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: MERRY L. GRISAK, Respondent, and DEPARTMENT OF TRANSPORTATION HEADQUARTERS OPERATIONS, Respondent.	Case No. 2015-0027 OAH No. 2015050678

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on December 3, 2015, in Sacramento, California.

Elizabeth Yelland, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

There was no appearance by or on behalf of Merry L. Grisak (respondent) or the Department of Transportation Headquarters Operations (Department).

Evidence was received, the record was closed, and the matter was submitted for decision on December 3, 2015.

ISSUE

On the basis of an internal (extreme fatigue, fibromyalgia and Epstein-Barr virus) condition, is respondent permanently and substantially incapacitated from performing her usual duties as Staff Services Manager I (SSM I) for the Department?

FACTUAL FINDINGS

1. At hearing, CalPERS established that both respondent and the Department were properly served with the Notice of Hearing in this matter. Consequently, the hearing proceeded as a default hearing against them under Government Code section 11520.

Respondent's Disability Retirement Application

2. Respondent was employed by the Department as an SSM I. On October 25, 2013, CalPERS received a Disability Retirement Application from respondent dated October 11, 2013. In her application, respondent indicated that she was retiring for service pending disability retirement. She designated December 31, 2013, as her retirement date. She described her specific disability as "extreme fatigue – fibromyalgia/Epstein Barr virus – chronic." She stated that her disability occurred in 1993. In response to the question asking how her disability occurred, she answered, "unknown." She described her limitations/preclusions as, "unable to perform physical, mental and emotional requirements of the job." She stated that she was then working full-time as an SSM I. She provided the following additional information, "mental fatigue, cannot perform assigned duties." She identified Jeffrey McGee, M.D., as her treating physician.

Physical Requirements of an SSM I for the Department

3. The working title of respondent's SSM I position with the Department was Transportation Permits Manager. The position duty statement for this position described respondent's position as having "functional responsibility for the day-to-day operations of the Transportation Permits office." The statement described the physical, mental and emotional requirements of the positon as follows:

> Incumbent may be required to sit for long periods of time using a keyboard and video display monitor, or while attending meetings. Some walking may be required between the Permits Office and HQ building for meetings. Must be able to work flexible hours to complete important work assignment.
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> Incumbent must be able to interact with many people. It is important that the incumbent work with others in a cooperative manner. Incumbent should be able to deal effectively with pressure, maintain focus, and intensity yet remain optimistic and persistent, even under adversity. Incumbent must be open to change and new information, adapt behavior and work methods in response to new information, changing conditions or unexpected obstacles.
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> Incumbent must have ability to create and sustain an organizational culture which encourages others to provide

quality of service essential to high performance, be open to change and new information, and have strong communications and listening skills in order to identify and communicate customer needs and expectations.

Incumbent must behave in a fair and ethical manner toward others and demonstrate a sense of responsibility and commitment to public service. Incumbent must value cultural diversity and other individual differences in the workforce.

Incumbent must have ability to multi-task, adapt to changes in priorities, and complete tasks or projects with short notice. Incumbent must grasp the essence of new information and master new technical and business knowledge that will meet the directives of the Division.

4. CalPERS submitted a completed Physical Requirements of Position/Occupational Title form that was signed by respondent and the Chief of the Office of Permits in October 2013. According to this form, an employee in respondent's position: (1) never runs, crawls, climbs, squats, bends at the neck or waist, pushes or pulls, engages in fine manipulation or grasping, lifts more than 10 pounds, works with heavy equipment, is exposed to excessive noise, extreme temperatures, humidity, wetness, dust, gas fumes, or chemicals, works at heights, operates foot controls, engages in repetitive movement, uses special visual or auditory protective equipment, or works with bio-hazards; (2) occasionally (up to three hours a day) stands, walks, reaches above and below the shoulder, lifts up to 10 pounds, walks on uneven ground and drives; and (3) frequently (three to six hours a day) sits, repetitively uses her hands, and uses a keyboard and mouse.

Reports and Testimony of CalPERS' Experts

5. CalPERS retained two experts to conduct independent medical examinations of respondent: Michael M. Bronshvag, M.D., and Douglas Haselwood, M.D.

6. Michael M. Bronshvag, M.D. Dr. Bronshvag is board-certified in neurology and internal medicine. He examined and took a history from respondent on July 7, 2014, reviewed medical records, respondent's position duty statement and Physical Requirements of Position/Occupational Title form, and issued an Independent Medical Evaluation (IME) report dated July 7, 2014. At the time of the IME, respondent was 52 years old. She had worked for the state for more than 30 years. She reported that she was "often in a 'fibro-fog' with pain, constipation, and irritable bowel symptoms." She also complained of fatigue. At the time of the IME, respondent was five feet eight inches tall and weighed 207 pounds.

