

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:

**SUSAN E. HEEGER, and VETERANS HOME OF REDDING,
CALIFORNIA DEPARTMENT OF VETERANS AFFAIRS,
Respondents**

Agency Case No. 2021-0614

OAH No. 2021110156

PROPOSED DECISION

Jessica Wall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference and telephone on March 16, 2022, from Sacramento, California.

The California Public Employees' Retirement System (CalPERS) was represented by Helen L. Louie, Staff Attorney.

Susan E. Heeger (respondent) was present and represented herself.

The California Department of Veterans Affairs (CalVet) was represented by Megan Elsea, Attorney III.

Evidence was received, the record closed, and the matter submitted for decision on March 16, 2022.

ISSUE

Was respondent Heeger substantially incapacitated from the performance of her usual and customary duties as a Certified Nursing Assistant (CNA) at CalVet, based on her orthopedic (back and hip) conditions at the time she filed her application for disability retirement?

FACTUAL FINDINGS

Jurisdictional Matters

1. At all times relevant, respondent was employed by CalVet as a CNA. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150.¹

2. On December 29, 2020, CalPERS received respondent's application for service pending disability retirement (Application). Respondent retired for service effective January 18, 2021, and has been receiving a retirement allowance from that date. On November 2, 2021, Keith Riddle, Chief, Disability and Survivor Benefits

¹ All further statutory references are to the Government Code unless otherwise specified.

Division, CalPERS, made and filed the Statement of Issues in his official capacity. Respondent timely filed a request for hearing under section 11505.

Application

3. On her Application, respondent identified her disability as “bulging disc L-2-3 (pain in back)” and “bilateral hip replacement,” beginning on September 24, 2018. CalPERS reviewed respondent’s medical documentation and sent her for an Independent Medical Examination (IME) with Robert Henrichsen, M.D. On May 24, 2021, CalPERS denied respondent’s Application, finding her conditions were not disabling, and she was not substantially incapacitated from the performance of her job duties as a CNA at CalVet. Respondent filed an appeal on June 10, 2021.

Job Duties

4. Along with her Application, respondent submitted two documents: a Duty Statement for a CNA at a CalVet Residential Care Facility for the Elderly (RCFE) (Duty Statement), and a CalPERS Physical Requirements of Position/Occupational Title form for the position of CNA-RCFE at CalVet (Physical Requirements). The Duty Statement breaks down essential functions into five groups: assisting residents with their activities of daily living skills (35 percent); maintaining clean, orderly areas of the RCFE kitchenette (35 percent); assisting in activities and programs with residents (15 percent); participating in continuing education programs (ten percent); and other related duties (five percent). The form also describes activities by frequency:

- 75 percent or more: walking, standing, balancing, lifting up to ten pounds, and reaching.

- 50 to 74 percent: carrying, bending at waist, kneeling, and pushing and pulling.
 - 25 to 49 percent: sitting and lifting ten to 50 pounds.
 - Less than 25 percent: climbing and driving.
5. The Physical Requirements for the CNA position include:
- Occasional tasks, for up to 2.5 hours of the shift: lifting up to ten pounds and over 26 pounds, sitting, crawling, kneeling, climbing, squatting, bending and twisting at the neck and waist, and reaching.
 - Frequent tasks, for 2.5 to five hours of the shift: lifting 11 to 25 pounds, and pushing and pulling.
 - Constant tasks, for over five hours of the shift: interacting with patients and coworkers, standing, and walking.

IME by Dr. Henrichsen

6. On March 16, 2021, respondent attended an IME with Dr. Henrichsen, a retired orthopedic surgeon of 38 years, licensed and Board Certified in Orthopedic Surgery. Dr. Henrichsen interviewed respondent; took a medical history and an accounting of her current complaints; and completed a physical, orthopedic examination of her lumbar spine and lower extremities. Later that day, Dr. Henrichsen reviewed respondent's medical records, Duty Statement, and Physical Requirements and wrote a report. He testified at hearing consistent with his report.

7. During the physical examination, Dr. Henrichsen took respondent's measurements, assessing her range of motion and testing her strength and

maneuverability. Dr. Henrichsen found respondent experienced pain on heel to toe walking but did not use a cane, crutch, or walker. She bent slightly at the waist when standing or walking. She could squat to 90 percent of the normal range and used her arms to help rise from sitting. Respondent had normal strength when standing on her heels and toes but exhibited some right hip muscle weakness. She could not lie prone, so she laid on her side while Dr. Henrichsen examined her back. Her low back lacked any specific trigger points, nodules, muscle guarding, or spasms. Both her hips had healed incisions from hip replacements. Ultimately, Dr. Henrichsen found that respondent's reported limitations did not align with the objective findings of her examination.

8. Dr. Henrichsen also reviewed chart notes by respondent's healthcare providers from July 2018 to February 2021. The records indicate that respondent's back pain started in December 2017. X-ray images showed respondent had low back degenerative disc disease (DDD) and right hip arthritis. A radiology report from a September 2018 magnetic resonance imaging (MRI) scan identified some DDD in her lumbar spine. A November 2019 report of a computed tomography (CT) scan of respondent's pelvis found advanced arthritis in both hips and degenerative changes in the low back. Respondent received physical therapy and epidural injections, neither of which helped. Shawn Brubaker, Doctor of Osteopathic Medicine (DO), released respondent to return to work on December 15, 2020, following her recovery from two hip replacements. Respondent reported significant anxiety about returning to work and sought a medical note to remain off work. Lisa Monroe, Nurse Practitioner (NP), provided a note on December 15, 2020, based on reduced motion in respondent's low back and hips.

9. Following his physical examination and a medical records review, including imaging, Dr. Henrichsen diagnosed respondent with multilevel DDD of the lumbar spine, intact right and left hip replacements, and a history of anxiety and panic attacks. However, Dr. Henrichsen found no objective findings to support respondent's complaints about symptom severity. In sum, Dr. Henrichsen found respondent was not substantially incapacitated from the performance of her CNA duties.

Supplemental IME Reports by Dr. Henrichsen

10. Thereafter, Dr. Henrichsen was provided additional medical records from Dr. Brubaker regarding respondent's hip replacements: August 11, 2020 (left hip), and September 15, 2020 (right hip). Both surgeries were successful, and she was able to move her hips without pain. On April 27, 2021, Dr. Henrichsen prepared a supplemental IME. After reviewing the imaging, his opinion remained unchanged.

11. Later, Dr. Henrichsen was provided more medical records, including respondent's September 24, 2018 MRI scan and November 5, 2019 CT scan. Based on the imaging, Dr. Henrichsen concluded respondent had some age-appropriate DDD and arthritis of her lumbar spine, but there was no objective medical condition that would cause the severity of symptoms she reported. Her hips functioned well after replacement, and she had reasonable low back mobility. On December 16, 2021, Dr. Henrichsen prepared a second supplemental IME. Dr. Henrichsen again concluded that respondent was not substantially incapacitated based on an orthopedic condition of the lumbar spine or hips.

Respondent's Evidence

12. Respondent is 63 years old, married, and lives with her husband. In January 2015, she began working as a CNA at CalVet. Her last day on the job was in

January 2020. Respondent retired for service effective January 18, 2021, and has been receiving retirement allowance from that date. She is not currently employed.

Respondent began experiencing back and hip pain in December 2017. Currently, she is in pain "all the time," which prevents her from sleeping through the night or holding her grandchildren.

13. Respondent felt that her Application and evaluation were not done correctly. She believes medical records from her pain management physician, Leonard Soloniuk, M.D., should have been considered. However, she admits she did not supply those records to CalPERS.² Additionally, she did not understand why Dr. Henrichsen spent much of the IME examining her hips, which are no longer a problem. Respondent explained that she was not "released from physical therapy," as the IME report states, but instead transitioned to exercises at home in August 2020.

14. In her role as a CNA at CalVet, respondent's main task was to disperse medications. This required respondent Heeger to push and pull a medication cart weighing over 50 pounds for much of the day. Additionally, she replaced linens in about 15 rooms each day, including towels and sheets, and lifted a linen bag weighing up to 50 pounds. Respondent cannot do these tasks because of her back pain.

Analysis

15. Respondent did not call any medical experts to testify. Her testimony about her inability to work and her substantial incapacity alone is insufficient to make

² Respondent provided a list of physicians and a consent to release records to CalPERS for the same. However, she did not respond to requests for additional documents.

a finding. (*Peter Kiewitt Sons v. Industrial Accident Commission* (1965) 234 Cal.App.2d 831, 838. [“Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a commission finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence”].) Although she argues that Dr. Soloniuk’s records would have supported her claim, she did not present evidence that Dr. Soloniuk made objective findings about her orthopedic conditions contrary to Dr. Henrichsen’s findings. In sum, respondent’s admissible evidence does not support her incapacity.

16. Dr. Henrichsen’s opinions are supported by the admissible medical evidence. He offered a persuasive opinion, based upon a review of respondent’s Duty Statement, the Physical Requirements of the job, medical records, and a physical examination. Dr. Henrichsen has experience conducting medical evaluations and providing opinions using the CalPERS standard. His conclusion is based on objective medical findings and not on respondent’s subjective complaints. For the above reasons, respondent did not establish, through competent medical evidence, that she was substantially incapacitated from performing the usual job duties of a CNA at CalVet based on her orthopedic (back and hip) conditions at the time she filed her Application.

LEGAL CONCLUSIONS

Applicable Laws and Statutes

1. Disability as a basis of retirement means disability of permanent or extended and uncertain duration. (§ 20026.) According to section 21156, subdivision (a)(1), “[i]f the medical examination and other available information show to the

satisfaction of the board . . . 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.”

2. An applicant for disability retirement must offer competent, objective medical evidence to establish that, at the time of the application, she was permanently disabled or incapacitated from performing the usual duties of her position. (*Harmon v. Bd. of Retirement* (1976) 62 Cal.App.3d 689, 697.) In *Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 887, the court interpreted the term “incapacity for performance of duty” to mean “the substantial inability of the applicant to perform [her] usual duties.” Difficulty or discomfort in performing job duties is not enough to support a finding of disability. (*Hosford v. Bd. of Admin.* (1978) 77 Cal.App.3d 854, 862.)

Determination

3. Respondent did not offer competent medical evidence sufficient to demonstrate that she was substantially incapacitated from performing her normal and usual employment duties as a CNA at CalVet at the time she filed her Application. Accordingly, her Application must be denied.

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ORDER

The appeal of respondent Susan E. Heeger's Application for CalPERS Disability Retirement is DENIED.

DATE: April 12, 2022

Jessica Wall

Jessica Wall (Apr 12, 2022 16:26 PDT)

JESSICA WALL

Administrative Law Judge

Office of Administrative Hearings