, and she can no longer drive due to the medication. Hogge has been found disabled due to her back condition for purposes of Social Security Disability Insurance Benefits and worker's compensation benefits in April 2020 and September 2020, respectively.

### **Duties and Physical Requirements of Hogge's Position at EGUSD**

8. As a "Lead Food and Nutrition Services – Secondary" for EGUSD, Hogge's basic function was as follows:

Under the direction of an assigned supervisor, plan, organize and participate in the operation of a middle or high school cafeteria including the preparation and serving of meals, cleaning of equipment and preparation area, ordering of food and supplies and computerized record-keeping, train and provide work direction to assigned staff.

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<sup>2</sup> M.D. is an abbreviation for Doctor of Medicine.

9. The position requires constantly (over six hours total in a workday) using hands repetitively and lifting or carrying up to 10 pounds; frequently (between three and six hours total in a workday) standing, walking, squatting, bending at the waist, twisting at the neck and waist, reaching above and below the shoulder, manipulating fine objects, using a keyboard and mouse, lifting and carrying between 11 and 50 pounds, and walking on uneven ground; and occasionally (up to three hours total in a workday) sitting, crawling, kneeling, climbing, bending at the neck, pushing and pulling, power grasping and simple grasping, lifting and carrying between 51 and 75 pounds, driving, and working at heights. Additionally, team lifting is encouraged for lifting heavier or oddly-shaped items within the foregoing job requirements.

## **Medical Opinions**

### **SARAH ZICHELLA, P.A.**

10. On January 21, 2020, Ms. Zichella completed a Physician's Report on Disability as well as a Work Status report. Ms. Zichella diagnosed Hogge with lumbar spondylosis and lumbar degenerative disc disease status post lumbar fusion surgery at L5-S1, based on examination findings of "constant low back pain – restricted range of motion" and pain running down Hogge's right leg. Ms. Zichella opined that Hogge is unable to lift more than 10 pounds frequently, push or pull more than 15 pounds, bend, squat, twist, or stoop. Hogge can only stand for up to 45 minutes before she has to change position, and she has to take a break every 45 minutes. Ms. Zichella noted that Hogge had achieved maximum medical improvement and that her restrictions were permanent.

## **INDEPENDENT MEDICAL EXAMINER ROBERT HENRICHSEN, M.D.**

11. On June 11, 2020, Robert Henrichsen, M.D., performed an IME of Hogge. Dr. Henrichsen has been a licensed physician for 53 years and is a board-certified orthopedic surgeon. He has significant experience in treating back conditions, including performing spinal fusion surgeries. He has also been performing IMEs for CalPERS since 2003.

12. As part of Hogge's IME, Dr. Henrichsen reviewed the CalPERS medical qualifications for disability retirement, Hogge's available medical records, and the duties and physical requirements of Hogge's position at EGUSD; obtained her medical history and report of symptoms; and performed a thorough physical examination of her lumbar spine and lower extremities. Following the IME, he prepared a report dated June 11, 2020, and a supplemental report dated July 28, 2020. He also testified at hearing.

13. Dr. Henrichsen diagnosed Hogge with a history of low back pain, a healed lumbar fusion at L5-S1, and lumbar spine degenerative disc disease. Additionally, he noted that Hogge reported pain and impairment of daily activities at severe levels ranging from eight to 10, present 100 percent of the time, which were not supported by the imaging studies, his physical examination, and the findings of Hogge's treating providers.

14. As for the imaging studies, 2017 and 2020 lumbar spine x-rays; a 2020 lumbar spine MRI; and a 2021 lumbar spine MRI, which Dr. Henrichsen reviewed at hearing, demonstrated a healed L5-S1 fusion and degenerative changes or "wear and tear." Dr. Henrichsen observed that such findings are normal for Hogge's age and do not reasonably support the alleged degree of symptoms. Although the 2021 MRI

suggested possible impingement of the descending left L4 nerve root, that finding was not clinically corroborated through extensive testing of the L4 femoral nerve on Dr. Henrichsen's physical examination. He explained that "imaging studies of any type demonstrate the static anatomy. Whether or not static anatomy is causing symptoms in an individual is determined by careful examinations."

15. The physical examination itself was relatively unremarkable; Hogge had a stable spine, normal gait, normal strength, normal neurological findings, no evidence of nerve impingement or radicular symptoms, and normal knees and legs with minimal atrophy of the left leg likely attributable to her prior fracture. The only significant findings were severely reduced ability to squat at 20 degrees and substantially reduced lower back range of motion, which Dr. Henrichsen found "troubling":

As to squatting, Dr. Henrichsen explained that individuals with lower back pain, but reasonable knee function can typically squat "almost normal." Hogge had a normal knee examination and notably did not have difficulty sitting in a chair with her knees flexed 90 degrees and then getting up from that chair. Thus, Dr. Henrichsen could not find a medical explanation for Hogge's severely reduced ability to squat.

As to lower back range of motion, Dr. Henrichsen could not find support for Hogge's substantial limitation based on the imaging studies or other portions of the physical examination. Moreover, he observed that less than a month after the IME, Dr. Hembd's treatment notes reflected that Hogge's lumbar range of motion was only a little reduced.

16. Finally, Dr. Henrichsen considered Ms. Zichella's January 2020 opinion, but noted that it was unsupported by significant objective findings and relied substantially on Hogge's subjective complaints of pain to impose prophylactic

restrictions. Although Ms. Zichella also referenced Hogge's restricted lower back range of motion, Dr. Henrichsen deemed that finding suspect for the reasons discussed above. Moreover, he opined that restricted range of spine motion alone was insufficient to find permanent disability.

17. In sum, Dr. Henrichsen concluded that Hogge was not permanently and substantially incapacitated from performing her usual job duties at EGUSD on the basis of an orthopedic (spine) condition. He explained that he always considers an individual's subjective complaints and symptoms during an evaluation, but also looks for reasonable correlation of such symptoms with the medical evidence and objective clinical findings. Here, although Hogge was cooperative with the IME, he found her symptoms "seriously in excess" of the objective findings on imaging studies and physical examination.

## **Analysis**

18. Dr. Henrichsen's opinion that Hogge is not permanently and substantially incapacitated due to her orthopedic (spine) condition is persuasive. It was supported by a thorough review of Hogge's medical records and a detailed physical examination, and he persuasively explained the factual bases for his conclusions and opinion.

19. Ms. Zichella did not testify at hearing. Even assuming, without deciding, that her opinion may be considered for all evidentiary purposes, it is less persuasive. It is supported by minimal objective findings and relies heavily on Hogge's subjective complaints, which are insufficient by themselves to find disability. Moreover, unlike Dr. Henrichsen, Ms. Zichella is a physician assistant and not a board-certified orthopedic surgeon. Thus, Dr. Henrichsen's specialist opinion is entitled to greater weight.

20. Finally, although Hogge was found disabled for purposes of worker's compensation and Social Security benefits, those findings are not binding in this matter. CalPERS must determine applications for disability retirement under its own rules and legal standards, which differ from those of other government agencies and programs.

21. In sum, Hogge has not met her burden of demonstrating that she is permanently and substantially incapacitated from performing her usual duties at EGUSD due to an orthopedic (spine) condition. Consequently, her appeal must be denied.

## LEGAL CONCLUSIONS

1. As the applicant, Hogge has the burden of proving by a preponderance of the evidence that she is entitled to CalPERS disability retirement. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that [s]he is asserting"]; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) A preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

2. "'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, or in the case of a local safety member by the governing body of the contracting

agency employing the member, on the basis of competent medical opinion." (Gov. Code, § 20026.)

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.)

3. Based on the Factual Findings as a whole, and specifically, Factual Findings 18 through 21, Hogge has not demonstrated by a preponderance of the evidence that she is permanently and substantially incapacitated from performing her usual duties as a "Lead Food and Nutrition Services – Secondary" for EGUSD on the basis of an orthopedic (spine) condition. Consequently, her appeal must be denied.

## ORDER

The appeal of respondent Vivian A. Hogge is DENIED. CalPERS' decision to deny Hogge's application for disability retirement is AFFIRMED.

DATE: June 15, 2021

*Wim vanRooyen*

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings