

ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for Disability Retirement of:

HAISONG PENG and

DEPARTMENT OF HEALTH CARE SERVICES, Respondents.

Case No. 2019-1153

OAH No. 2020020328

PROPOSED DECISION

Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by video conference on April 27, 2021, from Sacramento, California.

Austa Wakily, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Haisong Peng (respondent) appeared and represented herself.

There was no appearance by or on behalf of the Department of Health Care Services (Department). CalPERS established that it properly served the Department with a Notice of Hearing. Consequently, this matter proceeded as a default hearing against the Department pursuant to Government Code section 11520, subdivision (a).

Evidence was received, and the record was held open for the parties to file and serve written closing arguments, which were timely submitted. On July 2, 2020, the record was re-opened to allow CalPERS to file and serve a copy of the hearing transcripts referenced in its written closing arguments. CalPERS timely filed and served hearing transcripts. The matter was submitted for decision and the record closed on July 20, 2021.

ISSUE

At the time of her application, was respondent substantially incapacitated from performing her duties as a Health Program Audit Manager I for the Department based on neurological (left side weakness, dizziness) and psychological (anxiety) conditions?

FACTUAL FINDINGS

Respondent's Application

1. CalPERS received respondent's Disability Retirement Election Application on July 11, 2019. In her service pending disability retirement application, respondent described her disability as: "anxiety, dizziness, weakness of left side [of] body, high blood pressure, sensitive to sound, etc." She stated that her disability started in March 2016, and that it occurred "after a stressful meeting (audit appeal hearing) [that] lasted a full day." Respondent stated that her condition includes "extreme sensitivity to sound, blurry vision, inability to concentrate, hard to raise left arm and leg." Her condition affects her ability to perform her job because she is "not able to think, analyze the audit findings, and cannot make sound decision[s]." Respondent retired for

service effective August 1, 2019, and has been receiving her retirement allowance from that date.

Duties of a Health Program Audit Manager I

2. On July 5, 2019, respondent signed a Duty Statement for a Health Program Audit Manager I. A summary of the position states that the incumbent “[m]anages and supervises audit staff in the performance of complex field audits involving fiscal compliance, and management aspects of the healthcare delivery systems.” The essential duties include managing and supervising audit staff requiring extended travel and overnight stays (55 percent), preparing and reviewing audit reports and written correspondence (20 percent), and participating in appeal hearings, exit conferences, and other meetings (10 percent).

Respondent’s Evidence

3. Respondent began working for the Department as a Health Care Program Auditor in 2006, and was promoted to the position of Health Care Program Auditor Manager I in 2011. During the period from 2011 to the end of 2013, respondent experienced some “signals” from her body, such as dizziness, blurred vision, and sensitivity to sounds. She thought the symptoms were due to her busy schedule and did not complain. She treated her symptoms at the time with rest and sleep, allowing her body to self-heal.

4. In April 2016, respondent participated in an informal telephonic audit hearing. Near the end of the hearing, respondent felt extremely tired and dizzy, and could hardly move the left side of her body. She sat for a couple hours before she called her husband to come pick her up from work. When she got home, she lay down and rested quietly for several days.

5. On April 14, 2016, when respondent began to feel better, she went to the office of her primary care physician, Joy Liu, D.O. Dr. Liu was not available, so respondent saw Diane Asmuth, PA-C. On April 28, 2016, respondent saw Dr. Liu, who noted symptoms of fatigue and left sided weakness, and ordered an MRI to rule out a possible stroke. Respondent continued to see Dr. Liu, who diagnosed respondent with anxiety and adjustment disorder with anxiety. Respondent also saw Karsten Denge, M.D., a neurologist, in November 2016 and June 2017, who noted that respondent suffered from migraine phenomena and left-sided weakness associated with work stress, and referred her to behavioral health. Respondent "disregarded" Dr. Denge's referral to behavioral health. Respondent testified that she "believes in nature" and for this reason disregarded his advice. Respondent saw a second neurologist, Nidal Khalili, M.D., on February 22, 2018. He noted left-sided weakness, sensitivity to sound, and diagnosed her with hemiplegic migraines and conversion disorder.

6. In September 2018, Dr. Liu recommended that respondent work half-time. Dr. Liu told respondent this would be better than taking time off work because time away would only provide temporary relief until she returned to work again. Respondent's supervisor was supportive, and she was able to reduce her work to 20 hours per week. Respondent's symptoms improved with the reduced workload, but she has never fully recovered, even since retirement.

7. During April 2016 to October 2018, respondent worked full-time. During this time, she took prescribed medication to treat her high blood pressure. Respondent did not take medications as recommended to treat anxiety or see a counselor or psychologist. Respondent chose to use "alternative ways" to "help to ease [her] health condition on the psychological side." She is afraid to take any medications related to a psychological disorder, and refuses to do so.

CalPERS' Evidence

8. CalPERS retained Alberto G. Lopez, M.D., M.P.H.,¹ and Pramila R. Gupta, M.D., to conduct separate independent medical evaluations (IME). Their IME reports and testimony are reviewed below.

IME REPORT AND TESTIMONY OF ALBERTO G. LOPEZ, M.D., M.P.H.

9. Dr. Lopez is board certified in psychiatry by the American Board of Psychiatry and Neurology. He conducted an IME of respondent on August 14, 2019, regarding psychiatric symptoms, and issued an IME report on that date.

10. On August 14, 2019, Dr. Lopez took respondent's history. He noted that respondent enjoyed her work as a Health Program Audit Manager, and felt she was very good at it. She also came to regard her work as quite stressful. She developed physical symptoms including headaches, dizziness, left-sided weakness, and increased sensitivity to sounds. In April 2016, following a stressful audit hearing, respondent experienced a severe headache with migraine symptoms and left-sided hemiparesis.

11. Dr. Lopez also reviewed respondent's medical records. He noted that respondent was initially seen on April 14, 2016, by Diane Asmuth, PA-C, who took respondent off work until April 22, 2016. On April 28, 2016, respondent saw Dr. Liu who found that activity and stress exacerbated her physical symptoms. She took respondent off work until May 6, 2016. On September 11, 2017, Dr. Liu again noted that respondent's symptoms become worse when she is tired and stressed. On February 22, 2018, Dr. Khalili conducted a neurological evaluation. He diagnosed respondent with weakness and migraine without aura. Dr. Khalili recommended

¹ Master of Public Health.

psychotherapy. On June 11, 2018, Dr. Liu noted that respondent was having left-sided weakness two to three times per year, associated with stress, and diagnosed her with an anxiety disorder, unspecified. Dr. Liu recommended that respondent see a therapist to talk about stress. On September 26, 2018, Dr. Liu diagnosed respondent as having an adjustment disorder with anxiety, and prescribed hydroxyzine (25 mg) to treat anxiety, and recommended that respondent see a therapist. On October 29, 2018, Dr. Liu again advised respondent to look for a therapist or psychologist. In October 2018, respondent was placed on half-time work.

12. An adjustment disorder is an anxiety disorder resulting from a specific stressor. It is a "fairly benign" type of anxiety which can be expected to "go away" when the stressors are eliminated. Anxiety, unspecified, is a catchall diagnosis for a patient who has anxiety symptoms, without fitting into a more specific diagnostic category of anxiety disorders.

13. Dr. Lopez administered the Minnesota Multiphasic Inventory-2 (MMPI-2), a psychological testing instrument. Dr. Lopez found the scores to be valid. The scores included elevated scales of depression, somatization, and hypochondriasis. The testing also suggested a possible conversion disorder. A conversion disorder refers to a psychological problem being converted into physical symptoms, such as numbness or weakness. Conversion symptoms can be severe enough to prevent a person from working, but the symptoms are usually transitory.

14. Dr. Lopez diagnosed respondent as having "psychological factors affecting general medical condition, migraines." The psychological factors are respondent's responses to work-related stress. Dr. Lopez opined that this can be sufficiently severe to cause a substantial incapacity, but he did not find that to be true for respondent.

15. Dr. Lopez is familiar with the Duty Statement and physical requirements for a Health Program Audit Manager I. He testified based on his examination of respondent and his review of available records that she is not substantially incapacitated by a psychiatric condition from performing her usual job duties, nor was she substantially incapacitated at the time she applied for disability retirement.

16. Dr. Lopez's opinion is based on factors including that respondent was able to continue doing her job, at least half-time, until the date of her retirement. He also noted that her neurological symptoms including headaches were transient. Finally, he observed that respondent underwent very little treatment. She could have taken more prescribed medications and undergone psychological therapy to treat her anxiety, which would have made it easier for her to continue with her job. Respondent chose not to pursue this course of treatment.

IME REPORT AND TESTIMONY OF PRAMILA GUPTA, M.D.

17. Dr. Gupta is board certified in neurology by the American Board of Psychiatry and Neurology. She conducted an IME of respondent on September 26, 2019, regarding neurological symptoms, and issued an IME report on that date.

18. Dr. Gupta took an extensive history from respondent. She noted that respondent began having migraine headaches when she was in her late 30s or early 40s, accompanied by dizziness, blurred vision, and sensitivity to sound. These episodes were infrequent. In April 2016, following a full day of hearings, respondent began to feel paralyzed on the left side of her body. Respondent was taken off work for two weeks. She was diagnosed with migraine headaches. In October 2018, respondent was placed on half-time work at the recommendation of her physician. This helped relieve symptoms of anxiety and weakness on the left side of her body.

19. Dr. Gupta performed a physical examination. She found respondent's cranial nerves II through XII to be intact. She had no motor weakness, atrophy, or abnormal movements. Her sensory was intact, and reflexes were normal and symmetric. Respondent's gait and coordination were also normal.

20. Dr. Gupta reviewed respondent's medical records. On April 14, 2016, Diane Asmuth, PA-C, examined respondent and noted that she presented with weakness on her left side, decreased energy, and general fatigue. She also noted that the symptoms were alleviated by rest and exacerbated by activity. Dr. Gupta saw nothing in this examination to suggest the symptoms were neurological. Dr. Gupta found this visit to be significant because it was closest in time to respondent's original complaints in April 2016. Dr. Gupta noted that respondent underwent an MRI of her brain on April 28, 2016, which showed no significant intracranial abnormalities. Dr. Gupta also noted in the June 26, 2017 medical record entry that an MRI of respondent's cervical spine was within normal limits.

21. Based on her examination and review of respondent's history and medical records, Dr. Gupta diagnosed respondent with a history of migraine headaches and episodic left-sided weakness caused by anxiety/panic attacks. In addition, based on the medical records alone, Dr. Gupta diagnosed respondent with hypertension, hyperlipidemia, neck and lower back pain, and tennis elbow.

22. Dr. Gupta is familiar with the Duty Statement and physical requirements for a Health Program Audit Manager I. She found no neurological deficit that would cause respondent to be substantially incapacitated from performing the duties of a Health Program Audit Manager I.

Discussion

23. CalPERS presented competent medical evidence through Dr. Lopez and Dr. Gupta's testimony and IME reports that respondent is not substantially incapacitated from performing the duties of a Health Program Audit Manager I. Their testimony is persuasive.

24. Respondent testified persuasively regarding her symptoms. She also presented her clinical records and various articles and secondary sources. She did not, however, provide any competent medical evidence regarding her condition to establish that she is substantially unable to perform the duties of a Health Program Audit Manager I. In addition, respondent candidly acknowledged that she did not follow the recommendations of her treating physicians to take prescribed medication and see a therapist to treat her work-related anxiety.

LEGAL CONCLUSIONS

1. To qualify for disability retirement, respondent had to prove that, at the time she applied for disability retirement, she was "incapacitated physically or mentally for the performance of [her] duties." (Gov. Code, § 21156.) As defined in Government Code section 20026,

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

2. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform [her] usual duties." (Italics in original.) An applicant for disability retirement must submit 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. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.)

3. *Mansperger* and *Harmon* are controlling in this case. The burden was on respondent to present competent medical evidence to show that, as of the date she applied for disability retirement, she was substantially unable to perform the usual duties of a Health Program Audit Manager I due to neurological (left side weakness, dizziness) and psychological (anxiety) conditions. Based on the evidence as a whole, respondent did not meet this burden. For this reason, her application for disability retirement must be denied.

4. In addition, in *Reynolds v. City of San Carlos* (1981) 126 Cal. App.3d 208, the court upheld the denial of an employee's disability application on the basis that the employee refused reasonable medical treatment for the disabling condition. (*Id.* at p. 218.) Here, respondent refused reasonable medical treatment of her anxiety with prescribed medication and counseling. Based on the holding in *Reynolds*, respondent cannot now claim she is disabled by a condition for which she refused reasonable medical treatment.

ORDER

The application of respondent Haisong Peng for disability retirement is DENIED.

DATE: August 18, 2020

Timothy Aspinwall

TIMOTHY J. ASPINWALL

Administrative Law Judge

Office of Administrative Hearings