

**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:

DEBBIE A. HUDSON,

Respondent,

and

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION,

Respondent.

Case No. 9789

OAH No. 2011110264

**PROPOSED DECISION**

This matter was heard before Karen J. Brandt, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on May 5, 2016, in Sacramento, California.

John Shipley, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Ilija Cvetich, Attorney at Law, represented Debbie A. Hudson (respondent), who was present at the hearing.

There was no appearance by or on behalf of the California Department of Corrections and Rehabilitation (CDCR).

Evidence was received on May 5, 2016. The record was left open to allow respondent to submit her exhibits to OAH electronically. On May 9, 2016, respondent submitted her exhibits electronically. The record closed and the matter was submitted for decision on May 9, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED

May 16, 2016  
Ruthie E. Schreyer

## ISSUE

On the basis of audiological/otolaryngology (hyperacusis)<sup>1</sup> and orthopedic (neck, back and shoulder pain and headaches) conditions, is respondent permanently incapacitated from performing her usual duties as an Associate Governmental Program Analyst (AGPA) for CDCR's Prison Industry Authority (PIA)?

## FACTUAL FINDINGS

1. Respondent was born in 1956. She worked as an AGPA for the PIA. On December 12, 2007, CalPERS received a Disability Retirement Election Application from respondent. On her application, respondent designated the application type as "Service Pounding Disability Retirement." Respondent retired for service effective December 29, 2007, and has been receiving her service retirement allowance from that date.

### *Respondent's Application*

2. On her disability retirement application, respondent described her disability as:

Hyperacusis – diagnosed while working at Prison Industry Authority. Employer refused to give reasonable accommodations as doctor recommendation [*sic*]. By not providing the RA, I have been in pain @ work + cannot or makes it hard to do my job w/o wearing earplugs + headset to concentrate.

Respondent indicated in her application that she was working full time. She stated that she was "working w/earplugs + headset and always having ear pain." She included the following additional information in her application: "Employer has been given other option[s] to provide RA but refuse[d] to do them."

3. On December 9, 2009, CalPERS notified respondent that her disability retirement application had been denied. Respondent timely appealed from the denial.

### *Duties of an AGPA*

4. As set forth in the duty statement dated September 20, 2007, an AGPA for the PIA performs a wide range of research, analytical, and support functions related to the overall work activities of the Inmate Employment Program. Responsibilities include parolee job referral, inmate training certification, budget development, contracts management, technical research, and program analysis.

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<sup>1</sup> The MedlinePlus online medical dictionary defines "hyperacusis" to mean "abnormally acute hearing." (<http://c.merriam-webster.com/medlineplus/hyperacusis>.)

5. A Physical Requirements of Position/Occupational Title (Physical Requirements) form signed by a PIA personnel specialist and respondent in December 2007 indicated that a PIA AGPA never ran, walked, crawled, kneeled, climbed, squatted, engaged in power grasping, lifted and carried over 25 pounds, worked with heavy equipment, was exposed to extreme temperature, humidity, wetness, gas, fumes or chemicals, worked at heights, operated foot controls or repetitive movement, used special visual or auditory protective equipment, or worked with biohazards. A PIA AGPA occasionally (up to three hours a day) stood, pushed and pulled, walked on uneven ground, and drove. A PIA AGPA constantly (over six hours a day) sat, bent at the neck, twisted at the neck and waist, reached above the shoulders, repetitively used her hands, used a keyboard and mouse, lifted up to 25 pounds, and was exposed to excessive noise and dust.

#### *Respondent's Testimony*

6. Respondent worked for the state for 31 years. After she retired in December 2007, she worked part time for the Rancho Cordova Police Department. She testified that this part-time job did not work out because of the ear pain she experienced.

7. Respondent described the ringing in her ears that she experiences due to her tinnitus.<sup>2</sup> She also described her ear pain, vertigo, neck and back pain.<sup>3</sup> She testified that her audiologist asked the PIA to find her a quieter spot in which to work to reasonably accommodate her ear pain issues, but the PIA refused to grant her the requested accommodation. She was not allowed to wear earplugs while working for the PIA due to the safety issues involved when interacting with inmates.

8. Respondent received ultrasound and acupuncture for her back pain. She took "a lot" of different medications for her pain, including medical cannabis. She has not had surgery for her orthopedic or ear conditions.

#### *Expert Opinions and Medical Reports*

9. The parties did not call any expert witnesses at the hearing. Instead, they agreed that all the medical records and reports submitted by each party would be admitted as direct evidence. CalPERS submitted the reports of three experts: Roy N. Pottenger, M.D.,

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<sup>2</sup> The MedlinePlus online medical dictionary defines "tinnitus" as "a sensation of noise (as a ringing or roaring) that is caused by a bodily condition (as a disturbance of the auditory nerve or wax in the ear) and typically is of the subjective form which can only be heard by the one affected." (<http://c.merriam-webster.com/medlineplus/tinnitus>.)

<sup>3</sup> The MedlinePlus online medical dictionary defines "vertigo" as "a sensation of motion which is associated with various disorders (as of the inner ear) and in which the individual or the individual's surroundings seem to whirl dizzily." (<http://c.merriam-webster.com/medlineplus/vertigo>.)

Baer I. Rambach, M.D., and Joel E. Ross, M.D. Respondent offered numerous medical and other records from her treating physicians and healthcare providers.

10. Roy N. Pottenger, M.D. Dr. Pottenger is board certified in orthopedic surgery. On October 16, 2009, he conducted an independent medical examination (IME) of respondent, reviewed her medical records, history and job duties, and issued an IME report. Respondent told Dr. Pottenger that her back, hip and neck were injured in an accident in 1981. In August 2007, she slipped and fell, which aggravated her pre-existing conditions. She retired in December 2007 due to her hyperacusis and her inability to use a headset and earplugs in an area where she was working with prisoners. Her chief complaints were neck, back and hip stiffness and limited mobility. Respondent told Dr. Pottenger that her condition improved with massage therapy and chiropractic adjustments.

11. Upon examination, Dr. Pottenger found that respondent had full range of motion in her shoulders, elbows, wrists, hips, knees and ankles, and good grip strength. Her neurologic and motor functions in her upper extremities were "essentially within normal limits." He found "some restriction with forward flexion" because she was unable to touch her fingertips to her toes.

12. Dr. Pottenger opined that respondent had "no significant orthopedic problem." He concluded that respondent was not substantially incapacitated from performing her usual job duties. He found that she may "experience some pain in her neck and back, but she did not demonstrate any abnormality in sensory or motor function to her upper extremities, lower extremities, cervical, thoracic, or lumbar spine."

13. Baer I. Rambach, M.D. Dr. Rambach is board certified in orthopedic surgery. On October 9, 2012, Dr. Rambach conducted an IME examination of respondent, reviewed her medical records, history and job duties, and issued an IME report. Respondent told Dr. Rambach about the injuries she sustained. She complained of pain in her neck, shoulder, back and hands. She also complained about headaches, vertigo, and ringing in her ears. She described the medications that she took and the treatment she received.

After examining respondent, Dr. Rambach diagnosed her as follows:

1. Degenerative arthritis, lumbosacral spine, noted upon MRI studies in the report of the MRI performed on 3/15/2010, as described by Dr. Lynette Francis.
2. Degenerative intervertebral disc disease, L4, L5 and L5-S1.
3. Degenerative arthritis and scoliosis of the lumbar spine noted upon MRI examination.

14. Dr. Rambach opined that respondent was not substantially incapacitated from performing her usual job duties. But he found that there were:

...some specific job duties that [respondent] would be unable to perform because of her degenerative arthritic condition in her lower back, particularly at L4-L5 and L5-S1. She would be unable to sit for a period of over six hours in a day. She cannot constantly twist at the waist nor constantly lift up to 25 pounds. She also would be unable to occasionally walk on uneven ground up to three hours or drive up to three hours per day.

15. Dr. Rambach also opined that respondent did not “put forth her best effort” during the examination, and that “there was exaggeration of her complaints.”

16. Dr. Rambach issued a supplemental report dated November 27, 2012. In the supplemental report, Dr. Rambach made clear that he did not believe that respondent was substantially incapacitated from performing the usual duties of an AGPA for the PIA. He recognized that she manifested “some musculoskeletal problems, particularly the degenerative arthritic changes in her lumbar spine,” which may cause her to have “some difficulty sitting for extended periods of time over a working day, and also possibly lifting up to 25 pounds or occasionally walk[ing] on uneven ground up to three hours.” But he did not think that these problems and difficulties would prevent her from performing her usual job duties. He also noted that respondent appeared “to be magnifying her complaints.”

17. Joel C. Ross, M.D. Dr. Ross is board certified in otolaryngology head and neck surgery. On October 12, 2009, Dr. Ross conducted an IME examination of respondent, reviewed her medical records, history and job duties, and issued an IME report. Respondent told Dr. Ross that she had her first episode of vertigo and tinnitus in 2003, and it lasted several days. Her tinnitus “comes and goes” and was infrequent. She had no surgery for her condition and no history of head injury. She stated that she had infrequent sharp pains bilaterally in her ears, greater on the left than the right. She did not use any eardrops. She told Dr. Ross that she retired in December 2007 because of “sound sensitivity.” She did not have a history of being exposed to loud noises.

18. An audiogram was performed on the date of the examination by an audiologist. The audiogram indicated that respondent’s hearing was normal. In his IME report, Dr. Ross explained that hyperacusis “can be caused by lack of function or dysfunction of one or both of the middle ear muscles,” or if there was “some cochlear pathology.” Dr. Ross found that there were “no objective findings on [respondent’s] physical examination and the testing to substantiate her claim of hyperacusis.” Dr. Ross opined that respondent was not substantially incapacitated from performing the usual duties of her job.

19. On November 28, 2012, Dr. Ross re-evaluated respondent and issued an Independent Medical Re-Examination report. Respondent complained to Dr. Ross of “extreme sound sensitivity.” She used earmuffs or earplugs while at home or outside to

“abort sounds which are extremely irritating to her.” She also complained of “some vertigo” and “subjective tinnitus,” which had “greatly diminished.” She had not been hospitalized or undergone surgery for hearing problems. She had no history of ear infections or head injury. She had “some occasional pain in her ears.”

20. After examining respondent, Dr. Ross diagnosed her as follows:

1. Normal hearing.
2. Mild subjective tinnitus with intermittent episodes of vertigo.

21. Dr. Ross again opined that respondent was not substantially incapacitated from performing her usual job duties.

22. Respondent’s Medical Records. At hearing, respondent submitted medical and other records from Kaiser Permanente, Frank Koban, D.C., the Center for Interventional Spine, El Dorado Physical Therapy, Gregory Brown, L.Ac., the California Department of Rehabilitation, David Benevento, D.C., and Open Advantage MRI.

23. Included in respondent’s medical records was a letter dated October 18, 2007, from Julie Adamson, a Clinical Audiologist, in which she described “hyperacusis” as a “collapsed tolerance to everyday sounds.” In her letter, Ms. Adamson identified recommended treatments and reasonable accommodations in the work environment, including: (1) moving respondent’s workspace to a quieter area; (2) reducing reverberation and ambient noise levels in the office; (3) using felt cushions on cabinets, drawers, and phone cradles so they would not bang when closed; and (4) educating co-workers to be “more sensitive to how their actions can affect someone with hyperacusis.” Also included in respondent’s medical records were the MRI reports referred to in Dr. Rambach’s IME report, as well as other medical records reviewed in the IME reports described above.

24. At hearing, respondent did not identify any medical records or reports in her exhibits in which medical experts, applying the standards applicable in disability retirement cases, opined that she was substantially and permanently incapacitated from performing the usual duties of an AGPA for the PIA.

### *Discussion*

25. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of an AGPA for the PIA. The medical and other records respondent offered into evidence at hearing, while noting her subjective complaints, did not contain opinions from medical experts that, at the time she applied for disability retirement, she was substantially incapacitated from performing her usual duties as a PIA AGPA.



26. The opinions of Drs. Pottenger, Rambach and Ross were persuasive that respondent was not substantially incapacitated from performing her usual job duties. These doctors examined respondent and reviewed her medical records, history and job duties. Their IME reports were thorough and thoughtful. Their opinions were supported by the medical records and other documents they reviewed.

27. Because respondent failed to offer sufficient competent medical evidence to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a PIA AGPA, her disability retirement application must be denied.

### LEGAL CONCLUSIONS

1. By virtue of her employment, respondent is a state industrial member of CalPERS subject to Government Code sections 21150 and 20048.

2. To qualify for disability retirement, respondent had to prove that, at the time she applied, 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 ... 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.) The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, 863, explained that prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature.

4. When all the evidence in this matter is considered in light of the courts' holdings in *Mansperger* and *Hosford*, respondent did not establish that her disability retirement application should be granted. She failed to submit sufficient evidence based upon competent medical opinion that, at the time she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual duties of an AGPA for the PIA. Consequently, her disability retirement application must be denied.



ORDER

The application of respondent Debbie A. Hudson for disability retirement is  
DENIED.

DATED: May 13, 2016

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