

**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:**

**PRISCILLA CASTANEDA, Respondent**

**and**

**DEPARTMENT OF REHABILITATION, Respondent**

**Agency Case No. 2019-0291**

**OAH No. 2019070586**

**PROPOSED DECISION**

Jami A. Teagle-Burgos, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 20, 2021, by video conference due to the ongoing coronavirus pandemic public health emergency.

Preet Kaur, Senior Attorney, represented petitioner, Keith Riddle, Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Priscilla Castaneda, respondent, represented herself.

There was no appearance by Department of Rehabilitation (DOR). Upon proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default against DOR, pursuant to Government Code section 11520.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on May 20, 2021.

## **ISSUE**

At the time of Ms. Castaneda's application for disability retirement, was she permanently disabled or incapacitated from performing the usual and customary duties of a Staff Services Analyst, due to her otolaryngological (vestibular lesion, dizziness, and vertigo) conditions?

## **SUMMARY OF DECISION**

Ms. Castaneda had the burden to prove that, at the time of her application, she was permanently disabled or incapacitated from performing her regular and customary job duties as a Staff Services Analyst. Before the hearing, CalPERS issued an amended determination, finding that Ms. Castaneda is substantially incapacitated based on her psychological condition, but not based on her otolaryngological conditions. At the hearing, the competent medical evidence presented did not support her claim that she was permanently disabled or incapacitated from performing the regular and customary duties of a Staff Services Analyst, due to her otolaryngological (vestibular lesion, dizziness, and vertigo) conditions. As such, Ms. Castaneda's claim for disability retirement based on her otolaryngological conditions is denied.

## FACTUAL FINDINGS

### Preliminary Matters

1. Ms. Castaneda was employed by DOR as a Staff Service Analyst. By virtue of her employment, Ms. Castaneda was a State miscellaneous member of CalPERS subject to Government Code section 21151. Ms. Castaneda has the minimum service credit necessary to qualify for retirement.

2. On June 23, 2017, Ms. Castaneda signed an application for disability retirement with CalPERS. Her last day on payroll at DOR was January 17, 2017. She alleged her disability occurred on January 3, 2016, and her specific disability was "dizziness, vertigo, tinitis [*sic*], fullness in ears, ear pain, loss of equilibrium." Ms. Castaneda claimed she was limited because she "cannot look at the computer, drive, stand, read." Her ability to perform her job was "substantially affected" and she was not able to "stare at the computer, read, drive, or stand for long periods of time."

3. CalPERS obtained medical records and reports related to Ms. Castaneda's conditions, and selected Theodore M. Mazer, M.D., a board certified otolaryngologist, to perform a disability evaluation. Dr. Mazer provided CalPERS with narrative reports of his findings and conclusions. After reviewing all of those documents, CalPERS determined that when Ms. Castaneda filed her application for a disability retirement, she was not permanently disabled or incapacitated from performing the usual and customary duties of a Staff Services Analyst, due to her otolaryngological conditions.

4. On November 1, 2017, CalPERS issued a determination and notified Ms. Castaneda that her application for disability retirement was denied, due to her

otolaryngological (vestibular lesion, dizziness, and vertigo) conditions. CalPERS advised Ms. Castaneda of her right to appeal that adverse determination.

5. On November 27, 2017, Ms. Castaneda timely filed her appeal and a hearing was scheduled with OAH.

6. On September 2, 2020, CalPERS issued an amended determination and notified Ms. Castaneda that based on additional information received during the appeal process, her application for disability was approved based on her psychological condition. However, she was not approved based on her otolaryngological conditions. CalPERS informed Ms. Castaneda that if she was re-examined for reinstatement in the future, she would be reexamined based on her psychological condition and no other conditions. She was notified that if she wished for her future re-evaluation to be based on her otolaryngological conditions, then she must appeal and proceed with a hearing.

7. On November 10, 2020, petitioner filed the amended statement of issues in his official capacity. The amended statement of issues, notice of hearing, and other jurisdictional documents were served on respondents. DOR did not respond to the amended statement of issues or appear in this matter and the matter proceeded against DOR as a default.

### **Job Description Documents**

8. The Essential Functions of a Staff Services Analyst, and the Physical Requirements of that position outlined the tasks and physical requirements of that position. Dr. Mazer relied upon those documents in formulating his opinion.

## **CalPERS's Medical Evaluation Conducted by a Medical Expert**

### **DR. MAZER AND HIS INITIAL AND SUPPLEMENTAL REPORTS AND TESTIMONY**

9. Dr. Mazer is a board certified otolaryngologist, specializing in head and neck surgery since 1988, and he received his medical degree from the State University of New York, Syracuse. He is Vice Speaker of the House of Delegates for the California Medical Association, since 2010; he was President of the San Diego County Medical Society in 2006 and 2007; he is an Alternate Delegate for the American Medical Association, since 2010; he is a Board of Director for Scripps Mercy Physicians Partners, since 2009; and he is Director of Scripps Mercy Physicians Partners Services, since 2010. Dr. Mazer has been affiliated with Sharp Grossmont Hospital, Alvarado Hospital Medical Center, Grossmont Plaza Surgery Center, San Diego Outpatient Surgery Center, and Physicians Surgery Center. He has also authored several publications in medical journals, been a designated presenter at numerous medical presentations, and served on various medical staff committees. Dr. Mazer is a medical expert in his field.

10. Dr. Mazer reviewed Ms. Castaneda's treatment records and/or reports by her providers, including the following medical records.

11. A magnetic resonance image (MRI) on October 18, 2016, was performed by Sharp Rees-Stealy during a period of Ms. Castaneda's symptoms and the results were normal.

12. A handwritten note on March 29, 2017, in Spanish, by Dr. Nakashimada, an otolaryngologist in Tijuana, Mexico, reported a finding of bilateral vestibular lesion of undetermined etiology with normal hearing testing and normal middle ear pressure measurements.

13. On May 23, 2017, Dr. Ian Purcell, a treating otolaryngologist, noted a history of anxiety and depression, and Ms. Castaneda's alleged otolaryngological symptoms began in January 2016 when she was awakened with acute onset of spinning sensation lasting for hours. She complained of photosensitivity, auras consistent with migraines, and tinnitus beginning about six months prior. A video nystagmogram (VNG) study conducted on May 2, 2017, indicated bilateral caloric weakness, which differed from a VNG study conducted on May 24, 2017, that only showed abnormality of left caloric paresis of 56% and no specific abnormality on balance testing aside from mild sway on Romberg testing.

14. An audiogram on June 1, 2017, conducted by Sharp Rees-Stealy, was "totally normal at all frequencies, with normal speech discrimination both ears, normal middle ear testing without evidence of abnormal pressures." The results were the same for an earlier audiogram on March 17, 2016.

15. On June 7, 2017, Dr. Purcell described Ms. Castaneda as having left sided labyrinthine dysfunction with unsteady gait and that her VNG findings showed left caloric paresis with balance difficulties worsened by computer usage resulting in worsening sensation of disequilibrium with migraine variant. Nonetheless, Dr. Purcell reported her examination was unremarkable.

16. In a letter from Dr. Lautin in New York, he indicated that Ms. Castaneda consulted him on August 15, 2017, possibly remotely. He is not a board-certified physician or other medical professional in California. He is a psychiatrist in New York. He felt she was suffering from a "multitude of root causes," including migrainous vertigo, major depression, generalized anxiety disorder, bilateral vestibular disorder unspecified, tinnitus, chronic fatigue, fibromyalgia, and restless leg syndrome. It is

unclear if Dr. Lautin performed an actual examination of Ms. Castaneda, and there were no clinical notes of Dr. Lautin for Dr. Mazer to review.

17. On September 28, 2017, Dr. Mazer conducted an otolaryngological Independent Medical Examination (IME) of Ms. Castaneda, and prepared an initial IME report for CalPERS on October 10, 2017. Dr. Mazer noted that his examination included an interview with Ms. Castaneda where he was asked about her current complaints, relevant history of injuries, past medical history, family and social history, and daily activities. Ms. Castaneda reported being born with fluid in her ears, having "bad" dizziness, experiencing three deaths of close family members in 2015 including her father, and having migraines since 2015. She wore sunglasses in the exam room and had slow movements and slow speech. She reported having severe anxiety, depression, and panic attacks that were diagnosed in 2015, as well as migraines and vertigo. She described her vertigo as a "boaty float" that was constantly present, yet she did not describe it as spinning or positional vertigo. During the exam, she exhibited no nystagmus or balance problems.

18. Dr. Mazer found that, on physical exam, Ms. Castaneda was focused on balance and tinnitus complaints, yet she had a normal testing including Romberg, Hallpike, tilt, gaze, and coordination. Despite her complaints of feeling "boaty float," she had no objective abnormalities. Based on his findings, Dr. Mazer concluded the following:

I believe that many or most of Ms. Castaneda's complaints, while perhaps involving some unilateral labyrinthine dysfunction based on a single abnormal result on one VNG (it would be advisable to repeat her VNG in an independent facility, with at least 2 days absence of use of any

medications, including OTCs and homeopathics, before concluding that there is or is not indeed any vestibular pathology), are the result of underlying depression/anxiety and possible secondary gain, rather than directly due to any identified physical pathology. Her inability to drive stand or read, let alone due [*sic*] computer work, appear greatly out of proportion to any findings on exam. . . . Her pre-existent history of depression and anxiety give rise to more concern that the focus of her evaluation and potential intervention should include a neuropsychology evaluation. . . . It is my opinion . . . that she is not unable to perform her duties because of her alleged physical condition, which should allow for desk work with limited movement, and should allow for use of computer work with occasional breaks, but she may well at least [be] temporarily disabled from a mental health standpoint that I am not qualified to evaluate, such mental health issues magnifying or creating the very issues she alleges are making her unable to return to work at this time.

19. Dr. Mazer prepared a first supplemental IME report on October 25, 2017, which indicated he reviewed the treatment records from Dr. Michael Rensink, an ear, nose, and throat (ENT) provider, and a single record from Sharp Rees-Stealy physical therapy. Dr. Rensink noted in January and February 2017 that Ms. Castaneda complained of a "rocking sensation" for two years, which she described as intermittent, although she reported to physical therapy in 2016 that it was constant. She had a history of headaches after "dizziness attacks" and a history of panic attacks. Dr. Resnick

reported the Ms. Castaneda's condition was moderate to severe, yet her functional impairment was mild because she was aware of the imbalance but she stated it did not interfere with her daily activities. Her medications were alprazolam, nortriptyline, paroxetine, and Paxil. Dr. Resnick diagnosed her with migraine or migraine variant. An evaluation by Sharp Rees-Stealy physical therapy on October 7, 2016, provided a "totally different description of the sensation" and reported Ms. Castaneda complained of "spinning on lying with the head tilted backwards, looking right or left." As such, Dr. Mazer concluded that following his review of these additional medical records, his overall opinion remained unchanged.

20. Dr. Mazer prepared a second supplemental IME report on April 30, 2018, which indicated he reviewed treatment records from Sharp Rees-Stealy Medical Clinic that showed Ms. Castaneda had "anxiety problems" described as "gaze instability," yet her balance, Dix Hall pike, and positional testing were all unremarkable. She was discharged from physical therapy because of the lack of subjective improvement even though there "were no significant objective findings." The otolaryngology notes also "talk more about anxiety disorder and adjustment reactions, as opposed to any inner ear abnormality." Dr. Hotel agreed that her symptoms were likely migraine rather than inner ear related. Dr. Mazer also reviewed a note from Dr. Purcell, dated November 8, 2017, which extended Ms. Castaneda's disability status secondary to balance issues and reported photophobia and phonophobia, which were without any accompanying objective findings. Dr. Purcell's testing reported an upsloping hearing loss in both her ears, but her speech reception thresholds were significantly better than the pure tone average, whereby questioning the accuracy of Dr. Purcell's testing. Dr. Mazer noted that testing he conducted showed "perfectly normal hearing in both ears, including speech reception thresholds of 5 decibels in each ear and 100% speech discrimination

in both ears." As such, Dr. Mazer concluded that following his review of these additional medical records, his overall opinion remained unchanged.

21. Dr. Mazer prepared a third supplemental IME report on January 19, 2019, which indicated he reviewed additional medical records. A repeat computerized tomography (CT) scan of Ms. Castaneda's temporal bones and internal auditory canals (IACs) showed no specific finding and only a "questionable" left superior semicircular canal dehiscence (SSCD). Dr. Mazer wrote, "This finding remains uncertain at best, and all of the balance testing done to date fails to support a diagnosis of [SSCD]." A treatment record from Sharp Rees-Stealy on August 6, 2018, discussed Ms. Castaneda's history of migraines and "raised a question of persistent postural perception dizziness [PPPD], clearly distinguished from vestibular vertigo." A vestibular evoked myogenic potential (VEMP) test on October 8, 2018, was abnormal but the conclusion was vague because it noted "possible" left sided SSCD, which Dr. Mazer reported there was a lack of clinical correlation to support this diagnosis especially in light of the absence of any abnormal objective testing and Ms. Castaneda's "purely subjective complaints." As such, Dr. Mazer concluded that following his review of these additional medical records, his overall opinion remained unchanged.

22. Dr. Mazer prepared a fourth supplemental IME report on August 9, 2020, which indicated he reviewed additional medical records. A repeat VEMP test on October 8, 2018, was "possibly indicative of SSCD" even though it was normal a year earlier. A University of California, Los Angeles (UCLA), House Clinic, treatment record by Dr. Yang on February 5, 2019, reported that imaging showed left SSCD and right thinning even though a radiologist reading of the right was normal; "clear" as opposed to "possible" dehiscence; and a normal audiogram. On June 6, 2019, she underwent surgery for left SSCD performed by Dr. Yang. Upon follow-up on June 19, 2019, she

complained of some worsening dizziness and given materials for a "migraine diet." A treatment record by Dr. Hubbard on January 13, 2020, indicated Ms. Castaneda had a diagnosis of major depressive disorder, recurrent, moderate, and she was possibly treating with Lexapro. She planned to return to work on January 2, 2020. A treatment record by Dr. Purcell on January 24, 2020, noted Ms. Castaneda had disequilibrium as opposed to vertigo, which increased with stress and caused her to leave work early. She continued to treat with Dr. Purcell despite a lack of progress in symptoms. She had decreased anxiety with Lexapro, but she reported new symptoms of paresthesia along the trigeminal nerve and scalp, photophobia and phonophobia episodes, and headaches. Her symptoms lasted seconds to days. Her exam was unremarkable except for "moderate sway on Romberg" and a nonspecific report of impaired tandem gait. Her "flair ups were not described as vertigo, but rather as lightheadedness associated with anxiety." Dr. Mazer noted this was all post-SSCD surgery on June 6, 2019.

Dr. Mazer also carefully reviewed a neuropsychology independent report conducted by qualified medical examiner Mara Tansman, Psy.D., in July 2020. Ms. Castaneda complained of balance problems since 2013, nausea, tinnitus, feeling faint, panic attacks, and depression. She reported continuing with vestibular rehabilitation yet still having constant dizziness; a recent diagnosis of PPPD; suicidal ideation and hospital admission in October 2019; and a divorce in January 2020. She was working five hours a day, from home due to Covid-19, which she alleged increased her dizziness, yet she was able to work these hours. Ms. Castaneda reported the passing of her grandmother in 2015; the passing of her father in 2016; a history of panic attacks and anxiety in 2016; and fatigued, depression, and inability to go to work in 2017. Her diagnosis at that time was panic disorder without agoraphobia, and dysthymia. Upon mental examination, Dr. Tasman assessed that Ms. Castaneda was "in the severely depressed range of subjective depression, and the severe range of subjective anxiety."

Dr. Tasman diagnosed panic disorder, and major depressive disorder, single episode, moderate; and found Ms. Castaneda's "psychological condition is too severe to allow her to provide her duties adequately, and that given the ongoing emotional condition, she cannot perform her duties." Dr. Tasman noted that Ms. Castaneda's "anxiety is amplifying the balance complaints, as opposed to the balance complaints causing the anxiety." Upon his review of Dr. Tasman's neuropsychological report, Dr. Mazer determined the following:

The balance complaints both pre and post surgical intervention, such surgical intervention appearing to have done little to change the patient's balance or emotional/psychological conditions, were of such a nature as to be absent significant abnormalities on physical exams and testing, and as stated in my original reports, would not appear to have precluded her from working, especially with appropriate accommodations. However, based upon Dr. Tasman's report, and the thus far unsuccessful attempts at managing very subjective balance complaints, the current overlay, or concurrent conditions of anxiety, depression would appear to make her unable to return to the workplace at this time on a full time basis.

However, she apparently has been able to work up to 5 hours a day, from home, . . . I am thus unable, from an otolaryngology standpoint, to declare her unable to work altogether and totally disabled. . . From the emotional and psychological standpoint, I must defer to Dr. Tasman. . .

23. Dr. Mazer prepared a fifth supplemental IME report on December 30, 2020, which indicated he reviewed additional medical records from Sharp Rees-Stealy Medical Group. A physical therapy note on May 22, 2020, indicated Ms. Castaneda complained of being dizzy lying on both sides, yet she had unremarkable balance and ocular screen, and she was able to drive on the freeway and exercise. A telehealth note on August 13, 2020, reported she complained of doing worse but her mother felt she had improved, and she was able to drive. A telehealth note on September 17, 2020, reported she was getting out more often and she felt "drifting to left" while walking one evening; she rode her bicycle in the yard; and she took a trip to Las Vegas although she did not drive. Her balance screening was essentially normal and she was advised to continue with her exercise regimen. Dr. Mazer reviewed notes from Senta Clinic in August and September 2020, written by a physician assistant and signed-off by Dr. Purcell, which reported she was seeking a letter for disability and still pursuing her claim for dizziness. The notes reference cerumen removal for eight minutes, yet the visit is described as a "virtual telemedicine exam." Dr. Mazer concluded that following his review of these additional medical records, his overall opinion remained unchanged.

24. In addition, Dr. Mazer appeared and testified at the hearing. His testimony reiterated the same determinations that he made in his five IME reports, which are discussed at length above. He concluded, as he had done in his reports, that Ms. Castaneda was not substantially incapacitated for the performance of her job duties, and there were no specific job duties that she could not perform because of an otolaryngological condition.

## **Respondent's Evidence**

### **LETTER FROM SENTA CLINIC**

25. At the hearing, Ms. Castaneda submitted a letter by Touraj Yari, MSPA, PA-C at Senta Clinic, dated August 6, 2020, which she reported was dated incorrectly and given to her at her last visit in March 2021. The letter indicated that she has treated at Senta Clinic since May 2017 for left peripheral vestibulopathy and left sided SSCD that interferes with her normal daily functions. She continues to have chronic baseline disequilibrium despite undergoing a craniotomy on June 6, 2019.

### **TESTIMONY OF RESPONDENT, PRISCILLA CASTANEDA**

26. Ms. Castaneda appeared and testified at the hearing. The following is a summary of her testimony. She has three children and a life, and had to find out what is wrong with herself. She underwent surgery for SSCD and it was successful in repairing a small hole in her ear, but it was not successful in ending her symptoms. Dr. Purcell has followed her symptoms since the "beginning." A symptom of SSCD is oscillopsia, which is abnormal eye motions, and her eyes do not adjust on their own when she is moving. Everything looks like "waves" to her. When Dr. Mazer tested her, her "symptoms barely started happening." If he were to test her today, her symptoms would be worse. She wanted to correct some things stated by Dr. Mazer in his testimony. She has never driven a car to Las Vegas. She does not drive on freeways or long distances, and she only drives on local streets within a ten mile radius. Her mother drives her to places that are further.

27. The reason why she has anxiety, depression, and panic attacks is because of her physical condition. It is exhausting for her brain. It is like a "circle." She feels anxious. Her conditions has something to do with "crystals" in her ear. She has SSCD.

She is not asymptomatic, as she has tinnitus although she has no hearing problems and she no longer has migraines. She explained that her dizziness and disequilibrium exacerbates her anxiety, and her anxiety exacerbates her dizziness and disequilibrium.

28. Her job required her to work eight hours each day at the office. She had to file, kneel, stand up, and walk from her desk to a window where she had contact with the public. She would tell her supervisor when she was feeling bad, and she was sent home "countless times." She was never able to work more than four to five hours each day, and she would call her mother and cry. She used to be a productive person and she could work full-time, go to school, and care for her children. Her children are ages 12, 9, and 8. She testified that she lives with her children and "husband." This is inconsistent with her records that indicate she divorced her husband in 2020.

29. She is a recipient of Social Security Disability Income (SSDI), and she asserted that the Social Security Administration found her disabled, as of January 17, 2017, due to dizziness and a disequilibrium condition. However, she indicated that her SSDI approval letter did not state the medical condition for which she was determined to be disabled. She stated that at some point, "they wanted me to go back to work for nine months" on a trial work period. This is the reason why she returned to part-time work from January 2020 until October 2020, at home due to Covid-19. She then told her boss, "I can't do it," and her boss completed her paperwork so she could retire.

### **TESTIMONY OF ROCIO VALLE**

30. Rocio Valle, the mother of Ms. Castaneda, appeared and testified at the hearing in support of Ms. Castaneda. Her daughter would call and cry because she was upset that it has been several years and "a doctor was not really able to diagnose her until she went outside her regular doctors to get a diagnosis from a specialist." She

takes her daughter to her appointments due to her limitations. She has witnessed her experiencing dizziness, inability to sometimes walk, forgetfulness, inability to look at a screen for a prolonged period, inability to drive distances on the freeway, dizziness from cars driving by on the freeway, swaying side-to-side to try to maintain balance, and blurry vision. Sleep sometimes helps when she gets these "episodes." Her daughter cannot cook or do laundry. She helps with her grandchildren. She moved next door to assist her daughter with her daily activities. She notices a cycle in that her daughter feels dizzy and then gets anxious, which in turn creates dizziness, and then creates more anxiety.

## **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 he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

### **Applicable Statutes**

2. Government Code section 20026 defines "disability" and "incapacity for performance of duty," for purposes of a retirement, to mean "disability of permanent or extended and uncertain duration" based on "competent medical opinion."

3. Government Code section 21150, subdivision (a), provides that a member who is "incapacitated for the performance of a duty" shall receive a disability retirement. Section 21151, subdivision (a), provides that such incapacitated member shall receive a disability retirement regardless of age or amount of service.

4. Government Code section 21152, provides in part: Application to the board for retirement of a member for disability may be made by:

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

[¶] . . . [¶]

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

(d) The member or any person in his or her behalf.

5. Government Code section 21153 provides:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirements as provided in section 20731.

6. Government Code section 21154 provides in part:

The application [for disability retirement] shall be made only (a) while the member is in state service, . . . On receipt

of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

7. Government Code section 21156, provides that if the medical evaluation or other evidence demonstrates that an eligible member is incapacitated physically or mentally, then CalPERS shall immediately retire the member for disability. The determination of incapacitation shall be based on competent medical opinion.

### **Appellate Authority**

8. "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 public employee is not "incapacitated" and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873; *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1057.)

### **Competent Medical Opinion**

9. CalPERS makes its determination whether a member is disabled for retirement purposes based upon "competent medical opinion." That determination is

based on the evidence offered to substantiate the member's disability. (*Lazan v. County of Riverside* (2006) 140 Cal. App. 4th 453, 461, distinguished on other grounds.)

10. Evidence Code section 801 provides:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

11. The determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the trier of fact in the search for the truth, and "no hard and fast rule can be laid down which would be applicable in every circumstance." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 37-38.)

12. A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact but the expert's opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 529-530.)

13. Government Code section 11513, subdivision (d), provides in part: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

14. Unless admissible over objection in civil actions, hearsay evidence shall not be sufficient in itself to support a finding in an administrative proceeding. (*Carl S. v. Commission for Teacher Preparation & Licensing* (1981) 126 Cal.App.3d 365,371.)

15. Hearsay evidence is not competent evidence that can independently support a finding. (*McNary v. Department of Motor Vehicles* (1996) 45 Cal.App.4th 688.)

16. Determining both the nature of Ms. Castaneda's otolaryngological condition, and whether that condition incapacitated her from the performance of her duties, is sufficiently beyond common experience that expert testimony is required. Ms. Castaneda's physicians did not testify or offer written reports, and Ms. Castaneda's medical record from Senta Clinic was received as administrative hearsay. Thus, they were only considered to the extent they supplemented and/or explained other non-hearsay evidence.

## **Evaluation**

17. Before the hearing, CalPERS issued an amended determination, finding that Ms. Castaneda is substantially incapacitated due to her psychological condition, but not her otolaryngological conditions. Based on this determination, CalPERS will only consider the psychological condition(s), if and when, Ms. Castaneda is reevaluated in the future for reinstatement purposes. As such, the issue at hearing addressed Ms. Castaneda's appeal of CalPERS's denial of her application for disability retirement based on her otolaryngological conditions.

18. In order to qualify for industrial disability retirement, Ms. Castaneda must demonstrate with competent medical opinions that she was permanently disabled or incapacitated, due to otolaryngological conditions, from performing the usual and customary duties of a Staff Services Analyst when she filed her application. Dr. Mazer concluded that Ms. Castaneda was not incapacitated from performing her job duties as a result of any otolaryngological conditions. Ms. Castaneda offered no competent medical opinions to refute the opinion of Dr. Mazer. Thus, Ms. Castaneda failed to meet her burden of proof and her application must be denied. Petitioner's determination that Ms. Castaneda was not permanently disabled or incapacitated, due to otolaryngological conditions, from performance of her duties is affirmed.

## **Cause Exists to Deny the Application**

19. Cause exists to deny Ms. Castaneda's application for disability retirement based on otolaryngological conditions. Ms. Castaneda failed to establish by a preponderance of the evidence that she was permanently disabled or incapacitated from performing her usual and customary duties as a Staff Services Analyst, for DOR,

based on otolaryngological conditions (vestibular lesion, dizziness, and vertigo), when she filed her application for disability retirement.

### **ORDER**

The application for industrial disability retirement filed by Priscilla Castaneda for otolaryngological conditions, with the California Public Employees' Retirement System on June 23, 2017, is denied. California Public Employees' Retirement System's denial of Priscilla Castaneda's application, due to otolaryngological conditions, is affirmed.

DATE: June 18, 2021



JAMI A. TEAGLE-BURGOS

Administrative Law Judge

Office of Administrative Hearings