7. Dr. Bronshvag's musculoskeletal examination of respondent "did not demonstrate any impairment to range of motion of spine, shoulders, elbows, wrists, arms, or hands, hips, knees, legs, or feet." Respondent's paraspinous and appendicular muscle tone

was "normal." Respondent complained of "diffuse tenderness," but her complaint "did not match up with the physical findings." No sensory or neurological deficits were noted. Dr. Bronshvag noted that his physical findings with regard to respondent were "essentially unremarkable," and that there were "no medical notes documenting abnormal physical findings." According to Dr. Bronshvag, respondent's "symptoms of 'fibromyalgia' and 'fatigue' [were] not documented as being associated with any objective findings."

8. Dr. Bronshvag diagnosed respondent with "Non-disabling fybromyalgic-type subjective complaints." He opined that respondent was "able to perform the full range of the duties described [as] relevant" to an SSM I. He opined further that respondent was "not substantially incapacitated for the performance of her usual duties."

9. On September 2, 2014, CalPERS received a letter from respondent dated August 28, 2014. In her letter, among other things, respondent described the examination Dr. Bronshvag conducted as follows:

> The exam took 20 minutes from beginning to end. He asked me to walk a few steps across the room, tested my reflexes and moved my right arm over my head. At NO TIME did Dr. Bronshvag check my body to see if I reacted to any of the 18 pressure points associated with Fibromyalgia. He did not ask about my past medical history which includes severe muscle pain, fatigue, sleep problems, and irritable bowel syndrome. These symptoms are all related to Fibromyalgia and are noted in the report from my physician.
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> On the morning of my exam with Dr. Bronshvag, I had seen my regular physician who has been treating me over the last several years. I asked him what I should do during the exam and my doctor indicated that I should expect to have my body checked for the 18 pressure points at the minimum. This did not occur. In fact, considering the exam completed by Dr. Bronshvag in 20 minutes included a change into clothing provided by the doctor, I'm not sure he allowed time to accurately make a diagnosis.
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> In addition, when I asked him how long it would take to get the report, he stated "the sooner I get it in, the sooner I get paid." Needless to say this statement alone leads me to believe that Dr. Bronshvag was only interested in getting paid. It did not appear that he was interested in my medical condition or whether I was able to physically work. In addition to the shoddy exam completed by him, I do not believe that he was qualified to review and make a recommendation based on my medical history. (Capitalization in original.)

10. On October 21, 2014, Dr. Bronshvag issued a Supplemental Report in response to respondent's August 28, 2014 letter. In his Supplemental Report, Dr. Bronshvag stated that, on July 7, 2014, he spent 15 to 20 minutes taking respondent's history, five to 10 minutes doing an "appropriate physical examination," and another five minutes after the physical examination to see if he had omitted anything. As Dr. Bronshvag explained, respondent stated that she had carried the "diagnosis" or "label" of fibromyalgia for 25 years. In his Supplemental Report, he stated that, "As of 2010 the American College of Rheumatology no longer considers the tender points to be valid diagnostic criteria." He included multiple medical articles with his Supplemental Report to support this statement. He stated further that the articles "indicate to what extent the concepts regarding fibromyalgia have changed" over the 25 years since respondent was diagnosed. In addition, the condition "may be very mild or very severe, and it is the role of the history and the physical to weigh severity as well as reality." He opined that:

> Since [respondent's] history was of work until retirement, and since her physical examination was reassuringly free of abnormal findings, the concept of fibromyalgia or fibromyalgia-type difficulty may be suggested, but a diagnosis of fibromyalgia-type difficulty is not synonymous with disability.
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> Since [respondent's] history was of work until retirement, and since her physical examination was reassuring, I do not find [respondent] at this time to be disabled from the job she did until she retired.

11. On November 11, 2104, Dr. Bronshvag submitted a second Supplemental Report after reviewing additional medical records provided by CalPERS. Dr. Bronshvag described the pertinent issues as: (1) "work history – full work until retirement"; (2) "normal physical examination"; and (3) a "complaint of fibromyalgia without clear-cut medical documentation via abnormal physical findings or abnormal lab studies." Dr. Bronshvag noted that medical records of Dr. McGee, respondent's treating physician, described "consecutively normal physical examinations, and diagnoses (based only on history) that include fibromyalgia, infectious mononucleosis, and fatigue." According to Dr. Bronshvag, "Dr. McGee's serial careful histories of [respondent] are very similar to my own (symptoms noted), and his physical findings are basically identical with mine (normal exams)." Dr. Bronshvag concluded that, "On the basis of her work record, the normal physical examinations, and the absence of any objectively documented difficulties relevant to inflammatory muscle, bone, and joint disorder, mononucleosis, etc., I do not substantiate [respondent's] claim or fear that she is disabled now, and was actually also disabled before she successfully retired."

12. Douglas Haselwood, M.D. Dr. Haselwood is board-certified in rheumatology. He examined and took a medical history from respondent on December 1, 2014, reviewed medical records, respondent's position duty statement and Physical Requirements of Position/Occupational Title form, and wrote an IME report dated December 1, 2014. At the

time of the IME, respondent was 53 years old. Respondent told Dr. Haselwood that she was then working approximately four hours a week as a sales clerk in a gourmet kitchen store. She described having spontaneous onset of hip pain about 27 years ago, and over the ensuing years, she experienced the onset of a "more generalized and ultimately widespread musculoskeletal pain syndrome in association with generalized fatigue." Approximately 24 years ago, she was told by a rheumatologist that she had fibromyalgia and was prescribed Prozac. Notwithstanding this diagnosis, she was able to "continue her avocational, vocational and homemaking activities without significant disruption." She reported further that about three years before the IME, she experienced a "rather abrupt and spontaneous and, ultimately, disabling acceleration of her widespread musculoskeletal pain, fatigue and malaise." She described having symptoms of a "syndrome of constant moderate to severe widespread musculoskeletal/soft tissue pain, constant moderate to severe fatigue and constant fluctuating difficulty with cognition and concentration."

13. After examining respondent, Dr. Haselwood diagnosed her as follows:

1. Chronic, widespread musculoskeletal pain, dysfunction and fatigue syndrome presumptively representing the cumulative effect of:

   a. Age-appropriate degenerative mechanical musculoskeletal phenomena.
   b. Non-specific widespread myofascial discomfort with a hypervigilance for same historically characterized as the syndrome of fibromyalgia.
   c. Obesity and physical deconditioning.
   d. An element of non-organic amplification.

2. Co-morbidities to include sleep apnea, obesity, endometriosis and hyperlipidemia.

14. Dr. Haselwood found that the "unusually high and incapacitating level of widespread musculoskeletal pain, dysfunction, and fatigue" perceived by respondent, were "based almost entirely, on self-assertion and subjective criteria." He explained that, as a result of the recent redefinition issued by the American College of Rheumatology, the syndrome of fibromyalgia is "now based entirely on patient self-reporting without the need for any correlating clinical or physical abnormalities." As a result, there is "no objectively based mechanism for determining the actual 'severity' of fibromyalgia in any given individual." But, based on the then available medical records and "absent much more convincing evidence to the contrary," it appeared that respondent's health care providers were "using the syndrome of fibromyalgia as a convenient 'default diagnosis' to characterize the perception of a much more non-specific perception of discomfort and dysfunction which lacks any evidence of correlating musculoskeletal pathophysiology or impairments." He found that in the "context of some elements of the musculoskeletal/soft tissue portion of the examination, some of her discomfort and guarding mechanisms were inconsistent and non-

physiologic." At hearing, Dr. Haselwood explained that this meant that respondent's withdrawal and guarding mechanisms during the physical examination did not correspond to any physical abnormalities that he could identify.

15. Dr. Haselwood concluded that respondent possessed the "physical capabilities of participating in the essential and substantial physical requirements of her work" as an SSM I. He found that there were no specific job duties that respondent was unable to perform. In sum, Dr. Haselwood opined that respondent was not substantially incapacitated from performing the usual duties of an SSM I.

Discussion

16. Respondent sought disability retirement on the basis of an internal (extreme fatigue, fibromyalgia and Epstein-Barr virus) condition. There was no competent medical opinion presented at the hearing to establish that respondent is substantially incapacitated due to her alleged internal condition from performing the usual duties of an SSM I. The IME reports and hearing testimony of Dr. Bronshvag and Dr. Haselwood were persuasive that respondent is not substantially incapacitated. The curriculum vitae of these physicians demonstrate that they have the expertise to formulate the opinions they offered. Their evaluations and reports were consistent, thorough and convincing. Respondent did not appear at hearing and did not offer any competent medical evidence to support her disability retirement application.

17. The burden was on respondent to present competent medical evidence to establish that she is permanently and substantially incapacitated for the performance of her usual job duties. Respondent did not submit evidence to meet her burden. Consequently, her disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of her employment as an SSM I, respondent is a state miscellaneous member of CalPERS and subject to Government Code section 21150. Respondent has the minimum service credit necessary to qualify for retirement.

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

> "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 the basis of competent medical opinion.

3. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.)

4. To qualify for disability retirement, respondent had to offer sufficient evidence, based upon competent medical opinion, to establish that she is permanently and substantially incapacitated for the performance of her usual duties as an SSM I for the Department. Respondent failed to offer such evidence. Consequently, her disability retirement application must be denied.

ORDER

The application of Merry L. Grisak for disability retirement is DENIED.

DATED: December 8, 2015

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Karen Brandt
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KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings