

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:

LISA TREVINO-ANGELO,

Respondent,

and

DEPARTMENT OF MOTOR VEHICLES,

Respondent.

Case No. 9354

OAH No. 2013070573

PROPOSED DECISION

This matter was heard before Dian M. Vorters, Administrative Law Judge, Office of Administrative Hearings, State of California, in Sacramento, California, on March 11, 2014.

Rory J. Coffey, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS and Petitioner).

There was no appearance by or on behalf of Lisa Trevino-Angelo.

There was no appearance by or on behalf of the Department of Motor Vehicles (DMV).

Evidence was received and the case was submitted for decision on March 11, 2014.

ISSUE

Is respondent permanently disabled or incapacitated from performance of her duties as a Personnel Specialist for DMV, on the basis of internal/rheumatology (myofascial pain syndrome, chronic migraines, chronic fatigue syndrome, diabetes) and psychological conditions?

FACTUAL FINDINGS

1. CalPERS informed respondent of its determination to deny her application by letter dated March 10, 2009. Respondent requested an appeal of the denial by letter dated April 2, 2009. Anthony Suine, Chief, Benefit Services Division, filed the Statement of Issues against respondent on July 16, 2013, in his official capacity.

2. Respondent was served with the Statement of Issues and Notice of Hearing by electronic and certified mail on October 31, 2013. Notice was sent to the address provided in her application for disability retirement. The Notice of Hearing informed respondent of the time and place set for a hearing on her appeal. On March 9, 2014, OAH received email correspondence from respondent stating that she would not be attending the hearing set for March 11, 2014. This correspondence was marked for identification as Exhibit 14. Despite proper service of the Notice of Hearing, respondent did not appear and was not otherwise represented at hearing. Compliance with Government Code sections 11505 and 11509 was satisfied and the matter proceeded as a default pursuant to Government Code section 11520.

Respondent's Employment History

3. Respondent began working for the state in 1991 as a seasonal worker and became full-time with the DMV in 1992. Her most recent job classification was personnel specialist. She began working a modified half-time schedule in 2001. Respondent is currently 43 years of age.

Duties of a Health Record Technician II Supervisor

4. As set forth in DMV's Position Duty Statement, a Personnel Specialist, under supervision, is responsible to perform personnel transactions as follows: 1) Prepare personnel/employee action requests for appointments, transfers, range changes, tax and address changes, leaves of absence, and separations (45 percent); 2) Receive, audit, and process attendance reports, payroll documents, health benefit forms, salary increase forms, probation reports, employment verifications, unemployment claims, and welfare investigation forms (20 percent); 3) Reconcile and update DMV automated leave system to correct vacation, sick, or other leave credits, audit and correct leave usage totals, and audit various other internal reports (15 percent); 4) Answer telephones and written correspondence from employees, managers, and other agencies regarding rights, salaries, and benefits (10 percent); and 5) Update controller's employment history data base and processing system payroll data base (10 percent).

Respondent's Disability Retirement Application

5. On July 18, 2008, respondent filed a Disability Retirement Election Application (Application) with CalPERS. She completed her Application as follows:

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- a. Respondent described her specific disability as:

"I have been suffering from myofacial pain syndrome, severe chronic migraines, chronic fatigue syndrome, severe anxiety and depression since about January 2000. I was diagnosed with Type II diabetes in February 2008. Occurred over several years, no preincident [*sic*] or injury"

- b. Respondent described her limitations/preclusions as follows:

"It is impossible to sit comfortably, write, key, use my hands, lift, squat, bend, stand, reach, walk, kneel, complete tasks, concentrate or hold a mouse, hold a pen, hold a phone in the crook of my neck or hand for even a small period of time without pain. Chronic pain and fatigue have made it impossible for me to concentrate and focus and my memory has been impaired." [Respondent attached two additional pages detailing her claimed disabilities.]

- c. Respondent stated that her injury affected her ability to perform her job as follows:

"I am suffering from constant widespread body pain and fatigue. It leaves me with limited ability to perform physical tasks and affects my concentration. I am chronically fatigued and have trouble focusing on tasks and am often overwhelmed by exhaustion. Sitting for short periods of time causes a deep throbbing ache in my neck and shoulders and low back. Pain is so great I cannot concentrate. I have forgotten how to do my job."

- d. Respondent was not working at the time she submitted her disability application. She had been on medical leave since January 26, 2007, and retired as of January 27, 2007.

- e. She also provided that because of chronic pain and fatigue, she was suffering from depression and severe anxiety, making it "impossible to get out of bed most days."

6. CalPERS arranged two Independent Medical Examinations (IME) of respondent. Patricia Wiggins, M.D., examined respondent on December 18, 2008, and reviewed medical records and two surveillance videos of respondent. Dr. Wiggins prepared an initial and a supplemental report of her findings for review by CalPERS. Benjamin Kaufman, M.D., examined respondent in or about January 2009, and reviewed medical records, and two surveillance videos of respondent. Both physicians opined that respondent was not disabled in any way for performance of her job duties.

7. By letter dated March 10, 2009, the Benefit Services Division of CalPERS notified respondent that based upon review of the medical records and IME reports, it had determined that her claimed physical and psychological condition was not disabling and that she was not substantially incapacitated from performing her duties as a Personnel Specialist with the DMV. As such, her Application was denied. She was notified of her employment options and right to appeal the decision within 30 days of the date of the denial letter. (Cal.Code Reg., tit. 2, §555-555.4) She timely filed her letter of appeal.

Dr. Patricia Wiggins' Evaluation of Respondent

8. On December 18, 2008, Dr. Wiggins, conducted an examination of respondent. Respondent reported numerous ailments as stated in her Application. She reported a history of back strain, migraine, and fatigue. She was unable to tolerate most pain medications and was reportedly taking Motrin and Metformin for diabetes. She had been seen by a psychologist and psychiatrist and was taking Serax for anxiety. She reported poor sleep. Her physical examination findings were normal, her weight was 117 pounds, and height was five feet. She reported that her weight was stable and appetite was good.

9. Based on her medical history, Dr. Wiggins diagnosed respondent with: 1) Claimed chronic fatigue and myofascial pain disorder, 2) Claimed chronic anxiety, social phobia, and depression, and 3) Claimed chronic recurrent migraine.

10. After reviewing the surveillance DVDs, Dr. Wiggins wrote a December 18, 2008 IME report. Her opinion as to whether there were specific job duties respondent could not perform are as follows:

According to the videos I have reviewed, these are at odds with what the patient is claiming she can do. The patient is observed in the videos being able to walk and bend. She is able to actively go in and out of stores, carry packages, carry a toddler ...She claims she is unable to cradle a phone or talk on the phone, or use a pencil, but is observed to talk for a prolonged period of time on a cell phone while watching a soccer game. It is my opinion there are no specific job duties [respondent] would be unable to perform.

11. Dr. Wiggins did not feel that respondent fully cooperated with the examination. She stated:

It is my opinion she exaggerated her symptoms. At times she is seen clutching her neck and upper trapezius. At other times she was seen and observed walking and moving normally. She refused to even try doing the Jamar grip strength. It is my opinion she is exaggerating her physical complaints.

In Dr. Wiggins' opinion, if respondent actually had chronic migraines, myofascial pain, chronic anxiety, social phobia, and depression, all were pre-existing conditions and not "caused, aggravated or accelerated by her employment at DMV."

12. After reviewing Dr. Kaufman's January 2009 IME Report, Dr. Wiggins' opinions remained constant. She stated in her February 3, 2009 Supplemental Report, "It is my clinical impression that [respondent] was not cooperating fully with the examination, and that symptoms were exaggerated and certainly incongruous with the reviewed surveillance videos."

Dr. Benjamin Kaufman's IME of Respondent

13. In January 2009, Dr. Kaufman conducted an IME of respondent. He interviewed and examined respondent, and reviewed medical records, two surveillance videos, and Dr. Wiggins' IME report.

14. Respondent reported numerous ailments as stated in her Application and interview with Dr. Wiggins. She reported being fearful of leaving her home even to check her mail box because she did not want neighbors to talk to her. Respondent reported being unable to drive outside of her "comfort zone" or immediate neighborhood, or lift anything of any weight including her baby or a "coffee cup." During the interview, she read from a list of restrictive symptoms she had prepared on five by seven note sheets.

15. Based on all available records and his IME encounter with respondent, Dr. Kaufman's diagnosis was, "Rule out malingering versus Somatoform disorder."

16. Dr. Kaufman wrote a January 9, 2009 IME report, in which he responded to CalPERS' specific questions. He opined that there were no duties respondent could not perform, either physically or mentally, as described in her duty statement and she was not substantially incapacitated by either a mental or emotional disability. Dr. Kaufman stated that respondent was "dramatizing symptoms that are not present when she is unobserved as demonstrated in the video surveillance."

Related Conviction

17. On July 31, 2009, the Sacramento County District Attorney filed a complaint against respondent for: 1) Between July 2008 and April 2009, making a fraudulent claim for an allowance in violation of Penal Code section 72, and 2) Between January and April 2009, making false material statements to receive benefits from the public employment retirement system in violation of Penal Code section 20085, subdivision (a)(1); both misdemeanors. Respondent pled not guilty and the matter proceeded to jury trial in October 2012. On November 1, 2012, in the Superior Court of California, County of Sacramento, Case No. 09M07633, a jury found respondent guilty of both counts. On January 4, 2013, respondent was sentenced to 40 days in jail, three years' probation, and fines. The decision became final on December 13, 2013.

LEGAL CONCLUSIONS

1. By reason of her employment, respondent is a state miscellaneous member of CalPERS and eligible for disability retirement under Government Code section 21150.

2. To qualify for disability retirement, respondent must prove that, at the time she applied for disability retirement, she was “incapacitated physically or mentally for the performance of ... her duties in the state service.” (Gov. Code, § 21156.) As defined in Government Code section 20026,

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, 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.

3. The burden is on respondent to present competent medical evidence to show that, as of the date she applied for disability retirement, she was substantially unable to perform the usual duties of a Personnel Specialist. (*Harmon v. Bd. of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691.)

4. Collateral estoppel, or issue preclusion, prevents parties or their privies from relitigating issues litigated and decided in a prior proceeding. (*Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601, 604; *Gabriel v. Wells Fargo Bank, N.A.* (2010) 188 Cal.App.4th 547, 556.) For an issue to be precluded from relitigation, the following requirements must be satisfied: (1) the issue must be identical to an issue decided in a prior proceeding; (2) the issue must have been actually litigated in the prior proceeding; (3) the issue must have been necessarily decided in the prior proceeding; (4) the decision in the prior proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must have been a party to or in privity with a party to the prior proceeding. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1077; *Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481.)

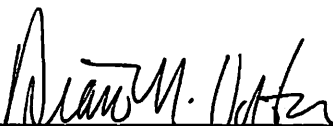
Analysis of Disability Claim

5. Respondent did not testify at hearing. Two IME physicians found respondent’s stated impairments to be incongruent with surveillance video. Subsequent to that, respondent’s claim of disability, as stated in her July 19, 2008 Application and supporting actions, was found to be fraudulent by a jury in November 2012. All of the requirements for collateral estoppel are met and the convictions are conclusive evidence that respondent’s claim of disability is false. Respondent is not substantially impaired by either a physical or psychological condition for performance of her usual and customary duties as a Personnel Specialist for DMV. Her Application, therefore, is properly denied.

ORDER

The application of respondent Lisa Trevino-Angelo, for disability retirement is
DENIED.

DATED: April 4, 2014



DIAN M. VORTERS
Administrative Law Judge
Office of Administrative Hearings