

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of Application for
Disability Retirement of:

MARK GALLEGOS,

Respondent,

and

DEPARTMENT OF WATER RESOURCES,

Respondent.

Case No. 2011-0216

OAH No. 2014060401

PROPOSED DECISION

Administrative Law Judge Perry O. Johnson, State of California, Office of Administrative Hearings, heard this matter in Walnut Creek, California, on November 4, 2014.

Neither respondent Mark Gallegos, nor any representative appointed by him, appeared for the hearing in this matter. And, before the date of the hearing, respondent Department of Water Resources notified petitioner that the agency would not participate in the hearing of this matter.

Senior Staff Counsel Elizabeth Yelland, California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, California 95811, represented Mary Lynn Fisher, Chief, Benefit Services Division, California Public Employees' Retirement System (petitioner)

On November 4, 2014, petitioner submitted the matter and the record closed.

ISSUE

When he filed an application for disability retirement was respondent Mark Gallegos substantially disabled or incapacitated for performance of the duties expected of an individual similarly situated in the civil service classification of Administrative Officer I with the Department of Water Resources so as to render him eligible for disability retirement in accordance with Government Code section 20026?

FACTUAL FINDINGS

1. On April 8, 2014, Mary Lynn Fisher, in her official capacity as Chief, Benefit Services Division, California Public Employees' Retirement System, made and filed the Statement of Issues against respondents Mark Gallegos (respondent Gallegos) and the Department of Water Resources.
2. Upon a determination that the Statement of Issues and the Notice of Hearing had been properly served upon respondents Gallegos and the Department of Water Resources in accordance with Government Code sections 11504, 11505 and 11509, the matter proceeded as a default hearing under Government Code section 11520.
3. Respondent Gallegos was employed as an Administrative Officer I with the California Department of Water Resources (respondent Water Resources). By virtue of the employment, respondent Gallegos was a miscellaneous member of CalPERS in accordance with Government Code Section 21150.
4. On May 28, 2010, respondent Gallegos signed an application for service pending disability retirement. The application's section captioned "Disability Information" sets out that respondent Gallegos was disabled because of orthopedic disorders, which he described as being: "lower back injury; nerve damage; bulging disk(s)." The application was accepted to mean that respondent Gallegos advanced as the basis for disability retirement orthopedic conditions involving the lumbar spine (low back).
5. At the time of filing the application for service pending disability retirement, respondent Gallegos had attained the minimum service credit to qualify for retirement based upon his years of service. Effective July 1, 2010, respondent Gallegos retired for service, and since that date he has been receiving a retirement allowance.
6. Respondent Gallegos is now 60 years old. At the time that he filed the application for service pending disability retirement, respondent Gallegos was 56 years old.
7. The duties of an Administrative Officer I with respondent Water Resources are set out in a two-page Job Description and Position Classification, dated May 1, 2010, and a form titled "Physical Requirements of Position/Occupation Title" prepared May 28, 2010, and signed by an Administrative Officer III for respondent Water Resources.

The work of the civil service classification as held by respondent Gallegos revolved around planning, organizing and directing duties, responsibilities and functions in respondent Water Resources' Business Management Services division. Two dominant functions are critical to performance of the classification, namely warehousing and procurement of materials and supplies for the Delta Field Division of the agency.

Thirty five percent of the overall work in the classification pertains to warehousing. Under that category of duties, functions and responsibilities, the classification holder *supervises* all warehousing functions, inventory control, storage of parts, chemical, equipment and supplies. And 35 percent of the work as an Administrative Officer I involves that civil service employee to *supervise* procurement of all materials for the Delta Field Division of the agency. The remaining 30 percent of the classification pertains to recommending "hires of purchasing and warehousing staff"; preparing Business Services' budget documents and controlling expenditures; and, in case of emergency situations taking direct responsibility for all Business Management Services activities.

The "special requirements" of the classification turn on the position holder to "have stamina and ability to sit at a desk, typewriter, and/or computer for extended periods of time." An Administrative Officer I must possess "manual dexterity" in order "to operate office machines. The civil service employee must have sufficient strength to lift 40 pounds. And the person must be able to bend, stoop, kneel, walk, and climb a ladder.

According to the form titled "Physical Requirements of the Position/Occupational Title," the only activities that the work performed by respondent Gallegos could be determined to occur "constantly," that is over six hours each day, included "repetitive use of hands, keyboard use, computer] mouse use, and [general] lifting/carrying."

Activities of an Administrative Officer I that occurred "frequently," that is three to six hours per day were "lifting/carrying" weights of "zero to 10 pounds," and "11 to 15 pounds"; simple grasping; reaching below the shoulder; twisting the waist; twisting the neck; bending the waist; bending the neck; standing; and sitting.

Activities of an Administrative Officer I that occurred "occasionally," that is up to three hours, were "lifting/carrying" weights of "25 to 50 pounds"; power graphing; fine manipulation; reaching above the shoulder; squatting, climbing, kneeling, and walking:

And activities that "never" occurred for the position of an Administrative Officer I were: running, crawling "lifting/carrying" weights of "51-75 [pounds]," "76-100 [pounds]," and "100 [pounds] plus," walking on uneven ground, working on heavy equipment, working at heights, operation of foot controls or repetitive movement, and working with bio-hazards.

8. Because respondent Gallegos failed to appear at the hearing of this matter, no competent, non-hearsay evidence regarding either the nature of his specific job duties, which he was performing at the time of his application for disability retirement, or the range of his

physical limitations when he sought disability retirement status, was available to be weighed against the evidence offered by petitioner.

9. And because he was not present for the proceeding, respondent Gallegos did not present any expert witness to offer opinion evidence in support of his application at the hearing of this matter.

10. Petitioner called Joseph B. Serra, M.D., to offer expert witness testimony at the hearing of this matter. Dr. Serra's testimony was comprehensive, reasonable and persuasive.

Dr. Serra is an orthopedic surgeon, who has been board certified since 1968. Dr. Serra has had an extensive medical practice, which includes teaching orthopedics at a Doctorate program for Physical Therapy at the University of the Pacific and serving as an Adjunct Professor at Stanford University's Department of Emergency Medicine. And he has authored several professional publications on topics in orthopedic medicine.

On October 14, 2010, Dr. Serra performed a comprehensive examination of respondent Gallegos's body part that the respondent-applicant avers was impaired so as to require his disability retirement.

Approximately four months, two weeks after the date on which respondent Gallegos had filed his application for service pending disability retirement, and approximately three months, two weeks after the effective date of his service retirement, Dr. Serra prepared a report, on October 14, 2010, regarding that evaluating physician's examination and assessment of respondent Gallegos's lumbosacral spine (low back) .

11. At the hearing of this matter, Dr. Serra affirmed the nature and scope of his medical evaluation of respondent Gallegos. The evaluating physician found no reason to detract from, or minimize, the findings and determinations reached in the Independent Medical Examination report, dated October 14, 2010, that pertained to respondent Gallegos.

Dr. Serra was reasonable and persuasive regarding respondent Gallegos's ability to perform activities at work, as prescribed in respondent Water Resources 's duty statement for an Administrative Officer I and the CalPERS Physical Requirements of Position for an Administrative Officer I for respondent Water Resources.

Dr. Serra compellingly expressed that during his physical examination of respondent's low back, respondent Gallegos demonstrated he could move about "very freely," and that he was "able to get out of a chair, and get on and off of the examining table with ease." The independent medical evaluator's examination of respondent Gallegos's low back revealed no evidence of pelvic tilt, scoliosis or muscle spasm. Applicant had no consistent express pain to palpation and the soft tissues. And of importance, the examination found "no tenderness over the sciatic notch bilaterally." And the neurologic examination of the lower extremities revealed "motor function to be intact." Dr. Serra found the Lasegue's

test and the Trendelenburg test to be normal. And, respondent Gallegos exhibited heel and standing in a normal manner.

Dr. Serra noted in his report that on June 9, 2010, respondent Gallegos underwent an MRI study of his lumbar spine. The study revealed “moderate narrowing at the L3-4 and L5-Si vertebrae. And the study showed bulging disc at the L3-4 and L4-5 levels “with minimal hypertrophy of the ligamentum flavum causing a mild degree of spinal stenosis.” But, the MRI indicated “no evidence of focal herniation or severe spinal stenosis.”

Dr. Serra made the following diagnosis for respondent Gallegos as a result of the October 2010 examination: “history of musculoligamentous strain of lumbosacral region; degenerative disc disease, lumbosacral spine. [n]o evidence of nerve root compression or radiculopathy. Lumbar spine-chronic unchanged, mild; and, no evidence of nerve root compression or radiculopathy, lower extremities.”

In the “Discussion” portion of the report, Dr. Serra concluded that respondent Gallegos “is capable of performing all duties of his usual and customary work activity as an Administrative Officer I.” And the evaluator answered, “no” to the question, “[i]s the member presently substantially incapacitated for the performance of his duties?”

Under the question, “[i]s the member cooperating with the examination and putting forth the best effort, or do you feel there is exaggeration of complaints to degree?,” Dr. Serra wrote, in pertinent part: “. . . his subjective complaints far outweigh any objective finding. Many of the findings on his physical examination were invalid due to inconsistency on the part of” respondent Gallegos.

Dr. Serra determined that by reason of the orthopedic condition affecting his low back, respondent Gallegos did not have an incapacity for performing job duties that were expected of his civil service classification. And Dr. Serra established that respondent Gallegos, at the time of his application for disability retirement, was not substantially incapacitated from performing the duties of an Administrative Officer I.

12. On the question of nature and extent of the actual disability impacting respondent Gallegos at the time of his May 28, 2010, application for disability retirement, the application asked, “[w]hat are your limitations/preclusions due to your injury or illness?” Respondent Gallegos wrote his answer as, “None at this time, but could change at any moment.” The position expressed by respondent Gallegos was contrary to the doctrine underpinning eligibility for disability retirement, namely, that an agency’s employee must be substantially incapacitated from performing his or her usual duties in order to be eligible for disability retirement. That doctrine goes on to require that the employee’s disability must be currently existing and not prospective in nature. And very importantly the civil service employee must be presently incapable of performing the duties of the position.

Ultimate Findings

13. At the time that he last performed duties as an Administrative Officer I, respondent Gallegos had conditions that involved his low back. But, the orthopedic condition did not warrant respondent Gallegos's disability retirement at a point in time when he filed the application for service pending disability retirement in May 2010. Nor, did the conditions render him disabled from the performance of his civil service classification by the date of his service retirement that was effective July 1, 2010.

LEGAL CONCLUSIONS

1. Government Code section 20026 provides, in pertinent part: "'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 . . . on a basis of competent medical opinion."

The section expressly vests jurisdiction to make disability retirement determinations with the CalPERS Board of Administration.

2. Government Code section 21152 prescribes:

Application to the board for retirement of a member for disability may be made by:

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

(b) The university if the member is an employee of the university.

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

(d) The member or any person in his or her behalf.

3. Government Code section 21154 prescribes that:

The application shall be made only (a) while the member is in state service 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

4. Government Code section 21156 sets out:

If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, 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, unless the member is qualified to be retired for service and applies therefore prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service. The governing body of a contracting agency upon receipt of the request of the board pursuant to Section 21154 shall certify to the board its determination under this section that the member is or is not incapacitated. The local safety member may appeal the determination of the governing body. Appeal hearings shall be conducted by an administrative law judge of the Office of Administrative Hearings pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of this title.

5. Respondent Gallegos has the burden of proving that he is “incapacitated for performance of duty because of disability determined by the retirement board to be of extended and uncertain duration.” (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691.)

The phrase “incapacitated from the performance of duties” means substantial inability to perform one’s usual duties in a particular position. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.)

An employee is not eligible to retire for disability retirement because he cannot perform certain duties that he may be occasionally called upon to perform. (*Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208.)

6. Petitioner offered the Board of Administration’s Precedential Decision No. 00-05 in the case titled “*In the Matter of the Application for Disability Retirement of Ruth A. Keck and Los Angeles County Schools (Glendora Unified School District)*.” The precedential decision is instructive. Among other things, the precedential decision notes that “it is clear

from case law that [a civil service member's] difficulty in performing certain tasks is not enough to support a finding of disability. An [government agency's employee] must be substantially incapacitated from performing his or her usual duties" in order to be eligible for disability retirement. Further, the precedential decision sets forth that "the disability must be presently existing and not prospective in nature. The [civil service employee] must be presently incapable of performing the duties of the position. Prophylactic restrictions that are imposed only because of risk of future injury are insufficient."

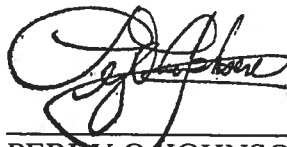
7. Petitioner sought and then received an objective, reasonably stated report of a medical examination from Dr. Serra, regarding respondent Gallegos's orthopedic ailment, which involved his low back. And petitioner reasonably determined that at the time that respondent Gallegos applied for service pending disability retirement and through the date of the last day in the civil service position of respondent Water Resources' Business Management Services division that respondent Gallegos was not substantially disabled or incapacitated for the performance of the duties expected of his civil service position.

8. Cause does not exist for granting the application of respondent Gallegos for disability retirement within the meaning of Government Code section 20026, other controlling statutory provisions and applicable case law.

ORDER

The application for disability retirement of respondent Mark Gallegos is denied.

DATED: November 20, 2014



PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings