

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:

KELLY A. STEPHENS,

Respondent,

and,

STOCKTON EAST WATER DISTRICT,

Respondent.

Case No. 2017-0587

OAH No. 2017070668

PROPOSED DECISION

This matter was heard before Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, on July 11, 2018, in Sacramento, California.

Cynthia A. Rodriguez, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Kelly A. Stephens (respondent) appeared on her own behalf.

There was no appearance by or on behalf of respondent Stockton East Water District (District). Proper service of the Accusation and Notice of Hearing was made to the District. The matter proceeded as a default against the District, pursuant to Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for decision on July 11, 2018.

ISSUE

At the time of respondent's application for disability retirement, was respondent permanently disabled or substantially incapacitated from the performance of her duties as an

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED July 27 20 18
S.M.S.

Administrative Services Manager (ASM) for the District based on an orthopedic (cervical spine) condition?

FACTUAL FINDINGS

Respondent's Employment History

1. Respondent was employed as an ASM for the District. Her last day on the payroll was December 9, 2016. Respondent retired for service effective December 10, 2016. By virtue of her employment, respondent is local miscellaneous member of CalPERS subject to Government Code section 20026.

Respondent's Disability Retirement Application

2. On September 27, 2016, CalPERS received respondent's Disability Retirement Election Application (application). In response to the question on the application about her specific disability, and when and how it occurred, respondent wrote:

Degenerative disc disease and disc desiccation throughout cervical spine. Spinal and neural foraminal stenosis on all levels. Loss of disc height and end plate sclerosis.

In response to the question on how her disability occurred, respondent wrote, "Unknown."

Respondent described her limitations/preclusions to her disability as:

Prolonged sitting, extensive amount of time working at desk/computer, stress from daily essential duties, prolonged physical movement, movement of my right hand, movement of my body in general.

Respondent identified her treating physician as Alex Phan, M.D., a pain doctor specializing in physical medicine and rehabilitation.

3. On February 28, 2017, Anthony Suine, Chief of the Benefit Services Division, notified respondent that her application had been denied based upon a finding that her orthopedic (cervical spine) condition was not disabling, and that she was not substantially incapacitated from the performance of her job duties as an ASM for the District. Respondent timely filed an appeal.

///

ASM Duties

4. According to the District's Duty Statement for an ASM, an ASM generally plans, organizes, manages, directs, and supervises administration support staff. Physical activities of the job include: using a telephone, office equipment such as computers, calculators, copiers, scanners, printers, facsimile, audio-visual devices, and mobile devices; and sitting for extended periods of time.

5. Respondent completed a CalPERS form entitled, "Physical Requirements of Position/Occupational Title," setting forth the physical requirements information for an ASM. The physical requirements of the job include: constantly (over six hours) sitting, bending at the neck and waist, twisting of the neck, fine manipulation, repetitive use of hands, keyboard and mouse use; frequently (three to six hours) twisting at the waist, and simple grasping; and, occasionally (up to three hours) standing, walking, reaching above and below the shoulder, pushing and pulling, power grasping, lifting/carrying up to 25 pounds, driving, and being exposed to excessive noise.

Respondent's Evidence

6. Respondent provided numerous medical documents to CalPERS in support of her application. She relied on CalPERS to provide those documents at hearing. However, it was respondent's burden to provide competent medical evidence that she is substantially incapacitated from the performance of her usual and customary job duties. No expert medical practitioner, such as one specializing in orthopedic surgery and cervical spine conditions, testified on respondent's behalf. Respondent did not provide medical reports supporting her disability retirement application. With regard to the CalPERS Independent Medical Examination (IME) and subsequent report prepared by Harry Khasigian, M.D., discussed below, respondent asserted that Dr. Khasigian spent very little time with her, and she "questioned his ability to thoroughly diagnose [her] condition."

7. The sole document that respondent submitted in evidence was a CalPERS form entitled, "Physician's Report on Disability," completed by Richard Gonzales, M.D., respondent's previous primary care physician with Valley Springs Family Medical Center in Valley Springs, California. Dr. Gonzales did not testify at hearing, and his report did not serve to supplement or explain other direct evidence.¹ Therefore, Dr. Gonzales' report was given minimal weight.

8. Respondent asserted that she underwent a nerve conduction study performed by Anna Khananian, M.D., in Sonora, California, approximately three to four weeks ago, and that the results are expected "any day now." Once the results are completed, Dr. Khananian will discuss with respondent the "next steps for treatment." Dr. Khananian did not testify at

¹ Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (Govt. Code, § 11513, subd. (d).)

hearing to opine on whether respondent is substantially incapacitated from performing her usual and customary job duties due to her cervical spine condition. Respondent did not request that the record be held open to include the nerve conduction studies.

9. Respondent testified that she completed physical therapy on her neck area over two months ago, but her pain has not gone away. She has had steroidal injections, which provided some relief. However, within one week after receiving the injections, respondent's neck pain returned. Respondent takes pain medications to manage her neck pain.

CalPERS' Expert Harry Khasigian, M.D.

10. Dr. Harry Khasigian is a board-certified orthopedic surgeon. He has been an orthopedic surgeon in private practice for 38 years. On January 18, 2017, Dr. Khasigian conducted an IME of respondent at the request of CalPERS. Dr. Khasigian reviewed respondent's medical records, and social, occupational and treatment history, performed a physical examination, and prepared a report dated January 18, 2017. Dr. Khasigian testified consistent with his report. He described respondent's presenting complaints as right neck soreness, which respondent described as "stiffness, stabbing, and throbbing" pain.

11. Dr. Khasigian conducted a physical examination and noted no spasm or guarding of her cervical spine. Respondent's tissues were "soft and supple," and there was "no crepitus or spasm with range of motion of the cervical spine." Dr. Khasigian noted no concerns with respondent's thoracic spine, cervical spine, shoulders, upper and lower extremities. Respondent appeared to have a normal neurological examination. Dr. Khasigian noted that there were "no x-rays or CDs available to review diagnostic tests directly," but he did review an MRI² of respondent's cervical spine dated April 28, 2016. The MRI revealed "1) Mild multi-level degenerative disc disease throughout the cervical spine, [and] 2) Mild spinal and neural foraminal stenosis at multiple levels."

12. Dr. Khasigian provided the following diagnoses:

- a. Multi-level degenerative disc disease, cervical spine, without radiculopathy.
- b. Subjective carpal tunnel syndrome without clinical correlation.
- c. Hypertension.

13. Dr. Khasigian opined:

[Respondent] has been treated for a long period of time for chronic neck pain. She has had multiple epidural steroids,

² Magnetic Resonance Imaging.

medial branch blocks, and facet injections, none of which has provided her with any reasonable benefit. She has continued to complain of pain and retired in May 2016.³ She has been to two spine surgeons, neither of which has recommended surgery. Her most recent recommendation carried only a 50 percent success rate for degenerative disc disease. Her clinical examinations do not reveal neurological deficits or radiculopathy. Her pain minimally decreased after stopping work, and she does not show atrophy or dysfunction with regard to her physical examination. She has minimal loss of motion, no atrophy, and no neurological deficits on today's examination . . . Overall, she has, according to records and without direct review of her diagnostic tests, a mild degenerative disc problem at multiple levels in her cervical spine. It is not producing radiculopathy or nerve root irritation and it appears to be relatively stationary. This is a condition with which she worked for multiple years.

14. Based on respondent's objective orthopedic findings, Dr. Khasigian concluded that respondent is able to perform all of the specific duties listed in her duty statement and physical requirements of the job. Dr. Khasigian further concluded that respondent is not substantially incapacitated for the performance of her duties. He opined that respondent's job duties were administrative, and did not place "undue demands upon her cervical spine that would preclude her performance of her usual and customary job duties." Dr. Khasigian noted that respondent's "subjective complaints and presentation [were] much greater than would be ordinarily associated with the physical findings."

15. At the end of his testimony, Dr. Khasigian commented that the nerve conduction studies respondent mentioned in her testimony tested the nerves in her arm for carpal tunnel syndrome. An electromyography, or EMG study, tests the nerves in the neck. Dr. Khasigian did not know whether respondent had an EMG study done for purposes of her disability application, nor was any evidence presented that respondent had one done.

Discussion

16. Dr. Khasigian persuasively concluded that respondent was not substantially incapacitated from performing the usual duties of an ASM with the District. Respondent did not establish through competent medical evidence that, at the time of application, she was permanently disabled or substantially incapacitated from performing the usual duties of her position as an ASM for the District.

³ Respondent stated to Dr. Khasigian during the IME that she had been off of work since May 27, 2016. Respondent's actual last day on the payroll was December 9, 2016; her service retirement date was December 10, 2016.

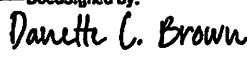
LEGAL CONCLUSIONS

1. Respondent had the burden of proof to establish by a preponderance of evidence that she was "incapacitated for the performance of duty," which courts have interpreted to mean "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877 (*Mansperger*)). Discomfort, which may make it difficult to perform one's duties, is insufficient to establish permanent incapacity from performance of one's position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862 (*Hosford*)). Furthermore, an increased risk of further injury is insufficient to constitute a present disability, and prophylactic restrictions on work duties cannot form the basis of a disability retirement. (*Hosford, supra*, 77 Cal.App.3d at p. 863.)
2. An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697 [finding that a deputy sheriff was not permanently incapacitated from the performance of his duties, because "aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the [the sheriff's] condition are dependent on his subjective symptoms"] (*Harmon*)).
3. *Mansperger, Hosford* and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date she applied for disability retirement, she was substantially unable to perform the usual duties of an ASM on the basis of an orthopedic (cervical spine) condition. Respondent failed to meet this burden.
4. In sum, respondent failed to show that when she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual and customary duties of an ASM for the District. Her application for disability retirement must, therefore, be denied.

ORDER

The application for disability retirement filed by respondent Kelly A. Stephens is DENIED.

DATED: July 25, 2018

DocuSigned by:

ACEA0DD78CC44EF...

DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings