

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:

ANNIKE D. DUNLAP and

STATE COMPENSATION INSURANCE FUND, Respondents.

Case No. 2021-0737

OAH No. 2022010205

PROPOSED DECISION

Marcie Larson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on July 19, 2022, from Sacramento, California.

Helen Louie, Attorney, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

Respondent Annike Dunlap appeared at the hearing and represented herself.

Respondent State Compensation Insurance Fund (SCIF) was represented by Roberta Hykes, Attorney IV.

Evidence was received, the record closed, and the matter submitted for decision on July 19, 2022.

ISSUE

The issue on appeal is whether at the time respondent filed her application for disability retirement, based on her bilateral hands, low back, neck, and left knee conditions (orthopedic conditions), respondent was substantially incapacitated from the performance of her duties as a Workers' Compensation Claims Adjuster (Adjuster) for the SCIF.

FACTUAL FINDINGS

Procedural History

1. On March 18, 2021, respondent signed and thereafter submitted an application for disability retirement (application) with CalPERS. At the time, respondent was employed as an Adjuster with the SCIF. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150.

2. In filing the application, respondent claimed that her specific disabilities were carpal tunnel, Dupuytren's contracture, lumbar spondylosis, left knee severe arthritis, and herniated cervical discs. Respondent wrote that her disability occurred due to "prolonged sitting, repetitive activities [and] typing." Her restrictions included the inability to sit or stand for long periods, her hands were "contracted" and she cannot turn her neck. Respondent also wrote that her disability affects her ability to do

her job because her "neck freezes up," her hands "cramp [and] spasm" and she has limited mobility in her back.

3. CalPERS obtained medical records and reports prepared by Toby Johnson, M.D., Diego Allende, D.O., Robert Salazar, M.D., and Don Williams, M.D., who conducted an Independent Medical Evaluation (IME) of respondent concerning her orthopedic condition. After reviewing the reports, CalPERS determined that respondent's orthopedic conditions were not disabling. As a result, she was not substantially incapacitated from the performance of her job duties as an Adjuster for the SCIF. By letter dated July 16, 2021, CalPERS notified respondent that her application for disability retirement was denied. Respondent was advised of her appeal rights.

4. Respondent filed an appeal and request for hearing with CalPERS by letter dated August 10, 2021.

5. On December 30, 2021, Keith Riddle, in his official capacity as Chief, Disability and Survivor Benefits Division, CalPERS, signed and thereafter filed the Statement of Issues.

Duties of an Adjuster for the SCIF

6. As set forth in respondent's SCIF Duty Statement, as an Adjuster respondent ensures timely and accurate liability decisions are made, manages, finalizes and controls an "inventory that includes more complex disability and maintenance cases," establishes and maintains "timely, current accurate and adequate estimates," "[s]erves as a lead person providing technical guidance and strategies and assisting the ACM [Assistant Claims Manager] within delegated authorities," provides and participates in the "Claims Training program," and manages and coordinates "special

projects as assigned by the ACM or Claims management." The physical requirements of the job include "[c]omputer data entry, frequent light lifting, bending, reaching, carrying, and telephone work, [and] mobility to various working areas."

7. On January 14, 2021, respondent signed a "Physical Requirements of Position/Occupational Title" form (Physical Requirements form). The Physical Requirements form was submitted to CalPERS. According to the Physical Requirements form, when working as an Adjuster, respondent: (1) constantly (over 5 hours) interacted and communicated with co-workers, lifted 0 to 10 pounds, sat, bent and twisted at her neck, and used a keyboard and mouse; (2) frequently (two and one-half to five hours) communicated by phone with the public, stood, twisted at the waist, and light grasped; (3) occasionally (31 minutes to two and one-half hours) communicated by phone with inmates, patients or clients, walked, and reached below the shoulders; (4) infrequently (five to 30 minutes) lifted between 11 and 25 pounds, and bent at the waist; and (5) never communicated face-to-face with the public, supervised, lifted more than 26 pounds, ran, crawled, kneeled, climbed, squatted, reached above her shoulders, pushed and pulled, power grasped, engaged in fine fingering, walked on uneven ground, drove, operated hazardous machinery, was exposed to excessive noise, extreme temperature, dust, gas, fumes or chemicals, or worked at heights.

