

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Statement of Issues
Against:

RAQUEL NADAL-RODRIGUEZ,

Respondent,

and

OAKLAND UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. 2012-0100

OAH No. 2013071273

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter on December 9, 2013, in Oakland, California.

Staff Attorney Christopher C. Phillips represented petitioner California Public Employees' Retirement System.

Respondent Raquel Nadal-Rodriguez represented herself.¹

There was no appearance by or on behalf of respondent Oakland Unified School District.

The record closed and the matter was submitted on December 9, 2013.

¹ Respondent's first name is misspelled "Racquel" in the statement of issues.

FACTUAL FINDINGS

1. Respondent Raquel Nadal-Rodriguez is a Physical Education (PE) Attendant with the Oakland Unified School District (OUSD). By virtue of her employment, respondent is a member of the California Public Employees' Retirement System (CalPERS). On March 1, 2010, respondent signed and submitted to CalPERS an application for disability retirement. On the application form, respondent stated the nature of her disability as "Lower back problems." CalPERS denied the application on December 6, 2010. Respondent filed a timely appeal. On July 30, 2013, Anthony Suine, Chief of the Benefit Services Division of CalPERS, filed a statement of issues, and this hearing followed.

Respondent's job duties

2. When she last worked, respondent was a PE Locker Attendant at Oakland Technical High School. Her primary responsibilities were to clean and maintain the girls' locker room, to store and maintain equipment, to issue equipment and supplies to students, and to monitor the activities of students using the locker room. Respondent was also required to bring equipment out of the locker room but, after her injury in 2007, the students and teachers helped her perform that task. Her job required her to stand for the most of the day, to bend at the waist "occasionally" – defined by the job description as "up to three hours per day" – and to lift up to 25 pounds occasionally.

Respondent's employment and medical history

3. Respondent, now 51 years old, started work at OUSD in 1998. During the district's summer vacations, she worked at the Richmond YMCA.

4. Respondent's testimony at hearing regarding the history of her injuries was not completely clear. Based on her testimony and the medical records, it appears that she injured her back picking up boxes at the YMCA in 2001; that she had a back injury while working for the school district in 2004; and that she suffered her last and final injury on July 11, 2007, while working at the YMCA. In that incident, respondent slipped and fell while chasing a child, injuring her left leg and also her back. Respondent sought treatment at an urgent care clinic, where x-rays were taken and respondent was informed that she had a sprained ankle. Respondent continued working at the YMCA, and then returned to work at Oakland Technical High School when school started in the fall. Respondent continued to work for the school district for about a year; the exact date she stopped working, and the circumstances which caused her to stop working, were not established. Respondent later told evaluator William R. Stearns, M.D., that she continued working for the YMCA for about three years. It appears that, since then, respondent has not worked in any capacity for any employer.

5. Since 2010, respondent has received chiropractic care from Steve Camenson, D.C., and Thomas Vamvouris, D.C., and pain management from Hessam Noralahi, M.D. At the present time, the only treatment respondent is receiving is medication for chronic pain. The medications, respondent testified, are not helping. She is in constant pain. Respondent

is trying to cope with the pain so that she can "be normal and go to work," but she finds that she cannot.

Medical opinions

6. Dr. Camenson submitted to CalPERS a Physician's Report on Disability, dated April 22, 2010, and Dr. Noralahi submitted a Physician's Report on Disability dated January 20, 2011.²

Dr. Camenson diagnoses respondent with a "lumbar sprain/strain" and a left ankle sprain/strain. He describes an October 23, 2007 MRI of respondent's back that revealed a "3 mm disc protrusion L3-4." Dr. Camenson writes that respondent cannot lift and carry more than five pounds and cannot push or pull more than five pounds. In Dr. Camenson's opinion, respondent is permanently incapacitated from performing her usual duties.

Dr. Noralahi's primary diagnosis is "left ankle." He states that a March 6, 2009 MRI revealed "anterior talofibular ligament slightly irregular consistent with old trauma." His secondary diagnosis is lumbar disc disease. Dr. Noralahi writes that a March 6, 2009 MRI of the lumbar spine revealed "mild bony and disc changes, 2 mm broad based L3-4 bulge with annular tear." In Dr. Noralahi's opinion, respondent is substantially incapacitated from performing her usual duties. He states that she is unable to stand for long periods, that she is precluded from repetitive bending or stooping at lockers, and that she cannot lift more than 10 pounds.

Neither Dr. Camenson nor Dr. Noralahi testified at hearing. Complainant timely objected to their reports as hearsay, and they were admitted pursuant to Government Code section 11513, subdivision (d). That section states that "hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action."

7. Dr. Stearns, a board certified orthopedic surgeon, examined respondent on October 16, 2010, at the request of CalPERS, and prepared a report that bears the same date. He also prepared a supplemental report dated March 15, 2011, and testified at hearing.

8. At the October 2010 examination, Dr. Stearns took a history from respondent; reviewed the medical records that were sent to him, which included Dr. Camenson's April 2010 report; reviewed respondent's job description and a description of the physical requirements of her job; and performed a physical examination. Dr. Stearns found that respondent was a poor historian. Upon examination, Dr. Stearns found evidence of back

² The evidence also includes the first page of another Physician's Report on Disability; the second page is missing, and that is the page that calls for the physician's opinion and signature. The author of the one-page report is not clear and the report is given little weight.

spasms and trunk deviation, but no objective evidence of nerve compression. He also found evidence of symptom embellishment, in that some of respondent's complaints or responses to examination had no physiologic basis. With respect to respondent's left ankle, Dr. Stearns felt that her ankle pain was referred from her low back.

Dr. Stearns concluded that respondent was temporarily disabled from performing her usual duties, and would remain so for the next three months. He found nothing in his examination of respondent or her medical records, including the report of the 2007 MRI, to support a conclusion that she is permanently disabled from performing her usual duties.

9. In his supplemental report, Dr. Stearns reviewed Dr. Noralahi's January 20, 2011 report, which postdated his October 2010 examination.

In light of the 2009 MRI of respondent's left ankle, Dr. Stearns changed his opinion that respondent's ankle pain was referred from her back. Nevertheless, he concluded that

chronic ankle sprains without instability rarely cause impairment or disability. In this case, having reviewed her job description, I find no reason to consider [respondent] incapacitated from her regular work due to her left ankle.

Dr. Stearns's opinion on this point is persuasive. After her 2007 injury, respondent continued to work for the school district for a year, and for the YMCA for another three years. In her disability retirement application, respondent did not identify her left ankle as a source of disability.

Dr. Stearns also addressed the 2009 lumbar spine MRI findings that Dr. Noralahi described in his report. Dr. Stearns concluded that

the abnormal MRI findings . . . are within the range of normal findings in asymptomatic populations. I did find evidence of muscle spasms and I consider that justification for a temporary disability to the degree I have described below. Based on my examination and review of the medical records available to me, I do not find evidence of permanent incapacity due to her low back.

Dr. Stearns opined that respondent was temporarily disabled from October 13, 2010, through January 13, 2011, but was not permanently incapacitated from performing her usual duties.

10. At hearing, Dr. Stearns testified that the MRI findings concerning respondent's lumbar spine are within the normal range for adults. In his opinion, the findings do not explain respondent's complaints of pain, as MRI studies of asymptomatic adults reveal similar conditions. His testimony is persuasive.

11. Dr. Stearns's opinion that respondent is not permanently disabled from performing her usual duties is more persuasive than the contrary opinions of Dr. Camenson and Dr. Noralahi. Respondent worked for over a year after her 2007 injury. To the extent that she could not perform some of her duties, the teachers and students at her school accommodated her limitations. The circumstances under which respondent stopped working for the school district are not clear, and she continued to work for the YMCA for several years after that. Respondent's physical examination demonstrated symptom embellishment, a finding not addressed by Dr. Camenson or Dr. Noralahi. Respondent's lumbar spine MRI is consistent with MRI findings of asymptomatic adults, an issue not addressed by Dr. Camenson or Dr. Noralahi. And, as a board certified orthopedic surgeon, Dr. Stearns's qualifications for assessing respondent's orthopedic condition are stronger than those of Dr. Camenson and Dr. Noralahi. While respondent had a period of temporary disability, the evidence does not establish that she is permanently disabled from performing her duties, or that her disability will be of an extended and uncertain duration.

Other evidence

12. On June 26, 2013, respondent was found eligible for social security disability benefits. The Social Security Administration's finding of disability is not binding on CalPERS, which was not a party to that proceeding. The medical opinions described in the Social Security Administration's decision are hearsay, and cannot support a finding of disability in this proceeding.

LEGAL CONCLUSIONS

1. A miscellaneous member of CalPERS who becomes "incapacitated for the performance of duty," and who has sufficient service credit, shall be retired. (Gov. Code, § 21150.) The term "incapacitated for the performance of duty" is defined by the Public Employees' Retirement Law to mean "disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion." (Gov. Code, § 20026.) To determine whether an applicant is "incapacitated for the performance of duty," the courts look to whether the applicant is substantially disabled from performing her usual duties. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876; accord *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.)

2. The burden of proof is on respondent. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691.)

3. To meet her burden, respondent must establish by competent medical evidence that she is incapacitated for the performance of duty within the meaning of Government Code section 21150. Respondent did not meet her burden. Under Government Code section 11513, subdivision (d), the hearsay medical reports of Dr. Camenson and Dr. Noralahi are not sufficient to support a finding that respondent is incapacitated for the performance of duty.

4. Even if the reports of Dr. Camenson and Dr. Noralahi were admitted as direct evidence, however, their opinions are not as persuasive as the opinion of Dr. Stearns. (Finding 11.) Respondent had a period of temporary disability. The evidence fails to establish, however, that respondent's disability is permanent or of an extended and uncertain duration.

ORDER

The application for disability retirement of respondent Raquel Nadal-Rodriguez is denied.

DATED: February 21, 2014

A handwritten signature in black ink, appearing to read 'D. L. Benjamin', is written over a horizontal line.

DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings