

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues against:

ROBIN M. ROTHWELL-ALLISON, respondent

and

DEPARTMENT OF INSURANCE, respondent.

Agency Case No. 2020-0715

OAH No. 2020110125

PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by video and teleconference on March 15, 2021.

Helen L. Louie, Attorney, represented complainant Keith Riddle, Chief, Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS). Respondent Robin M. Rothwell-Allison (respondent) appeared and represented herself. There was no appearance by or on behalf of respondent Department of Insurance (DOI).

Oral and documentary evidence was received. The record was held open to permit closing briefs to be filed. Complainant filed a closing brief on April 14, 2021; it was marked for identification as exhibit 20. Respondent filed a closing brief on May 17, 2021; it was marked for identification as exhibit V. Complainant filed a reply brief on May 28, 2021, and a transcript of the hearing; they were marked collectively for identification as exhibit 21.

The record was closed and the matter was submitted for decision on May 28, 2021.

SUMMARY

Respondent has the burden to show that, at the time of filing her industrial disability retirement application, she was permanently disabled or incapacitated from performing her regular and customary job duties as a Special Investigator with DOI. CalPERS determined she was not incapacitated and denied her application, and respondent appealed. Both parties introduced medical evidence, but the record on the whole does not support respondent's claim. Her appeal from the denial of industrial disability retirement is denied.

FACTUAL FINDINGS

Jurisdiction

1. Respondent was employed by DOI as a Special Investigator for a total of approximately 12 years, from December 1999 through June 2007 (when she moved out of state) and from January 2015 (when she returned to California) to October 1,

2019. Respondent's employment at DOI establishes her as a state safety member of CalPERS subject to Government Code section 21151.

2. On August 17, 2019, respondent signed an application for service pending industrial disability retirement (Application), which was received by CalPERS on August 20, 2019. In the Application, respondent wrote that her disability consisted of anxiety, depression, stress, "psych," and headaches. (Ex. 4, p. 2.) She identified her limitations as "I cannot be exposed to significant emotional stress and/or harassment," and wrote that her injury or illness renders her "unable to perform my duties as a Special Investigator." (*Ibid.*)

3. Respondent retired from service effective October 1, 2019, and has been receiving a retirement allowance from that date.

4. By letter dated April 15, 2020, CalPERS notified respondent of its denial of her Application. CalPERS wrote that it obtained and reviewed medical reports prepared by Pouratian Nader, M.D., Ramya R. Malchira, M.D., Shahab Moradi, M.D., Barry A. Halote, Ph.D., Q.M.E., David E. Sones, M.D., Khaled A. Anees, M.D., and Lawrence H. Warick, M.D., concerning respondent's psychological conditions (anxiety, depression, stress) and her neurological conditions (headaches, trigeminal neuralgia). CalPERS determined that respondent's conditions were not disabling and that respondent, therefore, was not substantially incapacitated from the performance of her job duties as a Special Investigator with DOI at the time she filed the Application. CalPERS advised respondent of her appeal rights.

5. Respondent filed a timely appeal by letter dated May 12, 2020, and requested an administrative hearing. This hearing ensued.

Duties of a Special Investigator

6. According to DOI's Essential Function Duty Statement (Duty Statement) for Supervising Special Investigators (ex. 17), the essential functions of respondent's job were distributed as follows: 40 percent administrative, criminal, and civil investigations, including gathering and securing evidence and conducting interviews; 30 percent preparing investigative reports and preparing for cases, including analyzing and organizing evidence and testifying in court; 15 percent preparing and serving search warrants and subpoenas; and 15 percent administrative, including outreach with law enforcement for joint criminal investigations, maintaining investigative files, and acting in a lead capacity over other investigators. The Duty Statement requires the employee to be able to safely operate a motor vehicle, among other things.

7. According to a CalPERS form entitled, "Physical Requirements of Position/Occupational Title" (Physical Requirements statement) (ex. 18), respondent was required to be able to sit for over six hours, use a keyboard for three to six hours, and drive for up to three hours.

8. Respondent testified that her position as a Special Investigator involved serving warrants, filing criminal and administrative cases, interviewing witnesses, testifying in court, and doing field work in occasionally dangerous areas. Respondent testified her job involved driving and talking on a regular basis, and often involved working long hours, especially when preparing cases for trial. Respondent's testimony about her job duties, and the sometimes stressful nature of the job, was corroborated at hearing by the testimony of June Arago, a retired Supervising Investigator for DOI, and by Dorothy Torrescano, a retired annuitant for DOI and a former Supervising Investigator there.

Complainant's Medical Evidence

INDEPENDENT MEDICAL EXAMINATION BY KHALED A. ANEES, M.D.

9. CalPERS retained Khaled A. Anees, M.D., a Board-certified Neurologist, to conduct a neurological Independent Medical Examination (IME) of respondent's headaches and trigeminal neuralgia conditions. (Exs. 8 & 9.) CalPERS provided Dr. Anees with CalPERS' standard for disability retirement by letter dated January 15, 2020.

10. Dr. Anees examined respondent on, and prepared an IME report dated, February 18, 2020. He obtained from respondent her current complaints, medical history and history of her condition, occupational history and a description of her job as a Special Investigator. (Ex. 10, pp 1-5.) He also conducted a physical examination of respondent. (Ex. 10, pp. 5-7.) He performed a mental status examination, a cranial nerve examination, and a muscle examination, and examined her reflexes, sensory, coordination and gait. (*Ibid.*) Dr. Anees reviewed respondent's job descriptions (Exs. 17 and 18) and medical records provided to him and summarized those records in his consideration of respondent's neurological conditions. (Ex. 10, pp. 6, 9-33.)

11. Following the physical examination and medical records review, Dr. Anees formulated the following medical opinion:

The examinee has [a] history of trigeminal neuralgia. She continues to have ongoing complaints of intermittent facial pain and tingling sensation. Her neurological examination today was essentially unremarkable. She had a normal mental status, normal speech/language and memory. She also had normal cranial nerve function, normal motor and sensory examinations, normal reflexes, normal coordination

and normal gait/balance. There is no evidence of significant fixed physical or cognitive neurological deficits or ongoing objective neurological loss of function. She also had prior brain imaging studies, MRI scan, which showed a small left trigeminal nerve, likely developmental, but otherwise did not show acute pathology or significant structural lesions.

(Ex. 10, pp. 6-7.)

12. Dr. Anees concluded that respondent is not substantially incapacitated.

(Ex. 10, p. 7.) He wrote:

In my professional opinion, and based on history obtained and my neurological examination today, the member is not substantially incapacitated for the performance of her duties from a neurological standpoint. There is not enough evidence of an actual and present neurological impairment that arises to the level of substantial incapacity to perform her usual job duties. [¶] . . . [¶]

The determination that the member is not substantially incapacitated is based on the following: it was based on the history and examination obtained today, as well as the medical record review. She does have multiple ongoing symptoms. However, her neurological examination was essentially unremarkable. She also had neurological testing with imaging studies (brain MRI), which was also essentially unremarkable with no evidence of acute pathology

identified. There were no objective findings indicating physical/cognitive neurological deficits or neurological loss of function that would warrant substantial incapacitation from a neurological standpoint.

(Ibid.)

13. On August 24, 2020, Dr. Anees prepared a supplemental report following his review of additional medical records received. (Ex. 11.) Dr. Anees concluded that the additional records and information did not change his opinion that respondent is not substantially incapacitated. (Ex. 11, p. 4.) He wrote:

There is not enough evidence of an actual and present neurological impairment that arises to the level of substantial incapacity to perform her usual job duties. She does have multiple ongoing symptoms. However, there were no objective findings indicating significant physical/cognitive neurological deficits or neurological loss of function that would warrant substantial incapacitation from a neurological standpoint.

(Ibid.)

PSYCHIATRIC IME BY LAWRENCE WARICK, M.D., PH.D.

14. CalPERS retained Lawrence Warick, M.D., Ph.D. to conduct a psychiatric IME of respondent's anxiety, depression, stress, and psychological conditions. (Ex. 13.) Dr. Warick was a Board-certified Psychiatrist with extensive experience treating

patients as a psychiatrist and teaching psychiatry.¹ (Ex. 12.) CalPERS provided Dr. Warick with CalPERS' standard for disability by letter dated January 15, 2020. (Ex. 13.)

15. On February 19, 2020, Dr. Warick conducted a psychiatric IME of respondent, meeting with respondent for two hours. (Ex. 14, p. 1.) Dr. Warick obtained from respondent a personal and medical history, including her psychiatric and neurological conditions, her occupational history, a description of her job duties as a DOI Special Investigator, and her present symptoms. Dr. Warick conducted a Mental Status Examination, making the following findings and observations:

[R]espondent did not show signs of clinical depression and with an appropriate affect, she became tearful and emotional when discussing her "work stress". [¶] There was no evidence of overt clinical anxiety. [¶] There was no evidence of organicity or psychosis for her thought process and content.

(Ex. 14, pp. 8-9.)

16. In addition to observing respondent during the mental status examination, Dr. Warick administered the Millon Clinical Multiaxial Inventory-IV (MCMI-IV) psychological test. (Ex. 14, p. 10.) Dr. Warick found that respondent's MCMI-IV test results indicated no distinct clinical diagnosis on Axis I which confirmed

¹ Dr. Warick died in August 2020. The parties stipulated to the admission of all medical reports, including those of Dr. Warick. None of the authors of the medical reports in evidence testified or was subject to cross-examination at hearing.

his clinical impressions that respondent "has a very mild and non-disabling adjustment disorder that has basically resolved" (*Id.* at pp. 10, 14.) He also found that the MCMI-IV Axis II test results confirmed his impression that respondent has a histrionic personality and turbulent style. (*Id.* at p. 10.)

17. Based on a review of respondent's medical and employment records, including her duty statement (Ex. 17), Dr. Warick's psychiatric medical opinion was that "as a result of her interactions with her last supervisors, she developed mild to moderate Adjustment Disorder that is nondisabling and she has not required any medication." (Ex. 14, p. 14.) Dr. Warick opined that respondent was functioning quite normally in her daily activities at the time of the IME. (Ex. 14, p. 15.) Dr. Warick concluded respondent is not substantially incapacitated and "[f]rom a psychiatric point of view, there are no incapacities that would prevent her from working as a Special Investigator for the California [DOI]." (*Ibid.*) He also wrote: "[S]he has mild symptoms of depression and anxiety and some emotional lability and anger surrounding the issues of her interactions with her last supervisor. However, when I saw her, she was no longer being treated by Dr. Halote and she is not taking any psychiatric medication." (*Ibid.*)

18. Dr. Warick reviewed Dr. Anees' IME report (Ex. 10) and prepared a supplemental report on April 3, 2020. (Ex. 15.) Dr. Warick concluded that Dr. Anees' IME report did not change his opinion that respondent is not substantially incapacitated. (*Id.* at p. 11.)

19. David Sones, M.D., a Qualified Medical Examiner in psychiatry, evaluated respondent on July 30, 2019, "in connection with her Workers' Compensation claim . . . no treatment relationship existed." (Ex. 16, p. 1.) Dr. Sones diagnosed respondent with Adjustment Disorder with Mixed Anxiety and Depressed Mood, Chronic. (*Id.* at p. 34.)

He made no diagnosis of physical disorders or conditions, deferring "to the appropriate specialist." (*Ibid.*) Dr. Sones discussed respondent's self-reported work history, her stressors at work, her trigeminal neuralgia, Dr. Malchira's treatment of her trigeminal neuralgia, the denial of a request for transfer to a different supervisor, and her decision to stop working after March 15, 2019, and to file a Workers' Compensation claim "due to her intolerable level of psychological distress." (Ex. K, p. 27.) Summarizing the results of psychological testing, Dr. Sones wrote that respondent "displays depressive symptoms," "is also generally anxious," "is likely to overreact to minor physical dysfunction," "tends to react to stress, including responsibility, with physical symptoms," and "likely lacks insight into psychological factors underlying her symptoms." (Ex. K, pp. 24-25.) "Rather than being grossly incapacitated in functioning, she is likely to continue functioning, though at a reduced level of efficiency." (*Id.* at p. 25.) "From a psychiatric standpoint the applicant is capable of performing her usual and customary work duties as a special investigator for [DOI] without the need for any modifications." (Ex. 16, p. 41.)

Respondent's Evidence

20. Respondent's treating psychologist, Dr. Halote, wrote in a Physician's Report on Disability dated July 24, 2019, that respondent "is unable to perform her job duties due to work related stress and depression. Due to [] painful trigeminal neuralgia flare ups from stress, patient is unable to speak, move, drive or do any sort of duties during these episodes." (Ex. O, p. 2.) Dr. Halote found respondent "currently, substantially incapacitated from performance of the usual duties of" her position, and that her incapacity would not be permanent but would last longer than 12 months. Dr. Halote based his determination in part on the Duty Statement, the Physical Requirements statement, and information from respondent about "being harassed by

her Boss at work which has caused [a] great deal of anxiety, stress, pain due to an underlying medical condition." (*Id.* at p. 1.)

21. As summarized in a Comprehensive Psychological Primary Treating Physician's Medical-Legal Evaluation Report dated September 16, 2019, Dr. Halote interviewed respondent, reviewed her medical file, and administered psychological testing. He wrote respondent, who was pursuing a Workers' Compensation claim, was referred to him "with regard to psychological symptomatology arising from harassment and discrimination that she purportedly sustained during the course and scope of her employment" (Ex. K, p. 2.) Respondent also complained to Dr. Halote that she has tension headaches as well as trigeminal arousal, which causes pain on the left side of her face and an inability to talk when she is stressed.

22. Disagreeing with Dr. Sones (see Factual Finding 19, *ante*), Dr. Halote found that respondent suffered from Major Depressive Disorder, Moderate, and Anxiety Disorder Not Otherwise Specified, and Psychological Factors Affecting a Physical Condition. Dr. Halote found that respondent "suffered an industrial injury related to her harassment and lack of accommodation for her trigeminal neuralgia." (*Id.* at pp. 34-35.) "Her anxiety and depression interferes with her overall ability to function and to do her job. As a result, she has had to apply for disability retirement." (*Id.* at p. 34.) "She is unable to return to work" and cannot perform "her usual and customary job duties." (*Id.* at pp. 34-35.) Respondent is, Dr. Halote found, "temporarily totally disabled from a psychological perspective at this time." (*Id.* at p. 39.)

23. Respondent's primary care physician, Dr. Malchira, in a Physician's Report on Disability dated July 22, 2019, found that respondent was substantially incapacitated for more than 12 months. Dr. Malchira wrote that respondent "suspects her stress at work makes her trigeminal neuralgia worse causing flare ups of

excruciating pain." (*Id.* at p. 3.) She is "unable to speak during flare ups. Unable to concentrate at work." (*Id.* at p. 4; see also ex. E, pp. 3-4 [respondent "has to follow up with neurology specialist as deemed appropriate"].)

24. The July 2019 findings of Drs. Halote and Malchira are based primarily on respondent's self-reported symptoms and her belief as to their cause. The September 2019 findings of Dr. Halote are based also on a medical records review and psychological testing, and directly contrast with the similarly-based findings of Dr. Sones of July 2019.

25. Earlier, in a letter dated November 8, 2018, Dr. Malchira wrote that respondent requested an accommodation allowing her to work at home when needed. "When she has flare ups of pain it will be easier for her to do her job at home in a quiet and peaceful setting with no distractions and excessive stimulation from office noise. . . . Patient reports that she can perform many of her job functions [at home] . . . and will be able to schedule field work when she is not having flare-ups of her pain." (Ex. E, p. 3.) Dr. Malchira's findings are also reflected in a November 8, 2018 progress note, in which he wrote respondent had not experienced pain for two days, and that "[s]tress is alleviated from being off work." (Ex. G, pp. 10-11.) In a December 4, 2018 note, Dr. Malchira wrote that respondent gets relief when off work, likes her job, and "does have some cluster [headache] features," though she lacks "autonomic features and other cluster features/behaviors making cluster-tic less likely." (Ex. H, pp. 11-12.) On December 28, 2018, Dr. Malchira wrote that respondent's pain was better, "not sure if this [is] related to being off work. Needs to go back to work. . . . Loves her job." (*Id.* at p. 13.) In a letter of the same date, Dr. Malchira wrote that respondent's "medical condition" causes significant pain and flareups "are unpredictable and may be triggered by stress." (Ex. I, p. 5.) In an April 4, 2019 progress note, Dr. Malchira

documented that respondent reported continued sharp, shooting pain, anxiety related to work, and a referral to a psychologist by a workers' compensation doctor. (Ex. H, p. 17.) On July 19, 2019, Dr. Malchira noted, respondent said she wants to remain off work through September and planned to apply "for medical retirement." (*Id.* at p. 18.)

26. Sandra Jeffries, Health & Safety Analyst, Human Resources Management Division, DOI, wrote, in a March 18, 2019 memorandum to respondent that DOI "will continue to engage with you on any work accommodations once we have received valid medical certification" from respondent's neurologist, Mollie M. Johnson, M.D. DOI claims never to have received certification from Dr. Johnson; respondent testified she believes DOI never requested information from Dr. Johnson.

27. Respondent offered in evidence consulting and progress notes prepared by Dr. Johnson. For a September 26, 2018, consult she performed, Dr. Johnson wrote of respondent's report of trigeminal neuralgia symptoms and recommended continued medication with gabapentin and Indocin. (Ex. G, pp. 1-6.) On October 16, 2018, Dr. Johnson performed a greater occipital nerve block "to reduce pain and restore function" after "over 6 months of disabling chronic pain." (*Id.* at p. 6.) "The patient was discharged in excellent condition. Pain level reduced." (*Ibid.*) Dr. Johnson also increased respondent's dose of gabapentin. In an October 29, 2018 progress note, Dr. Johnson documented that respondent first experienced a shock behind her left eye in 2014 as a result of any pressure on her eye, such as that caused by a water drop in the shower. The pain, respondent reported, would return intermittently, remaining each time for three to five days. Respondent reported being asymptomatic in 2015, with pain returning in 2016 and continuing intermittently since then. Respondent reported the gabapentin had become ineffective, and that touching her cheek, talking, wind on her face, and brushing her hair triggered the pain.

28. Natalia Ratiner, M.D., Qualified Medical Examiner, Neurology, in a June 11, 2020 report, examined respondent in connection with her Workers' Compensation claim. Dr. Ratiner wrote: "According to the history given, the applicant was exposed to significant industrial stress. . . . [H]er work was very stressful . . . [and] she suffered extreme stress when the new supervisor came to the office in 2018 and refused to provide suggested accommodation for the applicant to let her work at home Therefore, with a reasonable degree of medical probability the applicant's trigeminal neuralgia problem was exacerbated by industrial stress." (Ex. M. p. 90.) Dr. Ratiner recommended, "It is absolutely necessary for this applicant not to be exposed to any kind of stress that could exacerbate her problem with facial pain even more. . . . [¶] In the foreseeable future, the applicant has to continue to be under the care of a neurologist to manage her unpredictable and strong facial pain." (Ex. M, pp. 90-91.)

29. Dr. Ratiner's conclusion that work-related stress probably, rather than possibly, triggered respondent's trigeminal neuralgia symptoms, has some persuasive weight, but that is limited because she applied a Workers' Compensation standard for causation rather than the standard to be applied in cases of industrial disability retirement.

30. Respondent testified that her position as a Special Investigator was stressful. Respondent argued that a field investigator who cannot drive is substantially incapacitated from performing her job duties as described in the Physical Requirements statement. Respondent argued that the "physical requirements and essential functions of my job were the 'actual' usual and customary duties from which I was substantially incapacitated . . . at the time I left work." (Ex. V, closing brief, p. 3.)

31. Respondent described suffering from trigeminal neuralgia, a chronic facial pain condition first diagnosed in mid-2018. She testified that the pain strikes

randomly, and the debilitating effect and duration vary. It feels like her face is “being electrocuted.” Symptoms may be triggered by eating, wind on her face, or brushing her hair. She first tried gabapentin and oxcarbazepine, medications prescribed by her neurologist, to help mask the pain, but by August 2018 the medications lost their effectiveness. Respondent testified she was unable to go to work timely on a regular basis. She was denied a requested accommodation to work from home for part of the day when her symptoms made it necessary. She believes her symptoms were triggered by work stress; her pain would diminish when she was off work.

32. An August 18, 2017 consultation report from Ronnie Bergen, M.D., notes that respondent reported intermittent electric-like pain behind her left eye, which had become more frequent and was provoked by washing her face, sneezing, and chewing. “She underwent a NC MRI of the brain last year which she reports was normal.” (Ex. H, p. 1.) Dr. Bergen wrote “neurologic exam is normal,” found that trigeminal neuralgia is “less common [where respondent reported the pain], but not excluded,” and recommended a brain MRI with contrast and other diagnostic procedures. (*Id.* at p. 3.) In a letter dated August 9, 2018, Dr. Bergen wrote that respondent would have to miss work due to a flareup of trigeminal neuralgia. “Currently, this problem is not stable and her treatment is actively being addressed.” (Ex. I, p. 1.)

33. Dr. Pouratian examined respondent on August 17, 2018, on a referral from Dr. Bergen. Dr. Pouratian reviewed respondent’s MRI, finding “no vascular compression on trigeminal nerve” and “[s]maller cisternal segment of left trigeminal nerve . . . likely developmental.” (Ex. H, p. 8.) In attempting to make a differential diagnosis, Dr. Pouratian found that trigeminal neuralgia was supported by the MRI, “which shows a small vessel pressed against the trigeminal nerve.” Dr. Pouratian, however, also found respondent’s symptoms were consistent with “sympathetically

mediated cluster headaches. Given that her symptoms appear to return at the same time of the year and are intermittent in nature also suggest more evidence towards cluster headaches." (*Ibid.*) Dr. Pouratian recommended "further investigation in establishing a diagnosis," and to that end recommended referral to a neurologist specializing in facial pain.

34. Considering the entirety of the record, complainant offered sufficient competent medical evidence from to establish that, at the time respondent applied for disability retirement, she was not substantially and permanently incapacitated from performing the usual duties of a DOI Special Investigator. She suffered from intermittent, severe facial pain, which her doctors diagnosed on balance as, likely, trigeminal neuralgia, though possibly cluster headaches. Most of respondent's physicians considered stress to be a possible trigger. She was not, at the time of the Application, experiencing incapacitating clinical depression or anxiety.

35. The medical reports that were admitted did not, on the whole, support a conclusion that respondent is substantially and permanently incapacitated from performing her usual job duties. To the extent the doctors who authored those reports applied evaluation standards applicable in workers' compensation cases, their opinions can be given limited weight in this proceeding. The standards in disability retirement cases are different from those in workers' compensation. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Kimbrough v. Police & Fire Retirement System* (1984) 161 Cal.App.3d 1143, 1152-1153; *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128, 132 [a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different].)

36. The pain and discomfort respondent reported are insufficient to establish a permanent disability. During her physical and psychological examinations respondent related her limitations as a result of facial pain and anxiety but was, for the most part, not incapacitated. This is in no way intended to diminish respondent's credible account of her experience of intermittently debilitating severe pain, and two witnesses who observed respondent testified her behavior during stressful times at work was consistent with extreme facial pain. But the record on the whole does not establish that she meets the standard for industrial disability retirement, i.e., that she was substantially and permanently incapacitated from performing the usual duties of a DOI Special Investigator. Consequently, her disability retirement appeal must be denied.

LEGAL CONCLUSIONS

1. An applicant for an industrial disability retirement has the burden of proving that he or she is entitled to it by a preponderance of the evidence. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332; Evid. Code, § 115.) In this matter, respondent has the burden of establishing that she was, at the time she submitted her Application, substantially incapacitated from performing the usual and customary duties of a Special Investigator at DOI.

Applicable Law

2. For industrial disability retirement purposes, "disability" and "incapacity for performance of duty" 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 . . . , on the basis of competent medical opinion." (Gov. Code, § 20026.)

3. A state safety member "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability." (Gov. Code, § 21151, subd. (a).) "The member may apply for disability retirement while in state service; on receipt of the application, the board must 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." (Gov. Code, §§ 21152, 21154.)

4. If the Board finds, on the basis of the medical examination and other information, "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" (Gov. Code, § 21156, subd. (a)(1).)

5. Courts applying the pertinent statutes have established the following principles. "Incapacitated" means the applicant for a disability retirement has a "substantial inability" to perform his or her usual duties. When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887) (*Mansperger*.) Courts look not solely to job descriptions but to the duties actually performed by the individual. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854, 860 (*Hosford*.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Id.* at p. 862.) An applicant must establish that the disability is presently disabling; a disability that is prospective and speculative does not satisfy the requirements of the Government Code. (*Id.* at p. 863.)

6. The employee in *Mansperger* was a game warden with peace officer status. His duties included patrolling specified areas to prevent violations and

apprehend violators, issuing warnings and serving citations, and serving warrants and making arrests. He suffered an injury to his right arm while arresting a suspect. He could shoot a gun, drive a car, swim, row a boat (with some difficulty), pick up a bucket of clams, pilot a boat, and apprehend a prisoner (with some difficulty). He could not lift heavy weights or carry a prisoner away. The court noted that "although the need for physical arrests do [*sic*] occur in petitioner's job, they are not a common occurrence for a fish and game warden." (*Mansperger, supra*, 6 Cal.App.3d at p. 877.) Similarly, the need for the employee to lift a heavy object alone was determined to be a remote occurrence. (*Ibid.*) In holding that the game warden was not incapacitated for the performance of his duties, the *Mansperger* court noted that the activities he was unable to perform were not common occurrences and that he could otherwise "substantially carry out the normal duties of a fish and game warden." (*Id.* at p. 876.)

7. The applicant in *Hosford* had suffered injuries to his left ankle and knee, and had strained his back. The court noted that the sergeant "could sit for long periods of time but it would 'probably bother his back;' that he could run but not very adequately and that he would probably limp if he had to run because he had a bad ankle; that he could apprehend persons escaping on foot over rough terrain or around and over obstacles but he would have difficulty and he might hurt his back; and that he could make physical effort from the sedentary state but he would have to limber up a bit." (*Id.* at p. 862.) Following *Mansperger*, the court in *Hosford* found that the sergeant:

is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of time in a patrol car would "probably hurt his back," does not mean that in fact he cannot so sit [¶] As for the more strenuous activities, [a doctor] testified that

Hosford could run, and could apprehend a person escaping over rough terrain. Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function, renders [the doctor's conclusion that Hosford was not disabled] well within reason. (*Ibid.*)

8. In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that "this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing." (*Hosford, supra*, 77 Cal.App.3d at p. 863.) As the court explained, prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Ibid.*)

Analysis

9. Respondent had the burden of proving she is substantially incapacitated from performing the usual and customary duties of a Special Investigator at DOI. Respondent did not meet her burden. CalPERS presented competent medical evidence showing respondent was not substantially incapacitated from performing the usual and customary duties of a Special Investigator at DOI. Although respondent suffered from episodic trigeminal neuralgia that could be debilitating, respondent has been dealing with this condition since 2014 and had been able to work as a Special Investigator for some years, eventually with certain accommodations.

10. Although respondent believed that her condition was exacerbated by job stress, which she attributed to long work days without breaks, excessive paperwork, and a supervisor she perceived to be hostile towards her, this was insufficient to establish that she was permanently and substantially incapacitated from the performance of her usual and customary duties. It is well established that, when an applicant can perform his or her customary duties even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (*Mansperger, supra*, at pp. 886-887.)

11. Moreover, the weight of competent medical evidence does not establish that she was disabled. Respondent's complaints of bouts of trigeminal neuralgia are credited. Trigeminal neuralgia is a well-recognized disabling condition. The condition exists continually, but does not continually flare up. One of the triggers for a flareup in respondent's case may be work-related stress. The evidence established that respondent has experienced flareups under stressful conditions while at work. But the evidence of respondent's psychological and physical conditions, in the areas where it is based on respondent's self-reporting of symptoms, triggers, and history, does not establish respondent's disability by a preponderance of the evidence, in light of other objective findings, such as those of Dr. Warick. Accordingly, the CalPERS's denial of respondent's application for an industrial disability retirement was justified, and respondent's appeal of CalPERS' determination must be denied.

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ORDER

The appeal of respondent Robin M. Rothwell-Allison from CalPERS' denial of her application for industrial disability retirement is denied. CalPERS' decision to deny respondent's application for industrial disability retirement is sustained.

DATE: 07/08/2021


Howard W. Cohen (Jul 8, 2021 09:12 PDT)

HOWARD W. COHEN

Administrative Law Judge

Office of Administrative Hearings