Independent Medical Evaluation by Don Williams, M.D.

8. On June 19, 2021, at CalPERS's request, Dr. Williams conducted an IME of respondent and issued a report. Dr. Williams testified at hearing consistent with his report. Dr. Williams obtained his medical degree from Case Western Reserve Medical School, Cleveland, Ohio, in 1977. Thereafter, he completed a general surgery internship and orthopedic residency. Dr. Williams is a Diplomate of the American Board of Orthopedic Surgery. Since 1986, Dr. Williams has operated an Orthopedic

Surgery private practice treating patients with orthopedic conditions. Dr. Williams specializes in treating shoulders, hands, and knees. Since 2014, Dr. Williams has performed IMEs for CalPERS.

9. As part of respondent's IME, Dr. Williams asked respondent to complete a questionnaire, interviewed respondent, obtained a personal and medical history, conducted a physical examination, and reviewed respondent's medical records and reports related to her orthopedic conditions. Dr. Williams also reviewed respondent's duty statement and the physical requirements of her position as an Adjuster.

RESPONDENT'S HISTORY OF INJURY AND COMPLAINTS

10. Respondent was 48 years old when Dr. Williams conducted the IME. Respondent informed Dr. Williams that she was originally injured at work in 2009. She was lifting heavy boxes and twisted. She sustained a herniated disc in her lower back. In July 2018, she filed a Workers Compensation claim for "a cumulative trauma injury associated with day-to-day mouse activities and keyboarding." Respondent explained that her recent work duties required her to constantly look up at a screen which caused neck pain and wrist pain.

11. Respondent explained that she underwent various treatments. SCIF conducted an ergonomic evaluation and provided her with a "stand or sit desk." However, she has arthritis in the left knee and the left knee hurts when she stands. Her low back hurts when she sits. Respondent had a microdiscectomy in 2009 and lumbar fusion performed in December of 2018, which helped her low back. In June 2020, she had a left hand Dupuytren's contracture release, which helped her hand. Respondent reported that her right long finger was still contracting but was not at a point that she needed surgery.

12. Respondent complained that she had left-sided neck pain and left scapular pain. She could not turn to the left. The pain in her left knee made it difficult to stand and walk. She had difficulty bending her knee. She also suffered from low back pain. Respondent explained that she could only walk 25 feet before she feels pain. Respondent cannot run and she felt that she could not lift over five pounds. She can sit for approximately 30 minutes. Respondent was able to cook, clean, and do yard work. Respondent stopped working in March 2020 due to the pain she was experiencing related to her orthopedic conditions.

PHYSICAL EXAMINATION AND REVIEW OF MEDICAL RECORDS

13. Dr. Williams conducted a physical examination of respondent, including her spine and upper and lower extremities. Dr. Williams noted that respondent had a "slight antalgic gait on initial rising from her chair and it clears to a normal gait without the use of a cane." Dr. Williams explained that an antalgic gait occurred because respondent had a quicker step on her favored one side, but this cleared as she walked. She was also able to walk without a cane inside the office for a short distance.

14. Respondent's cervical spine had flexion of 50 degrees, extension of 60 degrees, and rotation of 90 degrees to the right, but she was only able to turn 30 degrees to the left. Dr. Williams opined that respondent's cervical spine rotation was good and the inability to turn to the left was due to respondent's complaints of pain and stiffness.

15. Respondent's upper extremities were normal. She had good motion in her shoulders, elbows and wrists. She had full range of motion in her wrists. On her right hand she had a slight Dupuytren's contracture on the right long finger, which

affected the motion on that finger. On her left hand she had scars from surgery, but had full extension and flexion. Her grip strength was normal and equal on both right and left hands. Respondent's reflexes were normal and symmetrical on her biceps, in the brachioradialis, and the triceps bilaterally. Her upper back had some left-sided trapezial tightness. Respondent could flex her lumbar spine to 90 degrees and extend 10 degrees, which was slightly decreased.

16. Dr. Williams examined respondent's lower extremities. Respondent reported she was not able to squat. Her right knee motion was 0 to 150 degrees. Her left knee motion was slightly decreased at 0 to 130 degrees. She had a large scar on the left knee from a surgery in high school.

17. Dr. Williams reviewed medical records and reports related to respondent's orthopedic conditions, including imaging reports, post-operative reports and reports from John Emerzian, D.C, who performed a Qualified Medical Evaluation (QME) related to respondent's workers compensation claim. Dr. Williams noted that respondent's records related to her June 2020 contracture release demonstrated she had good results from the procedure. Respondent also received steroid injections to address her cervical pain related to her disc bulge at C5-6. Surgery was not recommended.

DIAGNOSIS AND OPINIONS

18. Dr. Williams diagnosed respondent with a two millimeter (mm) cervical disc bulge, slight left knee osteoarthritis, lumbar spondylosis, post discectomy and post fusion at her L4-5, post-left hand Dupuytren's contracture release with good results and early contracture Dupuytren's on her right long finger. Dr. Williams explained that respondent's "initial injury was in 2009, lifting heavy boxes, and

sustained disc extrusion at L4-5, and had a microdiscectomy in 2009. She returned to work." He added that "[s]he had gradually increasing problems in her lower back and neck thru July 17, 2018, cumulative trauma claimed injury. She had a lumbar fusion in December of 2018 at L4-5. It helped to return her to work, and she worked through March of 2020."

19. In response to the question posed by CalPERS to Dr. Williams concerning whether there were specific job duties that respondent was unable to perform because of her orthopedic conditions, Dr. Williams answered "No." Dr. Williams opined that respondent "does not have an actual orthopedic impairment that arises to the level of substantial incapacity." Dr. Williams explained that the following formed the basis of his opinions:

Subjective complaints are that she has to be able to stand or sit and her stance at desk does allow her to do that, but the arthritis in her knee makes it difficult to stand for a long period. Lumbar fusion did help, so she could sit longer, but still gets stiffness.

Objective findings include the MRI of the cervical spine showed only a 2-mm C5-6 disc bulge. She did have a previous lumbar MRI showing the 6-mm L4-5 for which she had surgery and the fusion improved. She had a good result from the fusion. She maintains normal upper extremity reflexes. She maintains adequate grip strength. Good range of motion in her hands and arms and the neck has acceptable range of motion. The lumbar spine maintains good motion, flexion to 90 degrees and extension 10

degrees. Her left hand has healed with the Dupuytren's release. Right hand still has a contracture that has been present for number of years. She does have some objective findings, but it does not cause substantial incapacity.

20. Dr. Williams concluded that respondent is not substantially incapacitated from the performance of her duties as an Adjuster due to her orthopedic conditions.

FEBRUARY 2022 SUPPLEMENTAL REPORT

21. Dr. Williams issued a supplemental report dated February 11, 2022, after he reviewed 104 pages of additional medical records and reports, including a report from Lonnie R. Powell, D.C., dated January 18, 2022. Dr. Powell, a chiropractor, performed an IME of respondent at her request, related to her workers compensation claim. None of the information reviewed by Dr. Williams changed his opinions set forth in his June 19, 2021 report. Dr. Williams noted that the medical reports indicate her "treatments for the cervical spine, treatment for the left knee, treatment for the lumbar spine, and treatment for the left hand Dupuytren's contracture" have been "helpful."

JUNE 2022 SUPPLEMENTAL REPORT

22. Dr. Williams issued a supplemental report dated June 3, 2022, after he received a second report from Dr. Powell dated April 28, 2022. Dr. Williams noted that Dr. Powell had recommended "prophylactic work preclusions based upon her subjective complaints and mild objective findings," including "no repetitive grasping, gripping," due to her bilateral hand complaints.

Based on review of the additional records Dr. Williams opined:

I can state with reasonable medical certainty that she does not have substantial disability for performing her job duties as a claims adjuster. I did not find evidence for substantial disability based on the good result from hand surgery and the neck with only 2-mm protrusion. The lumbar fusion is stable.

23. None of the information reviewed by Dr. Williams changed his opinions set forth in his June 19, 2021 report.

Respondent's Evidence

24. Respondent worked for SCIF since 2001. Her last day of work was March 3, 2020. Her doctor placed her on leave due to her neck pain and chronic headaches. She has not recovered enough to go back to work and her orthopedic conditions are now worse. Respondent explained that she experiences neck pain from sitting at a computer and looking at a computer screen all day. The pain and migraines prevent her from working.

25. Respondent has not been prescribed any medication for pain because she has gastrointestinal issues that prevent her from taking anything other than Tylenol or Excedrin. Respondent has been referred to a pain management specialist. She is not scheduled to undergo any additional treatment for her orthopedic conditions.

Analysis

26. When all the evidence is considered, Dr. Williams's opinion that respondent is not permanently disabled or substantially incapacitated from the

performance of her usual and customary duties as an Adjuster for the SCIF based upon her orthopedic conditions, was persuasive. Dr. Williams based his opinion on his review of respondent's duty statement, the physical requirements of her job, review of her medical records, and a physical examination. The physical examination revealed she had surgery on her L4-5 with good results. She has normal upper extremity reflexes and adequate grip strength. She also has good range of motion in her hands and arms. She has acceptable range of motion in her neck. Her lumbar spine has good motion. Her left hand healed with the Dupuytren's release. Her right hand still has a contracture. Dr. Williams opined that while respondent does have some objective findings, those findings and subjective complaints of pain do not prevent respondent from performing the duties of an Adjuster.

Additionally, none of the medical records reviewed by Dr. Williams contradict his opinion that respondent is not substantially incapacitated from the performance of her usual and customary duties as an Adjuster. There is no indication in the records that any of the doctors determined that respondent was permanently disabled or substantially incapacitated from the performance of her usual and customary duties as an Adjuster for the SCIF, based on her orthopedic conditions.

27. Respondent failed to present competent medical evidence to demonstrate she is permanently disabled or substantially incapacitated from the performance of her usual and customary duties as an Adjuster for the SCIF based upon the legal criteria applicable in this matter. Consequently, respondent failed to establish that her disability retirement application should be granted based upon her orthopedic conditions.

LEGAL CONCLUSIONS

1. Government Code section 21150, subdivision (a), provides, in pertinent part, that “[a] member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age. . . .”

2. 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 duration, which is expected to last at least 12 consecutive months or will result in death, 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.

3. Government Code section 21152, subdivision (d) provides that an application for disability retirement may be made by the member.

4. Government Code section 21154 provides in relevant part that:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties

from the date of discontinuance of state service to the time of application or motion. 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 relevant part that:

If the medical examination and other available information show to the satisfaction of the board, [...], the governing body of the contracting agency employing the member, 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, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

6. Incapacity for the performance of duty "means the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Substantial inability to perform usual

duties must be measured by considering applicant's abilities. Discomfort, which makes 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.) A condition or injury that may increase the likelihood of further injury, as well as a fear of future injury, do not establish a present "substantial inability" for the purpose of receiving disability retirement. (*Hosford v. Board of Administration of the Public Employees' Retirement System, supra*, 77 Cal. App. 3d 854, 863-864.)

7. Findings issued for the purposes of Workers' Compensation are not evidence that respondent's injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207; *English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563.)

8. The burden of proof is on respondent to demonstrate that she is permanently and substantially unable to perform her usual duties such that she is permanently disabled. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) To meet this burden, respondent must submit competent, objective medical evidence to establish that, at the time of her application she was permanently disabled or substantially incapacitated from performing the usual duties of her position. (*Harmon v. Board of Retirement, supra*, 62 Cal. App. 3d at 697.) Respondent did not present competent, objective medical evidence to establish that she was permanently disabled or substantially incapacitated from performance of her duties as an Adjuster for the SCIF at the time she filed her disability retirement application. Therefore, based on the

Factual Findings and Legal Conclusions, respondent is not entitled to retire for disability pursuant to Government Code section 21150.

ORDER

Respondent Annike Dunlap's application for disability retirement is DENIED.

DATE: August 9, 2022

Marcie Larson

Marcie Larson (Aug 9, 2022 13:18 PDT)

MARCIE LARSON

Administrative Law Judge

Office of Administrative Hearings