

ATTACHMENT A
THE PROPOSED DECISION

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for
Disability Retirement of:

LORI RALLS,

Respondent,

and

BEAUMONT UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. 2013-0615

OAH No. 2014100862

PROPOSED DECISION

This matter came on regularly before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California, at Los Angeles, California, on January 14, 2015, and June 10, 2015.

Petitioner, California Public Employees' Retirement System (Petitioner or CalPERS) was represented by Christopher Phillips, Staff Counsel in CalPERS' Legal Office.

Lori Ralls (Respondent) appeared and represented herself on the first day of hearing. On June 10, 2015, she was represented by Danny T. Polhamus, Attorney at Law.

No appearance was made by or on behalf of Respondent, Beaumont Unified School District.

Oral and documentary evidence was received. The record was closed on June 10, 2015, and the matter was submitted for decision.

The documentary evidence contained numerous disclosures of personally identifiable information. On his own motion, the Administrative Law Judge ordered those disclosures redacted from the record.

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PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

June 18 20 *15*
Lisa Kuris

FACTUAL FINDINGS

1. At and around the time of her application for industrial disability retirement, Respondent was employed by the Beaumont Unified School District (Beaumont or the District) as a Confidential Payroll Assistant. In that capacity, she is a local miscellaneous member of CalPERS pursuant to Government Code section 21150.
2. On September 18, 2012, Respondent submitted to CalPERS an application for disability retirement which was received on September 24, 2012. The application was based on her claim of orthopedic and psychiatric disorders. CalPERS denied the application on April 22, 2013. On or about May 21, 2013, Respondent filed a timely appeal of the decision.
3. Respondent's separation date from her employment with the District is October 6, 2010.

The Orthopedic Injury Claim

4. In 2004, approximately one year before she commenced her employment with the district, Respondent began treating with board-certified internist, Omar Bashir, D.O., for cervical degenerative joint disease and a herniated lumbar disc. She was treated conservatively. Those injuries were aggravated by a boating accident in July 2010, and she suffered radicular pain down the bilateral arms to the hands along with increased neck and low back pain. Among the limitations from her symptoms was an inability to sit at her desk, bend her neck to look down at documents, and then look up and laterally at her two computer monitors without severe pain in the neck.
5. Respondent received a variety of treatments for her orthopedic problems, such as medications including but not limited to a variety of narcotic analgesics, physical therapy, biofeedback, several epidural steroid treatments in both symptomatic spinal regions, and acupuncture. None of those treatment modalities resulted in lasting relief of her symptoms. Respondent was to have undergone a surgical consultation, but her medical insurance expired before she could make the appointment.
6. On November 18, 2010, a cervical magnetic resonance imaging (MRI) study showed multilevel disc disease with foraminal spinal stenosis, especially at the C4-5 disc space. (Exhibit 10, page 1.)
7. On February 27, 2013, at Petitioner's request, Respondent underwent an orthopedic independent medical examination by Keolanui Gregory Chun, M.D., a board-certified orthopedic surgeon. Dr. Chun reviewed Respondent's medical records and job description, took a medical history, took x-rays of the cervical spine, and examined Respondent. Respondent's chief complaints were severe neck and low back pain with radiculopathy and nocturnal paresthesias in both upper extremities, and radiculopathy in the left leg. In her history, she reported a 1992 industrial accident that had caused her lower back pain.

8. Based on the above, Dr. Chun diagnosed Respondent with degenerative cervical spondylosis at C4-5 and C5-6, and severe degenerative disease at L3-4, L4-5, and L5-S1. In his report, he wrote:

The patient had sustained an aggravation to her preexistent degenerative cervical and lumbar spinal conditions when she went on vacation during the July 4 holiday of 2010. Following the injury, she was able to continue to work in her usual and customary fashion until the "extent and severity" of her injury was realized. She was taken off work on 10/6/10 and has not returned back to the workforce. Treatment has consisted of medications, therapy, and multiple epidural steroid injections. The patient remains primarily symptomatic of her neck and to a lesser extent her lower back[¹]

(Exhibit 9, page 7.)

9. In response to Petitioner's inquiry, "Are there specific job duties that you feel the member is unable to perform because of a physical or mental condition? If so, please explain in detail" Dr. Chun opined: "The patient has advanced degenerative changes of the cervical and lumbar spine. However, based upon the job descriptions reviewed and today's evaluation, it is felt that she IS able to perform the described job duties" (*Id.* at page 8.) (Emphasis in text.) He also opined that Respondent was not substantially incapacitated for the performance of her duties. Aside from the general reference to "the job description," Dr. Chun did not attempt to reconcile his clinical findings of severe and advanced cervical and lumbar degeneration and cervical spondylosis against his opinion that Respondent is capable of performing the functions and duties of her job.

10. Respondent has remained consistently symptomatic. In March 2015, she began treatment with orthopedist Kent Yundt, M.D. On March 17, 2015, after Respondent underwent a SPECT² scan, Dr. Yundt diagnosed Respondent with cervical spondylosis, cervicgia, and carpal tunnel syndrome. He recommended nerve conduction studies of the bilateral upper extremities to determine the relationship of the cervical spondylosis to the carpal tunnel syndrome, a right-sided C2-3 and C3-4 facet joint block, and a left-sided C4-5 and C5-6 facet joint block in response to the "marked uptake" on the SPECT scan. (Exhibit H, page 2.) Respondent was to continue taking Ibuprofen, 800 mg, three times per day for pain and inflammation.

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¹ Dr. Chun's writing style is such that he did not use periods at the end of the sentences in his report. The above quote remains true to his writing style.

² Single photon emission computed tomography.

11. Dr. Chun's failure to reconcile his record review, including the results of the MRI, his diagnoses and his analysis, with his opinions regarding Respondent's ability to continue to perform her work duties make his opinions less persuasive than those of Drs. Bashir and Yundt. Although Dr. Yundt did not express an opinion regarding whether Respondent is disabled, his findings were consistent with Dr. Bashir's findings and those of the pain management specialists who administered the epidural steroid injections. Based on his own work with Respondent, the findings of the pain management physicians, and various tests including the 2010 MRI,³ Dr. Bashir credibly testified that Respondent is incapacitated for her usual job duties. Dr. Yundt established that Respondent has remained symptomatic through the present time.

The Psychiatric Disorder Claim

12. Since 1989, Respondent has suffered from psychiatric symptoms such as anxiety, panic attacks, obsessive-compulsive disorder, and depression. (Exhibit 13, page 3.) Aside from a brief regimen of therapy around 1989, and individual marriage counseling at her church (her husband declined to attend), she did not receive any treatment for her symptoms until she began treatment with her internist, Dr. Bashir, who treated her psychiatric symptoms with medication only. In 2012, when he found that the antidepressants he had prescribed for Respondent's depression were not efficacious, Dr. Bashir decided she was suffering from bipolar disorder and changed her medication. However, that medication was also ineffective. No evidence was presented that Dr. Bashir administered any psychometric tests or referred Respondent to a psychiatrist or psychologist for testing and/or treatment. Nor did he offer any evidence to show he was qualified to diagnose or treat psychiatric disorders. Dr. Bashir did not offer any basis for his diagnosis of bipolar disorder other than the ineffectiveness of the antidepressants he had prescribed. He did not testify to changing to a different antidepressant or ruling out other conditions.

13. Dr. Bashir was equivocal in his testimony concerning Respondent's psychiatric condition and treatment. For example, he testified that some of the medications he had prescribed for her "could" cause certain side effects, that side effects from medication "played a role" in his opinion that Respondent was psychiatrically incapacitated for her usual job duties even though he did not so indicate in his report (Exhibit C), and that work stressors "might have sparked" Respondent's bipolar disorder. That testimony was not persuasive.

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³ On Petitioner's objection, the MRI report, offered by Respondent, was excluded on hearsay grounds. However, Petitioner's expert, Dr. Chun, acknowledged in his report that he had reviewed the MRI report. (Exhibit 10, page 1.) Because his review of the medical records in this case contributed to his diagnoses and opinions, the contents of the report are accepted for that non-hearsay purpose.

14. On October 18, 2013, at Petitioner's request, Respondent underwent an independent medical examination with Lawrence H. Warick, M.D., Ph.D., a board-certified psychiatrist. Dr. Warick reviewed medical records, took a medical, psychiatric, personal, educational, military, occupational, marital, and social history, performed a mental status examination, and administered the MCMI-III.⁴ Based on the information gleaned from those sources, he diagnosed Respondent with chronic dysthymia with bereavement, non-industrial, history of panic attacks, generalized anxiety, non-industrial, and histrionic, obsessive-compulsive features. He noted several medical disorders and described her psychosocial stressors as problems involving her occupation, finances, and primary support group, her father's death, her mother's dementia, the loss of her uncles, worries about her sons, and problems with access to healthcare.⁵

15. Dr. Warick opined that Respondent was not psychiatrically incapacitated and that there were no job duties she was unable to perform from a psychiatric perspective. In his report, Dr. Warick provided a detailed analysis of Respondent's psychiatric condition that led to his opinions:

From a psychiatric point of view, the applicant has piggybacked many of her psychiatric symptoms onto the work situation. Because of lack of insight and sophistication, she claims that her psychological stress at work was causing problems, she had difficulty concentrating, was struggling and making many errors. She ascribes this to pain and having anxiety and panic. However, it is clear from the history I obtained that her psychiatric symptomatology is not related to work but impinged on her work. After all, she has a psychiatric history dating back to 1989 when she was treated for a year for a molestation memory. She also had a panic attack in 1998 when she was having trouble with her son, reactivated in 2009 when her father died and mother had a heart attack. She had marital counseling during her second marriage which broke up while she was working at Beaumont USD.

⁴ The MCMI-III is the Milon Clinical Multi-axial Inventory, third edition, a well-known and reliable psychometric test designed to elicit information concerning the taker's personality and psychopathology traits.

⁵ Dr. Warick based his diagnoses on the criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders, 4th edition, Text Revision (DSM-IV-TR), a highly respected and generally accepted tool for diagnosing mental and developmental disorders. Under DSM-IV-TR, diagnoses could be provided on five axes: I-Principal Disorders; II-Personality Disorders; III-Medical/Neurological Disorders; IV-Psychosocial Stressors; and V-Global Level of Functioning. DSM-IV-TR has since been superseded by DSM-5 which no longer uses the five axes for the purpose of diagnosis. (Gov. Code § 11425.50, subd. (c).)

Her psychiatric history prior to her employment at Beaumont is consistent with a Dysthymic Disorder aggravated during 2008-2010 by a number of losses. The DSM-IV describes the essential feature of dysthymia as being "a chronic disturbance of mood involving depressed mood . . . for most of the day more days than not, for at least two years." Associated symptoms are typically: poor appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration or difficulty making decisions, and feelings of hopelessness. There are no delusions or hallucinations in this disorder. This condition most often begins at an early age and has a chronic course. For these reasons, this disorder has also been called the "depressive personality." Moreover, there is some evidence of a familial pattern with this disorder. (Adapted from the DSM-IV.) It is my impression that this chronic, non-industrial condition was in no way caused or exacerbated by the applicant's work at Beaumont USD. The applicant's pervasive dysthymia, rather, has long impinged on all facets of her life; it should, in fact, be viewed as a significant, non-industrial stressor for this applicant.

According to the DSM-IV, the diagnosis of bereavement is used when "the focus of attention . . . is a normal reaction to the death of a loved one." It goes on to say that "a full depressive syndrome frequently is a normal reaction to such a loss." Associated symptoms might include feelings of sadness, poor appetite, weight loss, and insomnia. It notes that the duration of bereavement "varies considerably among different cultural groups." (Adapted from DSM-IV.) This is a non-industrial condition. It was caused by the loss of a loved one – a non-industrial stressor. This condition was not in any way caused or exacerbated by the applicant's work at Beaumont USD.

She also had a preexisting history of panic attacks and generalized anxiety. Panic attacks can be associated with palpitations, pounding heart, sweating, trembling, shaking, shortness of breath, a feeling of smothering and/or choking, chest discomfort, nausea, abdominal distress, dizziness, lightheadedness, derealization, feelings of unreality, fear of losing control, fear of dying, and emotional symptoms of crying, paresthesias, and chills or hot flashes.

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A generalized anxiety disorder is excessive anxiety and worry occurring over a number of months or years. The person finds it difficult to control the worry associated with at least the following six symptoms: restlessness, feeling keyed up, on edge, easily fatigued, difficulty concentrating, mind going blank, irritability, muscle tension, sleep disturbance, as well as other associated somatic symptoms including shortness of breath, numbness and tingling at times, also possibly even depersonalization and detachment.

Another factor to consider is her hypothyroidism for which she is on replacement therapy. Hypothyroidism can be associated very often with symptoms of depression.

Other psychiatric stressors that the applicant has had in her life include a brutal first husband who beat her up twice, requiring hospitalization, and a controlling husband who denied her sex for six or seven years whom she divorced.

(Exhibit 13, pages 12-13.)

16. At the administrative hearing, Dr. Bashir admitted that he is not a psychologist. He offered no evidence of education, training, or experience that could render him qualified to offer psychiatric diagnoses and opinions worthy of more than little weight, and he provided virtually no competent basis for his diagnoses and opinions. Contrary to Dr. Bashir, Dr. Warick is a board-certified psychiatrist who is well-qualified to render such diagnoses and opinions. He not only did so competently and convincingly, he offered a detailed analysis to support them. Dr. Warick's report and testimony are credited over those of Dr. Bashir.

LEGAL CONCLUSIONS

1. Cause exists to sustain Respondent's appeal of CalPERS' determination that Respondent is not substantially incapacitated for her usual duties as a Confidential Payroll Assistant with the Beaumont Unified School District, by virtue of orthopedic disorders, pursuant to Government Code sections 20026, 21150, 21152, 21153, 21154, and 21156, as set forth in Findings 1 through 11.

2. Cause exists to deny Respondent's appeal of CalPERS' determination that Respondent is not substantially incapacitated for her usual duties as a Confidential Payroll Assistant with the Beaumont Unified School District, by virtue of psychiatric disorders, pursuant to Government Code sections 20026, 21150, 21152, 21153, 21154, and 21156, as set forth in Findings 1 through 3 and 12 through 16.

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3. Government Code section 20026 states:

“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.

4. Government Code section 21150, subdivision (a) states in pertinent part:

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 . . .

5. Government Code section 21152 states in relevant part:

Application to the board for retirement of a member for disability may be made by: [¶] . . . [¶]

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

6. Government Code section 21153 states:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

7. Government Code section 21154 states in pertinent part:

The application shall be made only (a) while the member is in state service, or . . . (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence. . . . 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. . . .

8. Government Code section 21156, subdivision (a)(1) states in relevant part:

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 . . .

9. In order to be eligible for disability retirement, an applicant must have a "substantial inability" to perform his/her "usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) "Substantial inability" requires more than only difficulty in performing the tasks common to one's profession. In *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, a case involving a state traffic officer with the California Highway Patrol, who held the rank of Sergeant, the applicant established that he could run, but inadequately, and that his back would probably hurt if he sat for long periods of time, or apprehended a subject escaping on foot over rough terrain or over and around obstacles. The court found that this was insufficient to support a finding of disability. The court stated:

Hosford argues that the "Typical Physical Demands" document requires that he be able to perform these functions "safely and effectively." Both terms are highly subjective. Even officers in top physical condition may suffer injuries in performing these tasks, and effectiveness certainly cannot be equated with brute strength. Each officer must be expected to have an awareness of his own limitations in facing emergency situations.

(*Id.* at 862-863.)

10. In *Dillard v. City of Los Angeles* (1942) 20 Cal.2d 599, 602, the court stated:

Pension laws should be liberally construed and applied to the end that the beneficent policy thereby established may be accorded proper recognition.
(Citations.)

11. The evidence did not support Respondent's claim that she is entitled to disability retirement on the basis of her psychiatric condition. She offered in support of her position only the testimony of her primary care physician, an internist, who demonstrated no expertise or qualifications beyond his medical degree to competently render a convincing psychiatric diagnosis or opinion. His testimony and report were far less convincing than those of the independent medical examiner, Dr. Warick, a board-certified psychiatrist, who buttressed his opinions with facts, objective psychometric testing, and extensive analysis.

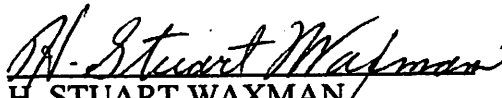
12. Respondent did establish her eligibility for disability retirement based on her orthopedic condition. Dr. Chun, the orthopedic independent medical examiner, acknowledged her serious and ongoing diagnoses which were based on competent medical evidence such as the MRI, but found, without explanation, that she was not incapacitated for her usual job duties. Even if Dr. Chun's cursory reference to Respondent's job description might qualify as his analysis, he still failed to explain how Respondent might be expected to perform her duties, which included looking down at documents on her desk, and then looking up and laterally at the two computer monitors located on the desk while suffering from severe cervical spondylosis. This is especially telling in light of the Physical Requirements of Position/Occupational Title (Exhibit 15) which indicates that Respondent's job required bending and twisting of the neck over six hours each day. Further, the exacerbation of Respondent's orthopedic condition occurred around the time of her July 2010 boating accident, while she was employed with the district, and those symptoms have continued consistently to the present time.

ORDER

1. Respondent's appeal of Petitioner's determination that Respondent is not eligible for and entitled to disability retirement benefits, pursuant to Government Code sections 20026, 21150 and 21156, is sustained.

2. Respondent shall be provided with appropriate disability retirement benefits forthwith.

Dated: June 16, 2015


H. STUART WAXMAN/
Administrative Law Judge
Office of Administrative Hearings