ATTACHMENT E

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: PATRICIA A. ANDERSON, Respondent, AND CALIFORNIA STATE UNIVERSITY AT SAN MARCOS, Respondent.	CASE NO. 2013-0989 OAH No. 2015070900

PROPOSED DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on March 30, 2016, in Orange, California.

Kevin Kreutz, Senior Staff Attorney, represented the Petitioner, California Public Employees' Retirement System (CalPERS). Respondent Patricia Anderson (Respondent) appeared at hearing and represented herself. No one appeared on behalf of Respondent California State University at San Marcos.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on March 30, 2016.

FINDINGS OF FACT

1. On April 13, 2015, Diane Alsup, in her official capacity as Acting Division Chief of the Benefit Services Division, Board of Administration, CalPERS, executed a Statement of Issues, Case No. 2013-0989, against Respondent, after Respondent filed a timely appeal on September 28, 2013 and requested an administrative hearing to dispute CalPERS' September 11, 2013 determination that Respondent was not permanently disabled or substantially incapacitated from the performance of her duties as a lecturer for California State University at San Marcos.

2. In 1984, Respondent received laminectomy surgery (back surgery). As a consequence of that surgery, Respondent reported she developed spinal fluid leaks.

3. In October of 1986, Respondent was involved in a motor vehicle accident while employed as a bus driver for Orange County. She sustained fractures to her vertebrae and was hospitalized for approximately 18 days. Subsequent to her discharge, Respondent underwent a second spinal surgery, which Respondent said was "botched." Consequently, Respondent underwent a third spinal surgery in 1987, specifically a lumbar fusion. In 1989, Respondent underwent a fourth spinal surgery to remove the hardware from the spinal fusion surgery.

4. Respondent began suffering headaches when she had her initial spine surgery in 1984. From 2000 to 2011, Respondent's postural headaches subsided, and she had no more further headaches until May 12, 2011, when she was involved in a second motor vehicle accident. In that low-speed accident, where she was struck from the rear, she sustained a concussion and a strained neck, which Respondent described as a traumatic brain injury.

5. Respondent, who served as a lecturer at California State University at San Marcos, which was covered by CalPERS, reported that when she returned to work after the accident, she could not drive, threw up in class several times, had poor short-term memory, could not read, and lost her ability to taste and smell. She could not be an effective lecturer. She last worked as a lecturer on September 4, 2012.[1]

6. Respondent received six months of vestibular therapy and occupational therapy for head injuries. Respondent carries an identification card from the Brain Injury Association, which is an organization in New Zealand where she currently resides, which offers membership to individuals for the receipt of information and guidance on how to function with a brain injury. No medical professional ordered or prescribed Respondent's membership to the Brain Injury Association.

7. On November 9, 2012, Respondent submitted to CalPERS a Disability Retirement Election Application, claiming she suffered a disability. Specifically, she claimed to have spontaneous intracranial hypotension and low central nervous system fluid pressure, "resulting in severe headaches, short term memory loss and impacts on other cognitive abilities, hearing problems, issues with balance and motor controls, and occasional impairment of sight."

8. In response to an inquiry on the application asking how her injury or illness affected her ability to perform her job, Respondent stated that her loss of cognitive abilities

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[1] Respondent also served as a lecturer at a community college, covered by the California State Teachers Retirement System (CalSTRS), and was approved for disability benefits effective January 1, 2013. Respondent also began receiving disability benefits from the Social Security Administrative, effective March 2013.

and other impairments, including nausea from pain and balance problems, prevented her from focusing her attention on material required for lecturing students on the various subject matters covered in the courses she taught. She also stated that her short term memory loss and hearing problems significantly impacted her ability to interact with students and focus on answering their questions, or otherwise meeting their educational needs.

Independent Medical Evaluation

9. On June 18, 2013, Vrijesh S. Tantuwaya, M.D. conducted an independent medical evaluation of Respondent at the behest of CalPERS. Dr. Tantuwaya, who testified at hearing, is a neurologist with a specialty in head injuries and spinal surgery. Specifically, Dr. Tantuwaya's special interests are in complex and general spinal surgery, cerebrovascular and skull base surgery, tumors of the nervous system, head and spine injuries, interventional pain management, and peripheral nerve surgery. Dr. Tantuwaya received his bachelor of arts from Northwestern University in 1990, his medical degree from Washington University School of Medicine in 1996, completed his post graduate studies at Washington University School of Medicine and at Medical University of South Carolina. He has been a licensed physician and surgeon since 2002, a state-qualified medical examiner since 2005, a diplomat of the American Board of Neurological Surgery since 2007, a diplomat of the American Board of Independent Medical Examiners since 2008, and a Medical Board of California expert reviewer. Dr. Tantuwaya is affiliated with five hospitals, has written five published journal articles, and has given a number of presentations in the area of neurology.

10. At the time of the independent medical examination, Respondent advised that her chief complaints were headaches, neck pain, and lower back pain, with her headaches being the most severe of those. Respondent described her headaches as stabbing pains and vise-like grips. As part of the evaluation, Dr. Tatuwaya reviewed Respondent's medical history through a number of medical reports and oral information received directly from Respondent.

11. Dr. Tatuwaya performed physical and neurologic examinations of Respondent. He also reviewed three inches of medical records, as well as radiology studies. The radiology studies included a CT scan of Respondent's head dated October 1, 2012, which showed no evidence of abnormalities.

12. Dr. Tatuwaya prepared a written report of his evaluation. He found no substantial evidence of intracranial hypotension or a meningocele to substantiate Respondent's claims. Additionally, he found no evidence of a cervical spinal fluid leak in any of the reports he reviewed, and noted that it would be quite unusual for a spinal surgeon leave an active symptomatic psudomeningcele untreated. Moreover, the leak, according to Dr. Tantuwaya, supposedly occurred as a result of the first surgery, yet after three additional surgeries, no surgeon noted or addressed the purported leak. Dr. Tantuwaya found such facts highly improbable. Additionally, Dr. Tantuwaya found no evidence in the medical records that Respondent had orthostatic hypotension as reported by Respondent, and that test results supported no finding of such a disorder.

13. Dr. Tantuwaya found evidence of minimal central canal narrowing of the cervical spine, according to a MRI report from August 11, 2011, due to a disc osteophyte complex, but found no other significant findings. The MRI findings were inconsistent with Respondent's reported symptoms of orthostatic headaches. Additionally, despite her second motor vehicle accident in 2012, there was no objective evidence of any significant debilitating injury.

14. Dr. Tantuwaya reviewed Respondent's duty statement and job description as a faculty member for California State University at San Marcos, which included the physical requirements of Respondent's position. These requirements were, but not limited to, teaching, researching, advising students, evaluating student performance, and providing services to the university, profession, and the community. Dr. Tantuwaya concluded that there was no objective evidence of any physical or mental condition that precluded Respondent from performing any of her specific job duties. Additionally, he found that Respondent was not substantially incapacitated for performance of her usual duties. Specifically, as he explained at hearing, he found Respondent to be well-oriented during her mental status exam, showing that she recalled two out of three items on the memory test, demonstrating she had good short term and long term memory. She also demonstrated good cognition, and showed no weaknesses or significant pathology that would interfere with her ability to do her job.

15. Dr. Tantuwaya also found that Respondent's complaints were not concordant with any of the objective test data and findings, and appeared exaggerated to some degree. Dr. Tantuwaya did not dispute that Respondent suffered from headaches, but stated there was no objective evidence in the medical records demonstrating why she suffered from headaches.

CalPERS Denial

16. On September 11, 2013, CalPERS sent Respondent a letter denying her application for disability retirement. CalPERS advised that it had reviewed all of the medical evidence submitted to it before rendering its decision, particularly reports prepared by 10 different physicians and medical professionals, including Dr. Tantuwaya. Based on the evidence in those reports, CalPERS determined that Respondent's purported conditions were not disabling.

17. On September 28, 2013, Respondent sent CalPERS a letter objecting to its denial of her disability retirement application. Specifically, Respondent argued that both CalSTRS and the Social Security Administration had determined her to be disabled based on the same medical information provided to CalPERS, with the exception of the report prepared by Dr. Tantuwaya. Respondent stated that Dr. Tantuwaya's report contained "multiple false, or fraudulent, information," and accused CalPERS of "doctor shopping" when it assigned Dr. Tantuwaya to perform an independent medical evaluation of Respondent.

18. Respondent listed eight chief criticisms regarding Dr. Tantuwaya's report: (1) the report noted that Respondent's father died in Vietnam while serving in the military, when, in reality, her father, who was a Vietnam veteran, died on December 7, 2011; (2) the report noted she was a "well-developed male" as opposed to a female; (3) the report indicated that Dr. Tantuwaya performed a chest/breast examination and found Respondent to have "no evidence of crepitus, ecchymosis, or tenderness to palpation," when, in reality, Dr. Tantuwaya conducted no breast examination, according to Respondent; (4) the report described Respondent as having "normal mood and affect," but Dr. Tantuwaya was "not a psychiatrist, and failed to note neither [Respondent's] confusion nor [Respondent's] need to ask him to repeat or restate questions throughout his examination;" (5) the report noted under the heading entitled "Thoracic Spine" that Respondent had "no . . . scoliotic deformities," even though Respondent had a documented history of previous back surgeries showing that she did, in fact, have minor scoliosis; (6) the report did not note under the heading entitled "Lumbar Spine" that Respondent had significant scaring and did not note any of the tenderness that Respondent had in that region as a result of her previous surgeries; (7) the report did not note under the headings entitled "Neurologic" and "Mental Status Exam," that Respondent required Dr. Tantuwaya to repeat or restate questions, nor did he note her slowness to respond to his questions. Respondent further contended that Dr. Tantuwaya had no baseline data to compare her responses, therefore, it would have been impossible for him to have been able to formulate a legitimate determination as to any current impact to her cognitive abilities or neurologic state; and (8) the report stated that Respondent was mentally able to handle her own financial affairs and enter into legally binding contracts, and appeared competent to endorse checks with the realization of the nature and consequences of the acts; yet, Dr. Tantuwaya's office repeatedly contacted her for payment for her visit, when CalPERS was the entity responsible for paying for the independent examination, showing he was in no position to judge her financial competence given the financial incompetence demonstrated by his office. Given her eight complaints, Respondent argued Dr. Tantuwaya's report could not be trusted, and should not have been used to make any decisions concerning her disability.

19. At hearing, Dr. Tantuwaya acknowledged he made a typographical error when he referred to Respondent as a male, and may have misunderstood the military history of Respondent's father. Additionally, Dr. Tantuwaya agreed he performed no breast examination, and did not indicate specifically that he had. Rather, he performed a chest examination. Other than the minor typographical errors or his misunderstanding regarding the history of Respondent's father, Dr. Tantuwaya stood firmly behind his findings and report.

20. Dr. Tantuwaya was a credible witness, as he testified in a clear, concise, and forthright way, buttressed by his wealth of knowledge and his years of experience as a neurologist. [2]

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[2] The trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness,

21. Respondent proffered no expert witnesses to interpret her medical records or dispute Dr. Tantuwaya's findings. Instead, she offered a series of letters from her husband, friends, and former colleagues who compared Respondent before her May 11, 2011 car accident versus and after. They described her as a highly intelligent, energetic, organized, sharp, efficient, capable, active, vibrant, and enthusiastic woman prior to the accident. After the accident, they described Respondent as demonstrating debilitating nausea and headaches, confusion, difficulty doing many simple mental and physical tasks, memory issues, sending incomprehensible emails, and difficulties meeting the demands of teaching her class. The authors of these letters did not testify at hearing.

LEGAL CONCLUSIONS

1. Government Code section 20016 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, 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."

2. Government Code section 21152 provides, in pertinent part:

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

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though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And the testimony of "one credible witness may constitute substantial evidence," including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.) A fact finder may disbelieve any or all testimony of an impeached witness. (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671.)

Evidence Code section 780 relates to credibility of a witness and states, in pertinent part, that a court "may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: . . . (b) The character of his testimony; . . . (f) The existence or nonexistence of a bias, interest, or other motive; . . . (h) A statement made by him that is inconsistent with any part of his testimony at the hearing; (i) The existence or nonexistence of any fact testified to by him. . . ."

"(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. [¶] . . . [¶]

"(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 21153 provides:

"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."

4. Government Code section 21154 provides, in pertinent part:

"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. . . ."

5. Government Code section 21156, subdivision (a)(1) provides, in pertinent part:

"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, ..."

6. Here, Respondent failed to sustain her burden of demonstrating that CalPERS erred in denying her application for disability. Specifically, Respondent failed to show that she was permanently disabled or substantially incapacitated from the performance of her duties as a lecturer for California State University at San Marcos. While Respondent demonstrated that she had a history of medical issues and surgeries related to two motor vehicle accidents, Respondent offered no credible evidence to dispute Dr. Tantuwaya's convincing report. Specifically, Respondent proffered no expert or any other witness

demonstrating that Dr. Tantuwaya erroneously concluded that no objective evidence of any physical or mental condition existed that precluded Respondent from performing any of her specific job duties. She also offered no evidence contradicting Dr. Tantuwaya's finding that Respondent was well-oriented during her mental status exam and demonstrated she had good short term and long term memory, good cognition, and no weaknesses or significant pathology that would interfere with her ability to do her job.

7. Given the above, Respondent's appeal shall be denied.

ORDER

Respondent's appeal is denied.

Date: April 26, 2016

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Carla Garrett
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CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings