

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
**In the Matter of the Application for Disability Retirement
and Earlier Effective Retirement Date of:**

MARSHUN D. LEWIS,

Respondent,

and

**CALIFORNIA DEPARTMENT OF STATE HOSPITALS –
METROPOLITAN LOS ANGELES,**

Respondent.

Agency No. 2022-0971

OAH No. 2023040787

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, by videoconference on July 11, 2023.

Nhung Dao, Attorney, represented California Public Employees' Retirement System (CalPERS).

No appearance was made by or on behalf of respondent Marshun D. Lewis (respondent) or respondent California Department of State Hospitals – Metropolitan Los Angeles (the Department) despite respondents receiving timely and appropriate notice of the hearing.

The hearing proceeded in default. CalPERS presented testimonial and documentary evidence, and gave a closing argument. The record closed and the matter was submitted for decision upon the conclusion of the hearing.

SUMMARY

Respondent appealed CalPERS' denial of her application for a disability retirement, as well as its determination she is not entitled to an earlier effective retirement date than when she submitted her application. However, respondent failed to meet her burden of establishing by a preponderance of the evidence that she is substantially incapacitated from performing the duties of an Office Assistant (Typing) and therefore is not eligible for a disability retirement. Thus, the issue concerning her request for an earlier effective retirement date is moot.

As a matter of law, CalPERS is not bound by the determination of respondent's employer, the Department, that she is disabled and unable to perform her duties. Respondent's remedy to the situation here, where she was not returned to her former position by the Department and yet is not eligible for a disability retirement, is to request the Department to reinstate her to the position as an Office Assistant (Typing).

Therefore, CalPERS' denial of respondent's application for a disability retirement is affirmed.

FACTUAL FINDINGS

Parties and Jurisdiction

1. CalPERS is a defined benefit plan administered under the California Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.; undesignated statutory references are to the Government Code.) CalPERS is governed by its Board of Administration (Board). (Ex. 1.)

2. Respondent was employed by the Department during her entire state service. By virtue of her employment, respondent is a state miscellaneous member of CalPERS. (Exs. 1, 3.)

3. Respondent's last day of actual service for the Department was March 2, 2005. At that time, respondent was employed by the Department in the position of Office Assistant (Typing). Respondent was on payroll with the Department until October 10, 2017, when she exhausted her leave benefits. She has been on an unpaid leave of absence since then. (Exs. 3, 21.)

4. On January 11, 2022, CalPERS received respondent's signed application for disability retirement (or application), which requested a retirement effective date of "upon expiration of benefits." Respondent described in the application her disability was from nerve damage, knee and back pain, cervical radiculopathy, and chronic neck pain. (Ex. 3.) Because respondent's leave benefits had been exhausted well more than four years earlier, i.e., October 2017, CalPERS deemed her application to include a request for a disability retirement to become effective earlier than the first day of the month in which her application was received, per section 21252. (Exs. 3, 4, 20.)

///

5. After reviewing medical information received from various sources, and after considering the applicable provisions of PERL, CalPERS determined that respondent was not substantially incapacitated to perform her usual work duties as an Office Assistant (Typing) with the Department; and, that she did not meet the criteria under section 20160 that would allow her to receive an effective retirement date earlier than when she submitted her application. (Exs. 7-9, 22-26.)

6. By letter dated July 28, 2022, CalPERS notified respondent of its determination to deny her application, and to deny her request for an earlier effective disability retirement date. (Ex. 4.)

7. Respondent filed a timely appeal by letter dated August 17, 2022, and requested an administrative hearing. (Ex. 5.) The Department did not file an appeal or request an administrative hearing. (Ex. 1.)

8. A Statement of Issues was signed by Keith Riddle in his official capacity as Chief of CalPERS' Disability and Survivor Benefits Division, seeking to affirm CalPERS' determinations described above. (Ex. 1.)

9. As alleged in the Statement of Issues, the issues on appeal in this case are:

(1) whether at the time of the application, on the basis of . . . orthopedic (neck, back, left knee) and neurological (nerve damage) conditions, respondent is substantially incapacitated from the performance of her usual and customary duties as an Office Assistant (Typing) for [the Department], and

(2) if respondent is found to be substantially incapacitated,
whether she made a mistake which was the result of
inadvertence, mistake, surprise or excusable neglect
correctable by Government Code section 20160 which
entitles her to an earlier effective retirement date.

(Ex. 1, pp. A14-15, emphasis added.)

Respondent's Work History with the Department and Injuries

10. Respondent began her state service for the Department on November 2, 2001. (Ex. 7, p. A86.) The Department is a psychiatric facility for those who have been ordered by a court to be confined for psychiatric evaluation and treatment. (Ex. 8.)

11. Respondent initially worked for the Department in a position she describes as a "medical records technician." (Ex. 7, p. A86.)

12. Respondent developed symptoms in her lower back which resulted from her repetitive and prolonged work activities, including ascending and descending ladders and heavy lifting. (Exs. 7, 24.)

13. In September 2005, while climbing up and down a ladder, respondent felt a twinge in her lower back. After she went home, her mid and lower back gave way. She rested and took pain medication. The following day, respondent called her supervisor and reported the injury. Respondent ultimately went on an extended medical leave due to her injured back. (Exs. 7, 24.)

14. Respondent returned to work in April 2007. As a reasonable accommodation, respondent was transferred to a new position in plant operations as an Office Assistant (Typing). (Ex. 7, pp. A97-104; Ex. 24.) She described that position to

the physician who conducted her independent medical examination (IME) in this case as more sedentary, without responsibility for "taking down" a psychiatric patient in crisis. (Ex. 7.)

15. According to the Department's Duty Statement for the position of Office Assistant (Typing), respondent was required to abstract and copy health records; retrieve and deliver records within the hospital; perform a variety of general office duties, such as abstracting and filing records, organizing various documents, typing mail, document handling, document preparation, as well as organizing and stocking supplies; use the Admission Discharge and Transfer (ADT) computer system to research and identify various patient documents for filing purposes; and perform other departmental functions as required. (Exs. 8, 9.)

16. According to the Department's Duty Statement, the position of Office Assistant (Typing) physically required respondent to exert up to 20 pounds of force occasionally and/or up to 10 pounds of force constantly to move objects; prolonged periods of standing, bending, sitting, kneeling, walking, stooping, squatting, crouching, and reaching; twisting, turning, grasping, and making repetitive hand movements; operating assigned equipment; periodically working in patient-populated areas; climbing up and down stairs and walking on uneven surfaces; working in a confined/restricted environment; and using a computer keyboard several hours a day. (Exs. 8, 9.)

17. On March 2, 2015, respondent was in her office working near her desk. The bottom desk drawer was open, and her phone was ringing. As respondent turned to reach the phone, she walked into the open drawer and struck her left shin. She immediately felt pain in her left lower leg. Respondent went home and noticed a cut

on her left lower leg. The following day, respondent reported her injury to her employer. (Ex. 7, pp. A84-85.)

18. Respondent was sent for medical treatment, including physical therapy, and did not return to work. She was put on another medical leave. (Ex. 25.)

19. In late May 2015, during one of her physical therapy sessions for her injured left leg, the therapist recommended an exercise which required respondent to push a weight backwards. As she was performing the exercises, respondent's left knee hyperextended. She reported her injury and was evaluated by a doctor at Kaiser Permanente (Kaiser). (Ex. 7, p. A85.)

20. In 2016, respondent was involved in a car accident. She was driving on a freeway in the carpool lane when traffic was at a standstill; her car was rear-ended by another vehicle travelling at high speed. That collision caused her vehicle to rear-end the car in front of her. Respondent felt pain in her neck. She sought care at a Kaiser Emergency Room. Respondent was referred to medical treatment, including a different facility for physical therapy. Respondent was placed on temporary disability. She received medical treatment for approximately four or five months until she was released from care. (Ex. 7, p. A85.)

21. In response to a statement she provided to CalPERS, respondent noted she attempted to return to work to the Department in 2016, but was sent to a new employee orientation class. After attending five days of the orientation class, respondent was advised there was no position for her in plant operations and that she would be returned to the previous position she had as a medical records technician in 2005 when she hurt her back. Because she was not able to perform those duties years

earlier when she was reassigned to plant operations, respondent's doctor put her back on temporary disability in 2016. (Exs. 24-25.)

22. Respondent continued to have problems with her left knee after she hyperextended it during physical therapy. In November 2017, respondent underwent surgery on her left knee. Thereafter, she was treated with postoperative physical therapy and continued being seen by the orthopedic surgeon who operated on her knee. (Ex. 7, pp. A85-86.)

The Department's Decisions Concerning Respondent's Work Status

23. Beginning in December 2016, the Department engaged respondent in an interactive process to return her to work. The Department contends respondent attempted to return to work in May 2015, not 2016, and that she spent six days in a limited duty assignment, not in a new employee orientation class. (Ex. 25, p. A389.) The interactive process continued in 2017, 2018, and 2019, with no resolution. (Ex. 25.) On February 5, 2020, the Department closed the interactive process, concluding:

[Respondent's] Reasonable Accommodation [RA] was closed. She had requested an RA to return to work with accommodation with her limitations. After the analysis she was declared a qualified individual with a disability. *She could not perform the essential functions of her current classification Office Assistant so an Alternate Job Placement was offered. She was offered positions of a Food Service Technician I (FST 1) and Custodian which she declined because the physical requirements would not work with her limitations and she was not interested in either*

position. Therefore the request for a reasonable accommodation was closed.

(Ex. 25, p. A390; emphasis added.)

24. CalPERS requested a statement from the Department concerning respondent's application. (Ex. 23.) In response, the Department advised:

1. [Respondent] stopped working because of a work-related injury that occurred on 03/02/2015.
2. [Respondent] reported injury to her lower back area, knee (left), lower leg (left).
3. [Respondent] engaged in the interactive process with Sandra Ng Personnel Officer and Zenaida Hernandez Options Coordinator and was provided with disability retirement information on 06/29/2018 and informed of mandatory reinstatement rights. She was provided with information about a Reasonable Accommodation, Medical Leave of Absence, and State Disability Insurance.
4. [Respondent] did not leave work for any other reason other than her disabling medical condition.
5. [The Department] has no objections to [respondent's] earlier request for a retirement date.

(Ex. 25, p. A386.)

///

CalPERS' Evaluation of Respondent's Application

25. In her statement to CalPERS, respondent explained her disabling conditions as follows:

Since I have had my knee surgery my knee flares up & swells. I have nerve damage & sciatica sometimes when I sit or stand for too long. I have flare ups that are very painful & uncomfortable. My back has flared up when I try any lifting over 10 to 15 pounds. Also since it took almost 2 1/2 years before I received my knee surgery my other knee swells with fluid also. In 2016 I was in a car accident. I have two slipped herniated disc[s] that [are] pressing on my nerves also. I just had [an] epidural [block] 3 weeks ago to try & ease the pain & numbness in my hands and the pain in my neck (Ex. 24.)

OBTAINING MEDICAL INFORMATION

26. After receipt of respondent's application, CalPERS requested medical records and documentation concerning the conditions she described in her application, i.e., nerve damage, knee and back pain, cervical radiculopathy, and chronic neck pain. (Ex. 26, pp. A403-412.)

27. CalPERS reviewed the medical records received and found that the submitted documentation indicated a possible disability regarding respondent's claimed orthopedic (neck, back, knee) and neurological (nerve damage) conditions. (Ex. 26, pp. A403-412; Ex. 4.)

28. CalPERS requested additional medical records from respondent regarding her orthopedic (right knee) condition. Since the medical reports received did not establish a current or continuous disability based on the alleged right knee condition, CalPERS did not have sufficient information to make a formal determination on this condition. (Ex. 26, pp. A403-412; Ex. 4.)

INDEPENDENT MEDICAL EXAMINATION

29. On May 22, 2022, respondent was sent for an IME by board-certified orthopedic surgeon Stephen P. Suzuki. (Ex. 7.)

30. As part of the IME, Dr. Suzuki interviewed respondent, examined respondent's body (including her neck, upper and lower back, legs, and knees), and reviewed pertinent medical records. Dr. Suzuki prepared a report of his examination and findings. (Ex. 7.) He also testified during the hearing.

31. Dr. Suzuki concluded respondent does not have a substantial incapacity to perform her usual and customary work duties as an Office Assistant (Typing) for the Department. Respondent's primary duty is typing. Dr. Suzuki does not believe any of respondent's conditions would prevent her from performing that duty. As to respondent's cumulative conditions (neck, back, or left knee), Dr. Suzuki saw no objective findings which would result in any incapacity to perform her usual job duties. Dr. Suzuki also found respondent's subjective complaints to be out of proportion to the mechanism of injury, diagnostic study findings, or his clinical evaluation. (Ex. 7.) For example, Dr. Suzuki found no evidence of muscle wasting or atrophy, but did see respondent exhibited normal motor strength. (Testimony [Test.] of Suzuki.)

32. Dr. Suzuki found respondent had slightly decreased range of motion in her cervical back and neck. He described the injury as a strain/sprain, muscular in

nature, which did not appear to radiate. Dr. Suzuki does not believe this condition is disabling because, as a typist, respondent could move the focus of her typing every hour or so to change her body orientation, and stretch to alleviate any neck pain. (Test. of Suzuki; Ex. 7.)

33. With regard to respondent's lumbar back, Dr. Suzuki noted she had a slight decrease in range of motion and mild disc degeneration. Dr. Suzuki saw from medical reports from other providers that respondent has irritated nerve roots in that area of her back, which causes pain to radiate downward; however, nerve velocity studies done by the other providers showed the pain radiated only a short distance. Dr. Suzuki concedes respondent can feel pain and numbness radiating into her legs from her lumbar spine, which could pose a work problem if her position required constant sitting, like a bus driver. However, Dr. Suzuki does not see this as disabling for respondent because she could get up and down from a seated position whenever she wanted, and could stand for long periods if she wanted. (Test. of Suzuki; Ex. 7.)

34. Dr. Suzuki found respondent's legs and knees to be normal, except for some arthritis in her left kneecap area. Dr. Suzuki associates the arthritis with respondent's age and a congenital condition in how her kneecaps "ride higher" than normal, which makes her vulnerable to kneecap dislocation. Since respondent would not be required to squat or kneel frequently at work, like a carpenter or tile installer, Dr. Suzuki does not believe her left knee arthritis is disabling. (Test. of Suzuki; Ex. 7.)

35. Dr. Suzuki found corroboration for his opinions in his review of medical records from other physicians who evaluated respondent in other legal proceedings related to her injuries. Examples include the Qualified Medical Evaluation conducted by Dr. Jaqueline Lezine-Hanna on August 8, 2016, an orthopedic surgeon, indicating that respondent could perform her full duties; and the same impression reached by

Agreed Medical Evaluator Dr. Richard Fedder, also an orthopedic surgeon, in his report of April 17, 2017. (Test. of Suzuki; Ex. 7.)

36. Dr. Suzuki also found interesting the Agreed Medical Evaluation report of Dr. Alexander Angerman, another orthopedic surgeon. Dr. Angerman noted that respondent did have limitations in her ability to repetitively squat, kneel, crouch, crawl, climb stairs or ladders, or walk on uneven surfaces, as well as prolonged standing and walking. But, based on respondent's job description, these limitations would not be exceeded. Dr. Angerman reiterated his conclusions in a supplemental report of August 22, 2019, in which he again specifically indicated that he believed respondent would be capable of returning to her usual and customary work activities if the restrictions he outlined were not exceeded. (Test. of Suzuki; Ex. 7.)

37. Dr. Suzuki noted respondent recently has been deemed temporarily partially disabled by Dr. John Tin, a physical medicine and rehab physician treating respondent through Kaiser. Dr. Tin indicated respondent should avoid hand-motion activities such as typing, dialing on the phone, and writing. Dr. Suzuki believes the problem is suggestive of carpal tunnel syndrome. However, Dr. Suzuki noted this is the first time respondent has had restrictions which would interfere with her primary duty of typing, and was raised for respondent many years after her last day of actual work for the Department. Dr. Suzuki concluded these limitations were unrelated to respondent's neck, back, and left knee injuries for which she applied for disability retirement. Dr. Suzuki also noted that these recent restrictions on activities regarding her upper extremities are not at this time permanent but temporary, as she has not had a sufficient medical workup to declare these as permanent restrictions. Finally, Dr. Suzuki did not see these problems as ultimately disabling because carpal tunnel syndrome is "very treatable." (Test. of Suzuki; Ex. 7.)

CalPERS' Determination of Respondent's Application

38. After review of all the medical reports received, including Dr. Suzuki's, CalPERS determined that respondent was not permanently disabled or substantially incapacitated from the performance of her duties as an Office Assistant (Typing) due to her orthopedic (neck, back, left knee) or neurological (nerve damage) conditions. (Ex. 4.)

39. In its determination letter, CalPERS advised respondent she had the following options due to the denial of her application:

1. Continue/Resume working as an Office Assistant (Typing) with the Department of State Hospitals - Metropolitan.
2. Seek employment in a different job with the same agency or with another CalPERS covered employer.
3. Discontinue CalPERS employment and advise your last employer to notify CalPERS that you wish to have your accumulated contributions remain in the Retirement Fund. At a future date, you may request service retirement (if you have attained age 50) or a refund of your accumulated contributions.
4. Terminate CalPERS employment and submit a written request for a refund of your accumulated contributions. Once the refund is mailed, your membership and eligibility for health insurance with CalPERS terminates, and no retirement benefits can be paid. (Ex. 4.)

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.)

2. The preponderance of the evidence standard requires respondent to present evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Disability Retirement Generally

3. The statutory scheme for disability retirement requires a “disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the [B]oard . . . on the basis of competent medical opinion.” (§ 20026.)

4. “If the medical examination and other available information show to the satisfaction of the [B]oard that the member . . . is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the [B]oard shall immediately retire him or her for disability.” (§ 21156, subd. (a)(1).)

5. The term “incapacitated for performance of duty” has been defined 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, 876–877 [*Mansperger*].) An applicant does not qualify for a disability retirement when she can perform customary duties, even though doing so may sometimes be difficult or

painful. (*Mansperger, supra*, 6 Cal.App.3d 873; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.)

It was Not Established that Respondent is Substantially Incapacitated

6. The weight of the competent medical opinions presented in this case establish that respondent is not incapacitated for performance of her duties as an Office Assistant (Typing). Those medical opinions primarily are from Dr. Suzuki, with the other opinions coming from physicians who have evaluated respondent in her other legal proceedings. Since this hearing proceeded by default, no competing evidence was presented by respondent from any of her treating physicians who may have contrary opinions. Thus, respondent failed to meet her burden in this case of establishing that she is substantially incapacitated. (Factual Findings 10-39.)

7. Respondent's case is complex. The medical records submitted to CalPERS confirm she has medical conditions with her neck and cervical back, lumbar back (including some radiating pain), and her left knee. Those conditions do limit respondent from some of her duties as an Office Assistant (Typing). However, Dr. Suzuki was able to persuasively explain why those limitations, individually and cumulatively, do not substantially incapacitate respondent from performing her duties. Respondent's emerging carpal tunnel syndrome is the one condition which causes the greatest limitation to respondent performing her primary duties. But, as Dr. Suzuki outlined in his IME report and testimony, that condition emerged years after respondent last worked as an Office Assistant, unrelated to the conditions she described in her application, is not a permanent restriction at this time, and is "very treatable." Thus, the carpal tunnel syndrome cannot be the basis for granting respondent's application at this time. In the absence of any competing medical

information submitted by respondent, there is no evidence in the record suggesting Dr. Suzuki is in error. (Factual Findings 10-39.)

The Department's Decisions About Respondent's Work Status

8. It is clear the Department believes respondent is incapacitated from performing her duties as an Office Assistant (Typing). For example, as part of its interactive process with respondent, the Department determined that she "could not perform the essential functions of her current classification Office Assistant." (Factual Finding 23.) And, in its response to CalPERS' inquiry in this case, the Department confirmed its conclusion that respondent has a "disabling medical condition." (Factual Finding 24.)

9. However, CalPERS is not bound by the decisions or agreements of its members or contracting agencies, including the Department, another state agency. (*Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453, 464.) Even if CalPERS could be so bound, there is no evidence in this record indicating the Department's conclusions concerning respondent's ability to perform her duties is supported by competent medical opinion, as required by section 20026. Thus, the fact the Department has deemed respondent incapacitated, while probative, is not dispositive.

10. It is concerning how the Department handled respondent's situation. In April 2007, the Department transferred respondent from her position as a medical records technician to that of Office Assistant (Typing) due her back injury. After incurring several more injuries while working in her later position, in 2016 the Department proposed to transfer respondent to her former medical records technician position, even though it had previously deemed respondent unable to perform that job. The Department next advised respondent it had no more Office Assistant (Typing)

positions available, but instead offered respondent more physically demanding positions in the kitchen or as a janitor, which respondent was not apt to perform given her restrictions. (Factual Findings 10-24.)

11. This situation puts respondent in the awkward position of not being offered a suitable position at work, while not being eligible for disability retirement. Such an untenable situation was discussed in the cases of *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985, 988-989, and *Raygoza v. County of Los Angeles* (1993) 17 Cal.App.4th 1240, 1245-1246. In those cases, the courts decided that following a final decision denying an application for disability retirement, the involved employer is required to reinstate its employee to her former position. Here, that means the Department is required to reinstate respondent to her former position as an Office Assistant (Typing), which the competent medical opinions established is a position respondent can perform. If the Department refuses, respondent's remedy is to file a petition for writ of mandate compelling the Department to do so. CalPERS has adopted such an approach in its Precedential Decision of *In the Matter of the Application for Disability Retirement of Ruth A. Keck* (May 16, 2000; made precedential by the Board on August 30, 2000). (Ex. 27.) An appeal decision that has been designated as precedential by the involved agency binds all future appeals to the extent that the disputed law and issues are the same. (§ 11425.60.)

Disposition


12. Since respondent failed to meet her burden of establishing by a preponderance of the evidence that she is substantially incapacitated for the performance of her duties as an Office Assistant (Typing), CalPERS' denial of her disability retirement application must be affirmed. (Factual Findings 1-39; Legal Conclusions 1-11.)

13. The denial of respondent's application for disability retirement renders moot her request for a determination that she is entitled to an earlier effective retirement date, as the Statement of Issues alleged such a resolution is only necessary "if respondent is found to be substantially incapacitated." (Factual Findings 1-39; Legal Conclusions 1-12.)

ORDER

CalPERS' denial of respondent Marshun D. Lewis's application for disability retirement is affirmed.

DATE: 08/01/2023


Eric C. Sawyer (Aug 1, 2023 16:51 PDT)

ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings