

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:

CARI J. MCCORMICK,

Respondent,

and

COUNTY OF LAKE,

Respondent.

Case No. 2015-0088

OAH No. 2015070687

PROPOSED DECISION

Administrative Law Judge Gene K. Cheever, Office of Administrative Hearings, State of California, heard this matter on June 8, 2016, in Sacramento, California.

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

Benjamin K. Karpilow, Attorney at Law, Law Office of Richard J. Meehan, represented Cari J. McCormick (respondent), who was present.

There was no appearance on behalf of the County of Lake (County).

The parties submitted closing briefs and the case was submitted for decision on June 24, 2016.

ISSUE

On the basis of an internal condition, was respondent permanently disabled or substantially incapacitated from performing her usual duties as an Appraiser III for the County when she filed her disability retirement application?

FACTUAL FINDINGS

Respondent's Disability Retirement Application

1. Respondent is 59 years old. Respondent began work for the County in January 2002 as an appraiser's aide. She was promoted and at all times relevant was an Appraiser III. She worked at the four-story Courthouse located at 255 N Forbes, Lakeport (Courthouse). On June 4, 2013, the County submitted a disability retirement application on behalf of respondent. On October 30, 2013, respondent submitted her own application for disability retirement (Application). Respondent service retired effective October 16, 2013.

2. In her Application, respondent listed her specific disability as, "respiratory [sic] and systemic health problems as a result of exposures in indoor environment at 255 N Forbes, Lakeport." She provided the following responses in her Application.

a. How did the disability occur?

Unclean, unsafe work conditions. Hazard was not revealed to me on 4-09-2012.

b. What are your limitations and preclusions?

I cannot work inside this building at 255 N Forbes, Lakeport.

c. How has your illness affected your ability to perform your job?

I could not perform inside the courthouse building and the county would not provide me a place outside of this building.

d. What other information would you like to provide?

I can work in another building as long as I remain asymptomatic "environmental sensitivity."

CalPERS' Denial of Application

3. After respondent submitted the Application, CalPERS received medical reports concerning respondent's internal condition from competent medical professionals. After review of these reports, CalPERS determined that she was not permanently disabled or incapacitated from performance of her duties as an Appraiser III at the time she filed her Application.

4. On December 4, 2014, CalPERS notified respondent of its determination and advised her of her appeal rights. On December 29, 2014, she filed a timely appeal and requested a hearing. CalPERS filed a Statement of Issues on July 16, 2015.

Physical Requirements of an Appraiser III

5. As set forth in the County's job description statement for an Appraiser III (Job Statement), respondent's job responsibilities were to analyze data for the appraisal of real property for ad valorem tax purposes, make field investigation studies and appraisals of residential, commercial, and farm properties, and defend challenged appraisals before the Board of Equalization. The Job Statement described the "typical physical requirements" for an Appraiser III as:

Sit for extended periods, frequently stand and walk, ability to walk in uneven terrain, normal manual dexterity and eye-hand coordination, lift and move objects weighing up to 25 lbs., corrected hearing and vision to normal range, verbal communication, use of office equipment, including computer, telephone, calculator, copiers, and FAX.

6. On November 15, 2013, respondent signed the CalPERS "Physical Requirements of Position/Occupational Title" for her position as an Appraiser III (Physical Requirements Statement). According to the Physical Requirements Statement, an Appraiser III: (1) constantly (over six hours a day) sits, walks, bends neck and waist, twists neck and waist, engages in fine manipulation, engages in simple grasping, repetitively uses her hands, uses a keyboard, uses a mouse, lifts objects up to ten pounds, walks on uneven ground, drives, is exposed to extreme temperature, humidity, and wetness, and operates foot controls or repetitive movement; (2) frequently (three to six hours a day) stands, climbs, and reaches above and below shoulder; (3) occasionally (up to three hours a day) runs, crawls, kneels, squats, pushes and pulls, engages in power grasping, lifts objects between 11 and 25 pounds, is exposed to excessive noise, dust, gas, fumes or chemicals, and works at heights; and (4) never lifts objects over 25 pounds, works with heavy equipment, uses special visual or auditory protective equipment or works with bio hazardous materials.

Medical Expert Testimony

CALPERS' MEDICAL EXPERT

7. Soheila Benrazavi, M.D., testified and provided written reports of her independent medical examination (IME) of respondent. Dr. Behrazavi is board certified in internal medicine and has practiced for more than 15 years in the field. She has over 12 years of experience as a disability evaluator. She examined respondent on June 3, 2014, reviewed respondent's medical records, Job Statement, Physical Requirements Statement, and issued an IME report dated June 17, 2014, and two supplemental reports dated October 10, 2014, and October 27, 2014, respectively. Respondent's complaint at the time of her examination was that she could not work at the Courthouse location. Dr. Benrazavi took a medical history and compiled a list of respondent's present illnesses. Respondent described her job and her work location at the Courthouse. She explained her fatigue and flu-like symptoms that began in 2010 and worsened in 2011 and 2012. Her lethargic feelings

progressed and she became more emotional. In April 2012, there was an evacuation of the entire fourth floor of the Courthouse due to a leak, which she believed was tar from the roof. Thereafter, respondent smelled strong odors in the building. She stated that a number of the County employees got sick, including her, but the others were able to go back to work. At the same time, respondent took six weeks off to get a hysterectomy. When she was out of the office, she felt better. When she went back to work though, she became sick again after working at the Courthouse a few days. She can no longer work in the Courthouse without getting sick. She reported that her sensitivity to odors has progressed over time. She can no longer tolerate the smell of cooking. She had to leave her husband's house to live in a separate house because of her odor sensitivity. She does not experience her symptoms when she is outdoors. Since she left work at the Courthouse, however, her symptoms have improved.

8. Dr. Benrazavi performed a physical examination of respondent. This exam showed normal results with no evidence that respondent could not physically perform her job duties.

9. Dr. Benrazavi's overall impression was: (1) respondent may be "experiencing a chemical hypersensitivity condition that includes hyperosmia"; (2) the office where respondent works "may be contaminated with mold or chemicals"; and (3) a combination of the two. She believed respondent was credible and cooperative. Dr. Benrazavi provided the following answers to questions posed.

a. Are specific job duties that respondent is unable to perform because of a physical or mental condition?

The applicant should be able to perform all of her duties including clerical and field duties. There is no physical or mental condition to prevent her from performing all her clerical duties as an appraiser and there is no physical condition to prevent her from performing her duties as a property appraiser and inspector. However, the applicant informs me that the particular building where she worked has a problem with mold contamination and mold infestation. Since I find her a credible historian, also in the context of her own specialty as an appraiser and building inspector, I heed the information that is given to me. It should be a verifiable fact that there is a court order to inspect the building and the inspection has not yet been done. I believe that the symptoms that the applicant is reporting to me are real and they are as a result of a physical and not a mental condition. I believe that some of her symptoms are related to exposure to certain materials, odors, chemicals and or mold contaminants in the building where she worked. Therefore if performing her job duties would mean that she would be located

at the same building where she worked before, at this time she would be temporarily and totally disabled from her job duties.

b. Is respondent substantially incapacitated for the performance of her usual duties?

Yes, given the circumstances of her environment where she has to work indoors she is now temporarily and substantially incapacitated and she would not be able to perform in her usual and customary job duties. The disability began in September 2012.

c. Is the incapacity permanent or temporary?

The incapacity is temporary. It is contingent upon either of the two options below. (1) Upon inspection of the environment where she worked if there are changes to be made by the recommendation by the hygienist, upon completion of the changes the applicant can return to her job duties; (2) the applicant can be relocated to another building where she could work in her usual and customary duties.

10. In October 2014, Dr. Benrazavi provided additional reports after reviewing additional documentation related to physical inspections and testing conducted at the Courthouse. These records, including a Mold Remediation Testing Final Report dated July 25, 2012, resulted in negative findings of the contaminants (e.g., mold, mildew, etc.) searched for during the inspections and testing. After review of these records and given consideration that two years had passed since respondent last worked at the Courthouse, Dr. Benrazavi believed that respondent should return to work at the Courthouse with accommodations and restrictions on a trial basis to determine if she is capable of working at the Courthouse.

RESPONDENT'S MEDICAL EXPERT

11. Massoud Mahmoudi, D.O., Ph.D., testified and provided written reports on behalf of respondent. Dr. Mahmoudi practices internal medicine. He reviewed respondent's medical history, examined her on February 20, 2013, and prepared a report dated March 20, 2013, and a supplemental report dated August 12, 2013. Respondent presented an oral history of her illness to Dr. Mahmoudi. Dr. Mahmoudi also reported that when respondent took six weeks off to have her hysterectomy in May of 2012, her symptoms improved while she remained away from the Courthouse. And shortly after she returned to work, her symptoms recurred. She stopped working at the Courthouse in September 2012, and when Dr. Mahmoudi examined her on February 20, 2013, she did not exhibit any symptoms of the illness. She did tell him, however, that when she is exposed to various odors, the symptoms do recur "within 10 minutes and it takes at least an hour for resolution of the symptoms

‘feeling fresh again.’” Dr. Mahmoudi’s physical examination of respondent showed normal results.

12. Dr. Mahmoudi diagnosed respondent as having allergic rhinitis and allergic-like reaction of unknown etiology. His impression was that she became symptomatic when working at the Courthouse, but was better when she was off work. At the time of his examination of her, she was asymptomatic, which led him to believe there was something in her work environment that caused her symptoms although it may be difficult to identify the precise trigger. He opined that she could not perform her job duties as an appraiser while working at the Courthouse, but that she could perform those duties at another work location as long as she remains asymptomatic. Because she is symptomatic with exposure to her work area at the Courthouse, but not outside of that work area, she does not have a permanent impairment. However, she is “temporarily partially disabled” if she has to work at the Courthouse.

Respondent’s Testimony

13. Respondent testified her feeling fatigue and flu-like symptoms starting in 2010 and worsening through 2012. She sought accommodation from the County. The County moved her work location to other locations within the Courthouse, but the changes did not relieve her symptoms. The County did not offer to accommodate her by moving her to a work location outside the Courthouse. She eventually used all of her medical leave and took a leave of absence due to her condition. In May 2013, the County terminated her employment.

Discussion

14. When all the competent medical evidence is considered, Dr. Benrazavi and Dr. Mahmoudi’s opinions were in agreement that respondent was not permanently disabled or substantially incapacitated from performing her usual duties as an Appraiser III for the County on the basis of her internal condition at the time she submitted her Application. They were also in agreement that, when respondent submitted her Application, she was substantially incapacitated from performing her usual duties as an Appraiser III for the County at the Courthouse, but not at other locations, on the basis of her internal condition. Respondent contends that because she was substantially incapacitated from performing her duties at the Courthouse, and the County would not accommodate her to work at a location outside the Courthouse, the Board is required to approve her Application. That contention is not persuasive in light of California case law interpreting disability retirement laws. (See, *Nolan v. City of Anaheim* (2004) 33 Cal.4th 335 (for police officer to qualify for disability retirement, he would not only have to show he was incapacitated from continuing to perform his usual duties in his former department, but also that he was incapacitated from performing the usual duties of a patrol officer for other California law enforcement agencies covered by the Public Employees’ Retirement Law); *Craver v. City of Los Angeles* (1974) 42 Cal.App.3d 76 (city’s charter use of language “in such department” for purposes of disability requirement required officer to establish that he was not only substantially incapacitated from

performance of his particular job duties in the department, but that he also could not perform job duties for other positions "within the department"); and *Wolfman v. Board of Trustees of the State Teachers' Retirement System* (1983) 148 Cal.App.3d 787 (elementary school teacher established substantial incapacity to perform her job duties due to her severe asthma and chronic bronchitis when it would be dangerous for her to be exposed to young children because there was no elementary teaching position to which she could be reassigned in any location).

LEGAL CONCLUSIONS

1. By virtue of her employment as an Appraiser III, respondent is a local 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*, *supra*, 6 Cal.App.3d at 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 Appraiser III for the County. Respondent failed to offer sufficient evidence she was unable to perform her usual and customary duties. Here, respondent's internal condition restricts her work at a particular location, but not her ability to complete her jobs duties. Consequently, her disability retirement application must be denied.

ORDER

The application of Cari J. McCormick for disability retirement is DENIED.

DATED: July 19, 2016

DocuSigned by:
Gene Cheever
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GENE K. CHEEVER
Administrative Law Judge
Office of Administrative Hearings