

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Disability
Retirement of:

PATRICIA A. HUNT,

Applicant/Respondent

and

CALIFORNIA DEPARTMENT OF SOCIAL
SERVICES,

Respondent.

Case No. 8828

OAH No. 2011120046

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on May 19 and September 12, 2014, in Sacramento, California.

Cynthia A. Rodriguez, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Applicant Patricia A. Hunt represented herself on the first day of hearing, and was assisted by Kathleen Marie. Neither applicant nor anyone acting on her behalf appeared at the second day of hearing, and the matter proceeded without her.

No one appeared for or on behalf of respondent California Department of Social Services.

Evidence was received, and the record was kept open to allow the parties to submit simultaneous closing and reply briefs on October 13 and 27, 2014, respectively. An Order After Hearing giving the parties notice of those dates was served on September 12, 2014. Complainant's Closing Brief, which is marked as Exhibit 25, was filed on October 13, 2014. Applicant did not file a closing brief, and neither party filed a reply brief. The record was closed, and the matter was submitted for decision on October 27, 2014.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Nov. 24, 2014
C. Boddy

SUMMARY

This appeal is limited to determining whether applicant is permanently and substantially incapacitated for the performance of her usual job duties as a Licensing Program Analyst with the California Department of Social Services due to an orthopedic condition. Applicant applied for service pending disability retirement benefits on the basis of "WORK RELATED CUMULATIVE TRAUMA TO BOTH UPPER EXTREMITIES, HEAD, NECK & SPINE. 1998 & UP TO 2002." However, she presented no admissible medical evidence in support of her application at hearing. On the other hand, CalPERS's offered the medical reports and testimony of Robert K. Henrichsen, M.D., which support the conclusion that applicant is not permanently and substantially incapacitated for the performance of her usual job duties due to any orthopedic condition. Therefore, applicant's application for disability retirement benefits should be denied.

FACTUAL FINDINGS

Procedural History

1. On May 24, 2007, applicant signed, and CalPERS received, a Disability Retirement Election Application (application). In the application, applicant identified her specific disability as: "WORK RELATED CUMULATIVE TRAUMA TO BOTH UPPER EXTREMITIES, HEAD, NECK & SPINE. 1998 & UP TO 2002."

2. At the time applicant filed her application, she was employed by the California Department of Social Services as a Licensing Program Analyst. By virtue of her employment, applicant is a state miscellaneous member of CalPERS subject to Government Code section 21150, subdivision (a).¹

3. CalPERS obtained or received medical reports concerning applicant's claimed disability from competent medical professionals. After review of those documents, CalPERS determined that applicant was not substantially incapacitated for the performance of her duties as a Licensing Program Analyst with the California Department of Social Services at the time she filed her application.

4. Applicant was notified of CalPERS's determination and advised of her appeal rights by letter dated April 16, 2008.

¹ Government Code section 21150, subdivision (a), states: "A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076, 21076.5, or 21077." No evidence was introduced that applicant elected to become subject to Government Code sections 21076, 21076.5, or 21077.

5. Applicant filed a timely appeal from the denial of disability retirement by letter dated May 2, 2008, and requested a hearing.

6. Mary Lynn Fisher, Chief of the Benefit Services Division of CalPERS, filed the Statement of Issues in her official capacity on November 21, 2011.

7. On December 16, 2013, CalPERS served a Notice of Continued Hearing on applicant and the Department of Social Services.

8. This matter was called for hearing on the date and at the time and location stated in the Notice of Continued Hearing. No one appeared for or on behalf of the Department of Social Services, and an evidentiary hearing was conducted as a default proceeding, as to the Department of Social Services only, pursuant to Government Code section 11520.

Job Duties of a Licensing Program Analyst

9. According to the Duty Statement for the position of Licensing Program Analyst (LPA), an LPA is responsible for evaluating community care facilities which operate day care programs for children who require care and supervision because of their age and/or disabilities. The duties of the position include field work, such as on-site inspections and collateral visits to facilities in any area under the jurisdiction of the assigned regional office. During pre-licensing, annual/biennial, complaint, plan of correction, or caseload management visits, the LPA inspects the facility, reviews records, and interviews staff and children in care to determine if the facility is in compliance with regulations. For all types of visits, the LPA progressively learns to analyze more difficult complaints and situations and may act as a team leader on visits.

10. With regard to applications for licensure and orientations for new licensees, the LPA conducts or assists in conducting group orientations and provides licensing information to applicants, consults with each applicant in a formal one-on-one meeting, progressively learns to analyze all facets of an application, including each applicant's administrative, fiscal, staffing, building, and activity plans.

11. An LPA also has administrative and caseload management responsibilities. Such duties include analyzing policies and regulations, information related to workload program characteristics, and statistical data related to caseloads and production. An LPA also provides licensing information to applicants, licensees, other agencies, parents, and the general public.

12. With regard to an LPA's duties regarding administrative actions, the LPA progressively learns to analyze information gathered during visits, received from other agencies, including criminal record reports from the Department of Justice, and makes recommendations about appropriate administrative actions, including compliance plans, revocations, denials of applications, and exclusions of individuals.

History of Applicant's Injury

13. The following history of applicant's injury was taken by Dr. Henrichsen during an Independent Medical Examination he performed on February 6, 2008:

[Applicant] last worked in 2002. At that time she was a Program Analyst for the State of California. She worked in the evaluation of child care centers and a portion of her work would be going out into the field about two to three times per week to facilities and homes and making inspections. Sometimes repairs would be necessary and then she and/or a similar person in her work would go out and be certain that the repairs had been completed. At the office area she would make reports and summaries of her evaluations and her conclusions. Therefore, her work was both in the office and in the field. She would often work in the area of Modesto, River Bank [sic] and Oakdale, California.

Over the years of her work for the State of California she has had a gradual onset of a variety of symptoms. The symptoms have involved the upper extremities, the interscapular region and the neck. There is a history of three work related injuries, and to my understanding these are cumulative injuries.

In 1993, she had an injury involving her arms and hands. In 1998, there was a second injury involving both arms and hands with increased symptoms. In 2002, again her arms and hands were the affected areas. She eventually was declared permanent and stationary. She underwent vocational rehabilitation for life coach training, but she has not yet started that occupational work. That training took about one year, she explains, and approximately eight or nine months ago she initiated her application for CalPERS retirement.

She has had treatment with acupuncture which has been her best overall relief. She has had x-rays. She did have EMG/NCV study. She had about three or four physical therapy treatments in approximately 1995 with some benefit at most. She had some temporary improvement in symptoms. She also had a blanching or whiteness of the skin in that region, about the size of a silver dollar. She did not have additional injections as she did not wish to have more of the skin changes, and she explained with time that the skin blanching has abated.

She has not used upper extremity orthoses. She does not use any special cervical pillow but she has determined that if she uses a small pillow she has much less trouble than with a large pillow.

She did have an EMG/NCV study in the past accomplished by Michael Bronshvag, M.D., on September 10, 2002.

Medical Evidence

14. Applicant did not call any medical experts to testify at hearing. Instead, she introduced the results of a December 19, 2006 sleep study (Exhibit 82), an April 10, 2014 letter written by Stephen A. McCurdy, M.D., M.P.H., (Exhibit 89), an April 16, 2014 letter written by Kimberly A. Hardin, M.D., M.S., F.A.A.S.M., F.A.C.C.P. (Exhibit 90), and a March 13, 2014 letter written by David Lee, M.D. (Exhibit 91). Each of those exhibits was admitted as administrative hearsay only, and none of them, except for Dr. McCurdy's letter, included a physician's opinion that applicant is permanently and substantially incapacitated for the performance of her usual job duties.

15. Dr. McCurdy opined in his letter:

Diagnoses that collectively underlie [applicant's] inability to perform essential job functions include chronic episodic shoulder strain aggravated by cumulative work exposures involving lifting and testing playground equipment [Note: an MRI of 1/25/13 showed that she had high-grade partial thickness tears of the supraspinatus and infraspinatus muscles of the right rotator cuff with subacromial spurring and a tear of the posterior superior labrum.]; chronic episodic lower and upper back pain aggravated by cumulative work exposures involving lifting and testing playground equipment; and age-related reduction in strength and agility preventing her from meeting physical requirements of her job.

While Dr. McCurdy's opinion that applicant is substantially incapacitated for the performance of her usual job duties supplements or explains applicant's limited, vague, and conclusory hearing testimony about the effect of her physical limitations on her ability to perform her job duties,² Dr. McCurdy did not explain the factual basis for his opinion. (See, e.g., *Jennings v. Palomar Pomerado Health Systems, Inc.* (2004) 114 Cal.App.4th 1108, 1117 ["An expert who gives only a conclusory opinion does not *assist* the jury to determine what occurred, but instead supplants jury by *declaring* what occurred."]; italics in original.)

² Applicant had just begun her direct testimony on the first day of hearing when the matter was continued as an accommodation to her. She did not return for the second day of hearing, and she never finished her testimony.

Therefore, his opinion does not constitute the type of competent medical evidence required by Government Code sections 20026 and 21156, subdivision (a)(2), to support a determination that an applicant is substantially incapacitated.

16. CalPERS, on the other hand, called Dr. Henrichsen as its medical expert at hearing. As previously discussed, he performed an Independent Medical Examination of applicant on February 6, 2008, which was limited to her cervical and thoracic spine and upper extremities. He prepared a report documenting his Independent Medical Examination, and that report was introduced into evidence.

17. Dr. Henrichsen explained at hearing that his findings upon physical examination of applicant were within the range of "normal." While the range of motion in her neck was "about 75 percent of normal," Dr. Henrichsen explained that the reduction in her range of motion was not significant enough to render her substantially incapacitated for the performance of her usual job duties. He provided the same explanation for the reduction in the range of motion of her shoulders, which he characterized as "a little bit reduced." The examination of applicant's elbow, forearms, and wrists was "normal."

18. Dr. Henrichsen also stated that applicant's grip strength was "quite a bit below normal," bilaterally. Based on the entirety of his physical examination, however, he opined that she did not put forth her best effort during the testing of her grip strength.

19. Dr. Henrichsen provided the following diagnoses for applicant:

1. Painful degenerative arthritis, cervical spine, consistent with her age
2. Referred right intrascapular and right upper extremity symptoms from the neck
3. Normal right and left shoulder
4. No examination evidence of carpal or cubital tunnel syndrome
5. History of tension headaches

20. Dr. Henrichsen provided the following discussion of his examination in his report:

With regards to Ms. Patricia Hunt, a careful review of this extensive amount of information, from the physical examination today and also review of her medical records indicates that Worker's Compensation conclusions and disability issues have been determined by subjective criteria, and that subjective

symptomology was not reasonably substantiated by objective findings, imaging studies or electrical studies.

Her electrical study changes are minimal at most, but most importantly in this situation if some physicians felt that her electrical study was so important then a carpal steroid injection is by far the best diagnostic maneuver to determine whether or not there is true carpal tunnel syndrome of a slight amount. What that means in general, is that none of the physicians felt that the situation was of significance.

Again, her overall examination demonstrates that she has a normal hard core objective examination. Her soft core findings are that she has some limited neck and shoulder motion, she has some tenderness above the elbows, and there were some hand symptoms that are not very well explained. Her Tinel's finding of the right radial nerve is considered normal in some individuals because the nerve is subcutaneous in that region near the right wrist.

During the examination I considered that she may have CMC joint arthritic changes and that could account for a variety of her symptoms. Her bone scan that was accomplished on October 23, 2002, was normal which would indicate that there was no symptomatic cervical spine arthritic change or CMC joint changes of the thumb at that time. Whether or not she now has CMC joint changes is another issue. Absent any new x-ray of her wrist or a new bone scan, my conclusion is thus far that she does not have significant CMC joint arthritic disease. This is a common condition in women, but not all women have the situation and I have seen it also in men but more commonly in women.

I reviewed her occupational description. Her computer work issues are not a large amount. Her field and office work was approximately 50 percent each. Carrying the computer seemed to be the biggest problem based on the medical records I saw.

There are some contradictory findings present. Her grip strength is not explained by the remainder of her examination. She explained her right forearm was swollen and it did measure larger than the left. I did not see any soft tissue swelling or any recent evidence of tissue injury of any type. I found no evidence of tissue crepitus in any area or along any tendon. All tendon attachments are present and working. This part of the

examination would suggest to me that she is using her upper extremities equally and normally.

21. Dr. Henrichesen opined that applicant is not substantially incapacitated for the performance of her usual job duties because of a physical condition. While he admitted that she would have some neck pain and upper extremity symptoms if she was to sit at a computer for more than six hours in a day, he explained those symptoms would be only temporary and would not prevent her from performing her usual job duties.

Discussion

22. As discussed above, applicant did not present any competent medical evidence that she is permanently and substantially incapacitated for the performance of her normal duties as a Licensing Program Analyst with the California Department of Social Services. Therefore, she failed to meet her burden of establishing her entitlement to disability retirement benefits, and her application for disability retirement should be denied.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Applicant has the burden of proving her eligibility for disability retirement benefits by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

Applicable Statutes

2. Government Code section 20026 provides, in pertinent part:

"Disability" and "incapacity for performance of duty" as the basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion.

3. Government Code section 21150, subdivision (a), provides: "A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076, 21076.5, or 21077."

4. Government Code section 21156, subdivision (a), provides, in pertinent part:

(1) If the medical examination and other available information show to the satisfaction of the board ... 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

(2) In determining whether a member is eligible to retire for disability, the board ... shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

5. The issue of whether applicant is substantially incapacitated for the performance of her usual job duties as a result of a disability is the sole issue for determination on appeal. If she is found to be substantially incapacitated, the issue of causation shall be determined as provided in Government Code section 21166, which states:

If a member is entitled to a different disability retirement allowance according to whether the disability is industrial or nonindustrial and the member claims that the disability as found by the board ... is industrial and the claim is disputed by the board ... the Workers' Compensation Appeals Board, using the same procedure as in workers' compensation hearings, shall determine whether the disability is industrial.

The jurisdiction of the Workers' Compensation Appeals Board shall be limited solely to the issue of industrial causation, and this section shall not be construed to authorize the Workers' Compensation Appeals Board to award costs against this system pursuant to Section 4600, 5811, or any other provision of the Labor Code.

Legal Standards for Determining Disability

6. The 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.) Discomfort, which may make it difficult to perform one's duties, is insufficient to establish permanent incapacity for the performance of her position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; citing, *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability determined. (*Hosford v. Board of Administration, supra*, 77 Cal.App.3d. at p. 863.)

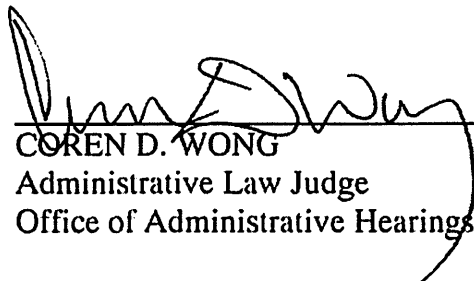
Conclusion

7. As set forth in Factual Finding 22, applicant failed to meet her burden of proving that she is permanently and substantially incapacitated for the performance of her usual duties as a Licensing Program Analyst with the California Department of Social Services due to orthopedic conditions. Therefore, her application for disability retirement benefits should be denied.

ORDER

The application of Patricia A. Hunt for disability retirement benefits is DENIED.

DATED: November 21, 2014



COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings