

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Disability Retirement of:

VICTORIA T. BARCENAS, and

CALIFORNIA DEPARTMENT OF TRANSPORTATION –

DISTRICT 04,

Respondents.

Case No. 2022-0828

OAH No. 2023010535

PROPOSED DECISION

Administrative Law Judge Michael C. Starkey, State of California, Office of Administrative Hearings, heard this matter on October 2, 2024, by videoconference.

Senior Staff Attorney Preet Kaur represented complainant California Public Employees' Retirement System (CalPERS).

Respondent Victoria T. Barcenas (Barcenas) represented herself.

There was no appearance on behalf of respondent California Department of Transportation – District 04 (Caltrans).

The record closed and the matter was submitted on October 2, 2024.

ISSUE AND SUMMARY

Whether Barcenas was incapacitated to perform her usual and customary duties as a staff services analyst for respondent Caltrans, on the basis of orthopedic (back, neck, bilateral upper extremities) and rheumatological (fibromyalgia) conditions, at the time of her application for disability retirement.

Barcenas contends that these conditions rendered her substantially incapacitated from performing her usual and customary duties as a staff services analyst. Barcenas's evidence was insufficient to prove such incapacity in light of the more persuasive evidence to the contrary.

FACTUAL FINDINGS

1. On January 11, 2023, complainant CalPERS filed the statement of issues.
2. Respondent Victoria T. Barcenas was employed by respondent Caltrans as a staff services analyst. By virtue of that employment, Barcenas was a state miscellaneous member of CalPERS, subject to Government Code section 21150 (all statutory references are to the Government Code unless otherwise stated).
3. On December 2, 2021, Barcenas submitted an application for service retirement pending industrial disability retirement. She listed her disability simply as "repetitive stress/strain injury." In response the question "How has your injury or illness affected your ability to perform your job?" Barcenas stated:

Repetitive motion is very fatiguing causing flareups, weakness, dizziness, making it difficult for me to sit, stand, and perform well. Non-stop physical pain affecting my mental and emotional health, sleep, mood, appetite, energy and causes severe stomach upset and headaches.

In the statement of issues, CalPERS characterized Barcenas's claimed injury or illness as "orthopedic (back, neck, and bilateral upper extremities) and rheumatological (fibromyalgia) conditions." In the context of the evidence submitted, this characterization is fair.

4. Barcenas was retired for service effective March 2, 2021.

5. On September 19, 2022, CalPERS sent Barcenas a letter denying her application for industrial disability retirement. Barcenas timely appealed and this proceeding followed.

Barcenas's Background and Job Duties

6. Barcenas was almost 56 years old as of December 2, 2021, the date she applied for industrial disability retirement.

7. The duration of Barcenas's employment for Caltrans was not established, but this employment appears to have started before 2005.

8. As a staff services analyst for Caltrans, Barcenas performed a variety of contract administration and budgetary functions. She served as a contract administrator for architectural and engineering contracts. Her duties were 100 percent administrative. She was primarily required to use a computer. According to the Position Duty Statement for her position, she was required to have the ability to

“rearrange meeting room furniture to properly set up for meetings with consultants,” which would “require bending, stooping, kneeling, and lifting (up to a maximum of 25 pounds).”

9. According to a “Physical requirements of Position/Occupational Title” document completed by Barcenas’s employer, the physical requirements of her position included occasional (up to three hours per shift): standing, walking, reaching above and below shoulder, pushing and pulling, simple grasping, and lifting up to 10 pounds; and constant (six hours per day or more): keyboard and mouse use, fine manipulation, repetitive use of hands. For all other listed physical activities, the employer checked the boxes to indicate they were never required. In a document Barcenas returned to CalPERS and in her testimony, she reports that she disagrees with this document as follows: she contends that her position required constant (up to six hours per shift): bending (neck and waist) and twisting (neck and waist). This contention is not credible, but Barcenas’s position did require occasional bending and twisting of the neck and waist in addition to the physical requirements listed by her employer. The physical requirements of her position were typical for a purely administrative position.

Barcenas’s Medical Conditions

10. Barcenas reports that she has been having medical problems since an injury at work on October 20, 2016. She did not describe this injury at hearing, but medical records indicate that she sat on her chair and felt a “pop” in her back on this date, which resulted in a worsening of right upper extremity symptoms she had experienced dating back to 2004. In 2019 she reported to David Smollins, M.D., an agreed medical examiner (in connection with a workers’ compensation claim), that she was diagnosed with a repetitive stress injury to her right upper extremity in 2004 and

received physical therapy and an ergonomic evaluation, and that in 2010 she was again diagnosed with a repetitive stress injury to her right upper extremity and received physical therapy. In this same interview, Barcenas reported that after the October 20, 2016, incident, she developed severe right-hand pain, numbness, and an inability to move her hand, all due to repetitive use of her right shoulder. She also reported nausea, dizziness, and a feeling that her left upper thoracic spine was "compressed." She visited an emergency room, but was discharged promptly. She was treated privately, including more physical therapy and medications. She was diagnosed with fibromyalgia and prescribed numerous other medications. She reported receiving "ankle injections," physical therapy, and acupuncture. She described widespread body pain, including pain and aches in her spine, shoulders, low back, thighs, and both feet, and numbness in all extremities and at the back of her head. She reported her various pains at levels 6 to 10 out of 10. She reported loss of sleep, sensitivity to touch, and various gastrointestinal symptoms. She reported difficulty dressing herself, walking, sitting, or typing on a computer.

11. On January 24, 2020, one treating physician issued a work restriction limiting Barcenas to 10 pounds of pulling, pushing, or lifting. That same date, another treating physician evaluated her and opined that she was fit to return to full duty work the following day.

12. On February 20, 2020, another treating physician examined Barcenas. She reported that she was working six hours per day and still experiencing a variety of symptoms and a pain level of 7 out of 10. This physician issued work restrictions of six hours per day, and no pushing or pulling more than 10 pounds. Over the following two months multiple other physicians issued similar restrictions and prescribed numerous conservative treatments.

13. On May 18, 2020, a physical therapist performed a functional capacity evaluation of Barcenas and reported a suspicion of “hypersensitive nervous system and myofascial pain syndrome” and recommended taking Barcenas off work entirely.

14. On May 21 and 22, 2020, two treating physicians renewed work restrictions of six hours per day, and one also opined that Barcenas should not, for a period of four weeks, engage in any repetitive neck or hand motions or overhead lifting. At some point in 2020, Barcenas was also referred for psychological treatment.

15. On May 29, 2020, Barcenas was again evaluated by Dr. Smollins. She reported continued pain, walking with a cane sometimes, and all the previous symptoms. Dr. Smollins diagnosed bilateral upper extremity repetitive stress injury, fibromyalgia, and depression. He opined that her disability was permanent and stationary as of this date, and rated her whole person impairment as six percent. The summary of Dr. Smollin’s report received in evidence does not indicate that he opined as to her ability to perform her usual job duties.

16. On June 22, 2020, a treating physician issued a work restriction limiting Barcenas to working no more than six hours per day.

17. According to summaries of medical records from this period, through September 2020, Barcenas continued to receive numerous types of conservative treatment and more restrictive work restrictions were issued.

18. On September 4, 2020, an MRI study of Barcenas’s cervical spine showed 1) “straightening of cervical lordosis [which] may represent muscle spasm and/or cervical strain, 2) a focal central disc protrusion at level C3-C4, causing a mild heart-shaped deformity of the cord without impingement, and 3) small disc

protrusions/bulge at levels C4-C5, C5-C6, and C6-C7, without significant central stenosis.

19. A summary of her medical records contains many reports that various treatments were helping Barcenas, but she continued to report numerous pains. In September 2020, she was taken off work completely.

20. According to a summary of her medical records, on December 25, 2020, Barcenas was diagnosed with cervicalgia (neck pain), chronic pain syndrome, generalized anxiety disorder, major depressive disorder (single episode, moderate), panic disorder, pain disorder "with related psychological factors," pain in both shoulders, pain in right wrist, radial styloid tenosynovitis (de Quervain's), and unspecified injuries to her arms and hands.

21. Barcenas testified that when she returned to work after six months on disability leave, a new supervisor did not understand her problems and assigned her to perform "the same repetitive movements" until her pain got worse and she filed a new workers' compensation claim.

22. On February 8, 2021, Barcenas reported to a physician that her pain worsened after returning to work and she was taken off work again. It appears that she never returned to work before retiring for service effective March 2, 2021.

23. Barcenas continued to receive regular treatment for her pain and psychological conditions. On April 5, 2021, she was examined by a psychologist (apparently in connection with a workers' compensation claim), who opined "Patient presents with yellow-flag symptoms, suggesting psychosocial or other than medical barriers to recovery" and also reported that Barcenas's "scores on the MMPI-3 [Minnesota Multiphasic Personality Inventory] Validity Scales raise concerns about the

possible impact of over-reporting (specifically, of somatic and cognitive symptoms) and under-reporting on the validity of this protocol . . . Pain Catastrophizing Scale: She scored a 23 which suggests high catastrophizing on the PCS and a tendency to magnify, ruminate, and feel helpless about her pain.” The psychologist also opined:

Given the chronicity of this case and four and a half years of medical appointments and hospitalizations for her various somatic complaints, see the need for intensive CBT to assist this patient on an ongoing basis. She should meet with a psychologist/clinician at a minimum twice a week for up to 6 months to try to contain her continued chronic complaints and to help her express distress by more adaptive means. Intensive psychotherapy over time helps contain emotional pain and can assist patients with discovering their irrational thoughts to replace them with more realistic beliefs. Believed this will take much time with her, but if she can build a generative bond by establishing an intensive treatment with a therapist, she can learn to reduce her somatic suffering. Would also recommend regular psychiatric consultation to better stabilize her with psychotropic medications. Proper pharmacotherapy should help her in both her “talk therapy” and other needed treatments.

24. On June 1, 2021, one of Barcenas’s treating physicians noted: “A referral for psychological evaluation is highly recommended at this time to help the patient overcome her mental and emotional blocks that may be hindering her recovery.”

25. On January 19, 2022, Lucas Campos, M.D., one of Barcenas's treating physicians charted "Patient is still being treated for ongoing pain neck, upper/mid/low back and bilateral upper extremity pain with radiculopathy . . . She is substantially permanently incapacitated from performance of the usual duties of the position for their current employer."

26. Recent medical records show that Barcenas is still receiving treatment for complaints of pain in numerous parts of her body, including her abdomen, neck, bilateral shoulders, low back, groin, hips, both legs, and tailbone. She is taking numerous medications, including gabapentin (for nerve pain), ulcer medication, and medicines to treat mood disorders and fibromyalgia. On September 9, 2024, a treating physician issued work restrictions prohibiting lifting more than five pounds and any repetitive neck movements.

27. At hearing, applicant reported that she "may look normal, but deep inside" she is in terrible pain. She reports pain, burning, pins and needles, and cramps "head to toe." She claims there are "tears on her shoulders" and that the discs in her neck and lower back are "not normal," even if imaging studies do not show abnormalities. She reports that she is in terrible pain, but she does not "show it to people" because she does not want to be seen as useless. Barcenas reports that these conditions have resulted in the loss of her employment, a worsening relationship with her husband, and a change in her own behavior. Barcenas reports that the gabapentin medication is critical for her, and without it, she is "screaming in pain."

28. Respondent submitted various documents showing that she has applied for and received disabled parking permits regularly since 2019, and that these applications contained signed statements from her physicians that she has a diagnosed disease which substantially interferes with mobility and a severe disability

such that she cannot move without aid of an assistive device. None of these physicians testified at hearing and these documents were admitted over objection as administrative hearsay pursuant to section 11513, subdivision (d).

Expert Opinions

EXPERT TESTIMONY AND REPORT OF DR. BELLOMO

29. At CalPERS's request, Anthony Bellomo, M.D., evaluated Barcenas's neck, back, and upper extremities conditions in the capacity of an independent medical examiner (IME). Dr. Bellomo reviewed Barcenas's position statement, the statement of the physical requirements of her position, and her medical records; and on March 17, 2022, he interviewed and examined Barcenas. He issued a report this same date and testified at hearing.

30. Dr. Bellomo earned his medical degree in 1985, and completed an internship in surgery in 1986, an orthopedic surgery research fellowship in 1988, a residency in orthopedic surgery in 1994, and a foot and ankle research fellowship in 1995. He is board-certified in orthopedic surgery and performed such surgeries through 1999. Thereafter an arthritic ankle prevented him from performing surgery as a primary surgeon, but he has assisted in hundreds of orthopedic surgeries since then. He has worked in private practice as an orthopedic specialist since 1995 and is a well-qualified expert in this field. Dr. Bellomo has conducted medical evaluations for CalPERS since 2008 and is familiar with the CalPERS standard for disability retirement.

31. Dr. Bellomo conducted a thorough examination of Barcenas and observed no significant objective findings of a problem with her neck or cervical spine. Barcenas's grip strength as measured by the Jamar grip test was below average, but Dr. Bellomo reports that he observed that she made a poor effort, demonstrated by

lack of muscles contracting in her forearms, fingers blanching, or other signs of effort. Numerous tests for nerve damage or impingement were negative. Dr. Bellomo observed some “unusual responses” such as: Barcenas’s gait and range of motion were much better when distracted than when formally tested; her performance on the seated and supine straight leg raising tests were inconsistent with expected results; and when he palpated certain nerve areas, Barcenas reported pain radiating up the nerve towards the spine, which is inconsistent with how nerves are known to work. Dr. Bellomo opines that these observations do not lead him to conclude that Barcenas is malingering, but they strongly suggest that the source of her complaints is not organic. Dr. Bellomo opines that Barcenas is not, from an orthopedic perspective, substantially incapacitated from performing her former job duties as a staff services analyst, even if one were to assume that her claims about the extent of these duties (see Factual Finding 9) were true.

EXPERT TESTIMONY AND REPORT OF DR. ANDERSON

32. At CalPERS’s request, Scott Thomas Anderson, M.D., Ph.D., evaluated Barcenas’s fibromyalgia condition in the capacity of an IME. Dr. Anderson reviewed Barcenas’s position statement, the statement of the physical requirements of her position, and her medical records; and on July 15, 2022, he interviewed and examined Barcenas. He issued a report this same date and testified at hearing.

33. Anderson earned his medical degree in 1986, completed an internal medicine residency in 1989 (he served as chief resident the last year), and completed a rheumatology fellowship in 1991. In 1998, Dr. Anderson earned a Ph.D. in medical anthropology. He is board-certified in internal medicine and rheumatology, with added qualifications in geriatric medicine. He has been practicing medicine for 35 years, primarily as a clinical professor of rheumatology at the University of

California - Davis School of Medicine, mostly in acute care. Dr. Anderson has conducted prior evaluations for CalPERS and is a well-qualified expert in these fields.

34. Dr. Anderson observed that Barcenas used two canes to walk down the hallways to the waiting room of his office. However, he observed that she walked without the canes and without apparent difficulty from the interview room to the examination room. Dr. Anderson conducted fibromyalgia trigger point tests and observed that she reported tenderness at 12 of the 18 trigger points, but he did not observe wincing or withdrawal (only verbal reports of pain). Like Dr. Bellomo, Dr. Anderson observed low scores on the Jamar grip test, but he also perceived poor effort.

35. In his report, Dr. Anderson set forth his opinions:

Fibromyalgia is a condition characterized by soft tissue aches and pains. In individuals with this symptom complex, there typically are no abnormalities on diagnostic imaging, muscle biopsy or laboratory testing with blood samples. It tends to be therefore a diagnosis of exclusion in individuals who complain of generalized body discomfort, particularly when no explanatory diagnostic condition emerges that is more specific.

Ms. Barcenas does have a rheumatological condition in the form of fibromyalgia. This is documented in the medical records and consistent with soft tissue tenderness on palpation. This condition, however, the specific diagnostic entity of fibromyalgia, does not arise to the level of being a

substantial incapacity to perform essential job duties. The reason is that this condition does not cause impaired range of motion, muscular wasting, neurological manifestations, or functional capacity limitations that would prevent the examinee from performing her essential job duties. In making this statement, I am indicating that she does not have musculoskeletal, "brain fog," or other nonspecific manifestations that would be obstacles to continuing to work in her position as a staff services analyst notwithstanding some soft tissue discomfort that may be present.

¶ . . . ¶

The key finding is a broad constellation of subjective complaints in the setting of a paucity of physical examination findings to indicate end organ damage or musculoskeletal dysfunction. Specifically, she has no rheumatoid nodules as might be seen with inflammatory arthritis, no muscular wasting, no evidence [that] fibromyalgia led to loss of tissue mass or other manifestations that would prevent her from engaging in typing, handling papers, answering phones, rearranging office furniture or performing similar duties as outlined in her job description. Therefore, although, she is diagnosable with a nonspecific syndrome of fibromyalgia, she does not have a condition that is serious enough to cause substantial

incapacity to perform job duties. The most important factor is a lack of objective physical findings to suggest muscular pathology or soft tissue dysfunction of a level that would represent an obstacle to continued employment.

REPORT OF DR. LEVINE

36. Barcenas submitted a report of Seymour Levine, M.D., dated September 2, 2022. This document was admitted over a timely hearsay objection pursuant to section 11513, subdivision (d).

37. In connection with multiple workers' compensation claims, Dr. Levine, who is board-certified in internal medicine and rheumatology, evaluated Barcenas in his capacity as a rheumatologist. He described her as a "rambling and somewhat poor historian." Dr. Levine diagnosed Barcenas with fibromyalgia and opined that there is "no evidence she has an underlying non-industrial inflammatory rheumatologic disorder such as rheumatoid arthritis, systemic lupus, or spondyloarthropathy to explain her clinical symptomology."

38. Dr. Levine opined that Barcenas's fibromyalgia pain was moderate to severe and that her other symptoms, such as chronic fatigue, headaches, depression, and gastro-esophageal reflux disease, could contribute to disability. He characterized her headaches as "frequent and slight." He opined that most patients with fibromyalgia are able to work, but that Barcenas has disability resulting in limitation of "semi-sedentary work." He explained:

This contemplates that the individual can do work approximately one half the time in a sitting position and approximately one half the time in a standing or walking

position, with minimal demands for physical effort whether standing, walking, or sitting. This would give this patient the ability to sit or stand at will which is exactly what she needs.

¶ . . . ¶

It would be of value to have this patient undergo evaluation by a vocational rehabilitation specialist to determine her feasibility to participate in the open labor market in a position consistent with her level of education and expertise.

Ultimate Factual Findings

39. Barcenas did not establish that she was incapacitated for the performance of her former duties as a staff services analyst at the time of the application, on the basis of orthopedic (back, neck, bilateral upper extremities) and rheumatological (fibromyalgia) conditions. The testimony and reports of Dr. Williams and Dr. Anderson were much more persuasive than the report of Dr. Levine, primarily because their observations suggest a non-organic source of Barcenas's pain and because Dr. Levine was equivocal as to Barcenas's capacity to perform "semi-sedentary work" and was not subject to cross-examination. The opinions of disability expressed by the physicians in the disabled parking placard applications (Factual Finding 28) were also not persuasive because they were summary and not based on the applicable standard. Likewise, the January 19, 2022, opinion of disability by Dr. Campos (Factual Finding 25) was summary, and he was not subject to cross-examination. Further, pursuant to section 11513, subdivision (d), a finding cannot be solely based on hearsay over a timely objection, and the report of Dr. Levine and the opinions in the

applications were hearsay to which CalPERS timely objected. Barcenas did not establish incapacity on the basis of competent medical opinion.

LEGAL CONCLUSIONS

1. To qualify for disability retirement, Barcenas has the burden of proving that she is “incapacitated physically or mentally for the performance of” her duties. (§ 21156, subd. (a).)

2. The term “incapacitated for the performance of duty” is defined as a “disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined . . . on the basis of competent medical opinion.” (§ 20026.) An applicant is “incapacitated for performance of duty” if she is substantially unable to perform the usual duties of her position. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876) Notably, discomfort, which may make it difficult for an employee to perform her duties, is not by itself sufficient to establish permanent incapacity. (See *Smith v. County of Napa* (2004) 120 Cal.App.4th 194, 207; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862; *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12–14.)

3. Barcenas did not establish that she was incapacitated for the performance of her former duties as a staff services analyst on the basis of orthopedic (back, neck, bilateral upper extremities) and rheumatological (fibromyalgia) conditions, at the time of the application. (Factual Finding 39.) Therefore, she does not qualify for disability retirement. (§ 20026.)

ORDER

The application for disability retirement of respondent Olivia Barcenas is denied.

DATE: 10/23/2024


MICHAEL C. STARKEY

Administrative Law Judge

Office of Administrative Hearings