ATTACHMENT E

THE PROPOSED DECISION

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

In the Matter of the Appeal of Reinstatement from Disability Retirement of:

AMY M. EDELEN, Respondent

and

DEPARTMENT OF CONSUMER AFFAIRS, Respondent.

Agency Case No. 2021-1122

OAH No. 2022050547

PROPOSED DECISION

Danette C. Brown, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on February 1 and March 13, 2023, from Sacramento, California.

Cristina Andrade, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Ellen Mendelson, Attorney at Law, represented Amy M. Edelen (respondent), who was present.

Respondent Veterinary Medical Board, Department of Consumer Affairs (DCA) did not file a Notice of Defense. The matter proceeded as a default against respondent DCA, pursuant to Government Code section 11520.

Evidence was received, the record closed, and the matter was submitted for decision on March 13, 2023.

ISSUES

1. Does CalPERS have jurisdiction to reinstate respondent from disability retirement?

2. If so, did CalPERS establish that respondent is no longer substantially incapacitated from performing the usual duties of an Associate Governmental Program Analyst (AGPA) for DCA and should therefore be reinstated from disability retirement?

3. Did CalPERS violate respondent's due process rights when it did not state the medical condition for which disability was granted in its issue statement in paragraph IX of the Accusation?

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent was employed as an AGPA for the Veterinary Medical Board at DCA on dates unknown. Prior to her employment at DCA, she worked at various

state agencies for the State of California since 1994. By virtue of her employment, respondent was a state miscellaneous member of CalPERS.

2. On September 21, 2010, respondent signed and thereafter filed her Disability Retirement Election Application (application) for disability retirement based on her rheumatological (fibromyalgia) condition.

3. On December 10, 2010, CalPERS approved the application, and respondent's disability retirement became effective immediately. CalPERS informed respondent that she would be reexamined periodically to verify her continued eligibility for disability if she was under the minimum age for service retirement. Respondent was approximately 37 years old at the time she submitted her application.

4. On December 28, 2020, CalPERS notified respondent it was reviewing her disability retirement benefits for continued eligibility. CalPERS requested respondent provide the Treating Physician Packet for completion by her physician, within 30 days, with his or her medical opinion on respondent's rheumatological (fibromyalgia) condition. It was respondent's responsibility to ensure the requested information was received by CalPERS by January 29, 2021; otherwise, she risked CalPERS discontinuing her disability retirement. If the medical information from the treating physician was insufficient, or if respondent had no treatment in the past year for her disabling condition, CalPERS would schedule an examination by an Independent Medical Examiner (IME).

5. On July 21, 2021, CalPERS notified respondent that it had completed its reevaluation of her continued eligibility for disability retirement and determined respondent was no longer substantially incapacitated from the performance of her duties as an AGPA due to her rheumatological (fibromyalgia) condition. CalPERS

further informed respondent she would be reinstated to her former position. CalPERS also considered additional allegations listed on her disability retirement application to determine if she was disabled from any other conditions. CalPERS requested medical records from respondent regarding her headache condition and reviewed those records. CalPERS determined that the medical evidence it received did not support the criteria for disability retirement benefits.

6. CalPERS issued two additional determination letters dated December 15, 2021 and August 22, 2022, based upon respondent's submission of additional information regarding her rheumatological (fibromyalgia) condition. IME physicians Scott Anderson, M.D., and Pramila Gupta, M.D., reviewed the additional information related to respondent's rheumatological (fibromyalgia) and neurological (headache) conditions, respectively. Both IME physicians determined that their disability decisions finding no substantial incapacity from respondent's usual job duties remained the same.

7. On August 2, 2021, respondent timely appealed CalPERS's determination. On April 11, 2022, Keith Riddle, Chief of CalPERS's Disability and Survivor Benefits Division, signed and thereafter filed the Accusation in his official capacity, setting forth the basis for CalPERS's determination. Respondent timely filed a Notice of Defense, and this hearing followed.

CalPERS Jurisdiction Over Mandatory Reinstatement

8. At hearing, respondent asserted that CalPERS lacks jurisdiction to mandatorily reinstate respondent if it is determined she is no longer substantially incapacitated from her usual job duties as an AGPA. She believes Government Code section 21193, which provides for reinstatement from disability retirement, requires

two parts: (1) that the recipient of disability benefits be "not so incapacitated for duty" in the position she held when she disability retired, or in a position in the same classification, or in a position where she has applied for reinstatement; and (2) her employer offers to reinstate her, prior to termination of her disability retirement and becoming a member of the system. Here, respondent argues, she has not applied for reinstatement, and the Veterinary Board at DCA has not offered to reinstate her. Moreover, there is no proof she can perform her usual job duties. Thus, she contends Government Code section 21193 has not been satisfied, and jurisdiction does not exist.

9. However, it has been held that when an employee is no longer incapacitated for duty, "an offer to reinstate is mandatory under section 21193." (*California Dept. of Justice v. Bd. of Administration* (2015) 242 Cal.App.4th 133, 141–142.) The court opined:

> The first paragraph of section 21193 suggests there is a two-step process for reinstatement, but when read in context with the second paragraph, it is clear that a state employee who is not incapacitated for duty must be reinstated. An offer to reinstate the employee is mandatory under those circumstances. DOJ was required to offer to reinstate Resendez after CalPERS determined she was no longer incapacitated for duty.

Thus, CalPERS has jurisdiction to determine whether respondent is still substantially incapacitated for the condition under which she was disability retired, and her employer must offer to reinstate her if CalPERS meets its burden to establish she is no longer substantially incapacitated from her usual job duties.

Essential Functions and Physical Requirements

10. DCA's Position Duty Statement for an AGPA for the Veterinary Medical Board sets forth the essential job duties. AGPAs provide executive and administrative program support by providing consultation, guidance, and technical analysis and support to board members; participating in quarterly board meetings; compiling sensitive materials; resolving sensitive and complex issues with consumers, licensees, and applicants; preparing correspondence for signature by the executive and assistant executive officers; and more. The AGPA also performs as a leadperson over the administrative, licensing, and examination units, and is a regulatory and project coordinator.

11. A CalPERS form titled "Physical Requirements of Position/Occupational Title" sets forth the physical requirements for an AGPA at DCA. An AGPA occasionally[1] performs the following activities: standing; walking; bending and twisting at the neck and waist; reaching above and below the shoulders; pushing and pulling; fine manipulation; simple grasping, lifting and carrying up to 25 pounds; driving; and exposure to excessive noise. An AGPA for DCA constantly[2] performs the following activities: sitting; repetitive use of hands; keyboard use; and mouse use.

CalPERS Investigation

12. CalPERS Investigator Benjamin Barba testified regarding his investigation in this case. Investigator Barba has been a CalPERS Investigator for four years and was a Department of Justice Auditor for 15 years prior to his employment with CalPERS.

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[1] "Occasionally" is defined as up to three hours.

[2] "Constantly" is defined as over six hours.

Investigator Barba's job duties include handling a wide variety of investigative tasks such as reviewing disability retirement claims and allegations of disability benefit fraud; gathering facts from state agencies, the internet, and social media; conducting surveillance; and writing investigation reports. Investigator Barba testified consistently with the contents of his Investigation Report in this matter.

13. On May 29, 2020, Investigator Barba was assigned to investigate an anonymous complaint received on the CalPERS Ethics Helpline, alleging that respondent "was committing 'disability retirement fraud' and had been 'collecting a CalPERS non-industrial disability retirement pension' "; she was "no longer physically or mentally impaired" as she was representing herself in her divorce, child custody, and spousal support proceedings throughout 2019; and she responded to "burdensome court documents over a two year period" thus demonstrating her "current abilities."

14. The complaint further alleged respondent was capable of working as an AGPA since she was doing "the equivalent job of a family attorney" during her court proceedings, she was "actively kayaking, skiing, and doing other outdoor activities," her "new medications would allow her to return to work," and she chose not to return to work because her Social Security and CalPERS disability benefits are the same amount as her salary as an AGPA. The complaint also alleged that respondent "had only been reevaluated 'one time' and her 'primary care physician, Dr. Anne Priest,' was a 'personal friend' who would 'sign off on any paperwork' to [respondent's] benefit."

15. On July 31, 2020, Investigator Barba located respondent's Facebook page and found 102 photos posted by respondent from July 2008 through December 2019, depicting respondent and her family in Lake Tahoe and San Francisco, and in the mountains, snow, and ocean beaches.

16. Investigator Barba and his surveillance team conducted five days of video surveillance of respondent in August 2020, three days in September 2020, and three days in October 2020, for a total of approximately 79 hours. The video footage was compiled on a digital video device (DVD), with some parts edited out where respondent was not in view or focus. In his Investigation Report, he completed and included a detailed log of respondent's activities while under surveillance.

17. Investigator Barba and his team observed respondent: driving around town on various days; driving to Folsom Lake with her teenage children, walking down a hill towards the water carrying three "ring" floating devices; jumping in the lake, floating, diving, backstroking, playing in and exiting the water; walking on the shore; walking up a hill toward her vehicle; putting on her tank top; and driving home with her children; shopping and trying on shoes, ordering food and taking it home; grocery shopping and loading groceries into her vehicle; and running various other errands. On or about October 21, 2021, Investigator Barba provided his Investigation Report, surveillance DVD, and respondent's Facebook profile and photos to CalPERS' Disability and Survivor Benefits Division for their review and determination.

Independent Medical Examination by Scott T. Anderson, M.D.

18. CalPERS sent respondent to Scott T. Anderson, M.D., for an Independent Medical Examination (IME) performed on April 13, 2021. Dr. Anderson is board-certified in Internal Medicine and Rheumatology. He received his medical degree from the University of Texas Southwestern Medical School, and his Ph.D. in Medical Anthropology from the University of California at San Francisco-Berkeley. He completed his residency in Internal Medicine at New York Medical College, Cabrini Medical Center, and was a Rheumatology Fellow at Georgetown University/VA Medical Center. He is currently a Clinical Professor of Medicine at the University of California at

Davis, Division of Rheumatology, Allergy, and Clinical Immunology, serves as a Qualified Medical Evaluator, is a consultant for Newton Medical Group/Exam Works IME Services, and is President of Anderson Arthritis Associates, Inc.

19. Dr. Anderson's IME consisted of interviewing respondent, conducting a physical examination, and reviewing respondent's medical records. He thereafter wrote an IME Report, dated April 21, 2021, and testified at hearing consistent with his IME Report.

20. Dr. Anderson summarized respondent's occupational history by reviewing and noting her job duties as an AGPA. The job's physical demands are described as follows:

> No specific physical requirements are present. The incumbent works up to 40 hours per week in an office setting, with artificial light and temperature control. Daily access to and use of a personal computer and telephone is essential. Sitting and standing requirements are consistent with office work.

Respondent reported "that she has not worked since retiring in 2009." She receives a retirement pension and Social Security disability benefits due to "fibromyalgia, migraines, and mental incompetence." He noted respondent's chief complaint as "fibromyalgia."

REPORTED SYMPTOMS

21. Respondent was 48 at the time of the IME. She reported to Dr. Anderson that she was diagnosed with fibromyalgia in 2008. Her symptoms are "all over body

pain," and at times, her "hair is vibrating." She believes she is "doomed" if she does not take her vitamins for her overall well-being. She alleviates her discomfort with essential oils and a "percussive massager." She feels better floating in a lake or bathtub.

22. Respondent reported that she cannot return to her employment because she "cannot be around people" and gets "overstimulated" if she is around people or is asked to perform work duties. She complained of brain dysfunction and said she suffered from "chronic fatigue," "genetic mutations," "chemical sensitivity," and "gluten intolerance." She spends her days sleeping and resting but has children at home with whom she interacts. She drives, walks, rides a bike, showers, and bathes, and does not use a cane, walker, or other assistive devices. She handles her personal finances but "lost control of this due to mental incompetence."

23. Dr. Anderson noted respondent had no history of inflammatory rheumatological disease, specifically, no "rheumatoid arthritis, systemic lupus, swollen joints, inflamed joints, facial rash, oral ulcerations, or nasal ulcerations." He further noted "no history of sleep disorder, although she does have a significant body mass index" but "no history of sleep apnea reported." Respondent's complaints were "chronic fatigue, pain, insomnia, and a prior diagnosis of fibromyalgia and feels that this precludes her return to her previous employment." Dr. Anderson went through a checklist of diseases or conditions, checking only "Thyroid disease" and "High blood pressure."

24. Dr. Anderson noted respondent's numerous "present" symptoms, including: migraine headache, blurred vision, lightheadedness, tremors, muscle ticks and twitches, muscle pain, poor balance, numbness and tingling, pain and stiffness, shortness of breath, chest pain, difficulty chewing, speaking, reading, writing,

remembering, understanding, depression, difficulty controlling bowels, panic attacks, irritability, moodiness, explosive temper, and more.

SUMMARY OF MEDICAL RECORDS

25. Dr. Anderson conducted an extensive review of respondent's medical records, providing a summary of each record dating back to May 26, 2009, when respondent was treated by Michael J. Powell, D.O., at the Fibromyalgia Treatment and Learning Center. Respondent's pain levels over the next three years ranged from low to high on a scale from one to ten, and her energy levels and brain function were consistently noted as low. Her stress levels were consistently high. In a record dated October 14, 2013, Dr. Powell noted that he began treating respondent on October 3, 2008, and "she has severe fibromyalgia; this condition causes intense muscle pain with decreased vascular circulation." He further noted respondent "is unable to sit or stand for long periods of time," and has "significant fatigue with decreased cognitive function."

26. Respondent began seeing Anne Priest, D.O., at Folsom Family Medicine on October 27, 2016, for "manipulation." Dr. Priest noted respondent "still having diffuse pain intermittently but less intense and less frequent," and she was "tolerating more stress." Dr. Priest diagnosed respondent with the following: (1) Fibromyalgia; (2) Cranial somatic dysfunction; (3) Somatic dysfunction of the cervical region; (4) Somatic dysfunction of the spine lumbar; (5) Somatic dysfunction of the sacral region; (6) Somatic dysfunction of the spine thoracic; and (7) Back pain unspecified back location.

Dr. Priest's treatment plan was for respondent to continue her osteopathic manipulative therapy visits. Respondent participated in these visits from October 27, 2016, to December 29, 2016.

27. On January 26, 2017, respondent again saw Dr. Priest for a manipulation visit and complained of "increased hypertonicity or tension in her upper back and neck" causing her to have headaches. Her headaches occurred five out of seven days per week. Dr. Priest diagnosed respondent at that time with: (1) "Headaches/upper back pain"; and (2) "Somatic dysfunction." She recommended respondent perform stretching exercises. Respondent continued to participate in in osteopathic manipulative therapy from January 26, 2017, to October 5, 2017.

28. On November 2, 2017, CalPERS conducted a re-evaluation of respondent's current disability. Her diagnoses were noted as: (1) fibromyalgia/migraine headache; (2) chronic fatigue; and (3) chronic intractable headache. CalPERS determined respondent was still substantially incapacitated from performing her usual job duties of the position from which she retired on disability. Respondent continued to participate in osteopathic manipulative therapy from July 16, 2019, to October 23, 2019.

29. On March 17, 2020, CalPERS conducted another re-evaluation of respondent's current disability. Respondent continued to have symptoms of headache, fatigue, and widespread pain exacerbated by stress. Her diagnoses were noted as: (1) fibromyalgia; (2) migraine headache; and (3) chronic fatigue. CalPERS determined respondent was still substantially incapacitated from performing her usual job duties of the position from which she retired on disability. Respondent continued to participate in osteopathic manipulative therapy from January 13, 2020, to December 14, 2020.

30. On January 11, 2021, CalPERS conducted its third re-evaluation of respondent's current disability. Her diagnoses were again noted as: (1) fibromyalgia/migraine headache; (2) chronic fatigue; and (3) chronic intractable

headache, and she was deemed no longer substantially incapacitated from performing her usual job duties of the position from which she retired on disability.

31. Based upon his review of the medical records provided, Dr. Anderson noted that respondent received "various treatments for subjective complaints of fatigue, pain, and insomnia." He did not see "diagnosis of any objective rheumatological pathology."

32. Dr. Anderson was also provided with Investigator Barba's Investigation Report, where he reviewed the surveillance log. He also received over 100 photographs showing respondent appearing "happy, smiling, in various settings, including outdoor hiking, camping, traveling, and at parties and social events." Dr. Anderson's "overall impression" was that respondent could "ambulate freely, and engage in fairly rigorous travel and outdoors-related activities."

PHYSICAL EXAMINATION

33. Dr. Anderson noted no remarkable findings related to respondent's head, eyes, ears, nose, and throat, neck, heart, lungs, abdomen, or extremities. He observed a "full range of motion of the hips, knees, ankles, and feet," "no rheumatoid nodules," and "no ligamentous instability." He further noted:

> On palpation of fibromyalgia trigger points, she reports verbally the pressure with [five kilograms] causes her to feel that the pressure "really hurts." There is no withdrawal triggering or grimacing. This response is noted at origin and insertion of trapezius and second costochondral joints bilaterally constituting 6 out of 18 fibromyalgia trigger

> points. She also has some tenderness on palpation of the forearm and forehead area.

34. Respondent's neurological examination by Dr. Anderson showed her as "mildly anxious," but her speech, comprehension, expression were "intact." Her short and long-term memory was "quite detailed and intact." Dr. Anderson found "no evidence of confusion or disorientation."

35. Dr. Anderson noted "no examination findings to suggest diagnosis of fibromyalgia or rheumatological disease at present." In a "Comment" section at the end of his report, Dr. Anderson wrote:

> I understand [respondent] was followed up with a Fibromyalgia Treatment Center. I note, however, that she does not have trigger points and there is no evidence of any objective rheumatological disease. She has no evidence of muscle wasting or other pathology and there is no triggering response in 6 out of the 18 trigger point areas rather just a verbal report of pain. Therefore, I do not believe she has fibromyalgia, and therefore, she has not rheumatological fibromyalgia-related impairment.

DR. ANDERSON'S CONCLUSION REGARDING SUBSTANTIAL INCAPACITY

36. Dr. Anderson concluded that respondent "does not have an actual and present rheumatological fibromyalgia impairment that arises to the level of substantial incapacity." His findings supporting this conclusion are that respondent "appears to be healthy, well-nourished with normal muscular development and no evidence of rheumatological disease." He added, "[s]pecifically, there is no evidence of muscle

wasting, joint instability, rheumatoid nodules, joint effusions, loss of pulses, or other pathology." He determined respondent is "able to perform all essential job duties," noting in the job description that "no specific physical requirements are present." He opined that the job "appears to be an office job with little in the way of extensive physical requirements." Although Dr. Anderson noted respondent was cooperative during the IME, he believed respondent exaggerated her complaints because "her complaints are myriad both in number and severity and yet the physical examination findings do not suggest any pathology, degenerative process, deconditioning, or inflammatory rheumatological condition."

Dr. Anderson's Supplemental IME Reports

37. Dr. Anderson received additional medical records for his review, and issued Supplemental IME Reports dated October 26, 2021, March 30, 2022, and July 15, 2022. Most of the medical records consisted of additional treatment notes by Dr. Priest, spanning from 2020 to 2022.

38. In his October 26, 2021, Supplement IME Report, Dr. Anderson noted that he appreciated Dr. Priest's insights, but nothing in her reports changed his medical opinion. He found it "noteworthy" that Dr. Priest described "somatic dysfunction," used when "there is either a nonspecific physical finding or some components of symptom amplification." He added, "the examination of [respondent] is normal," and the "sub-rosa video documentation completely contradicts the assertions of Dr. Priest."

39. In his March 30, 2022 Supplemental IME Report, Dr. Anderson noted: "The medical records confirmed what we already knew, namely that this individual has sought care from the same osteopathic physician for nonspecific body discomfort." He again concluded that respondent "does not have a disabling condition that rises to the

level of causing any substantial incapacity to perform her job duties," and he did not find "evidence of her being significantly disabled due to fibromyalgia as a condition."

40. In his July 15, 2022, Supplemental IME Report, Dr. Anderson noted that the additional medical records included "primary care visits for unrelated issues dating back to 2004." Dr. Anderson's medical opinion remained unchanged, stating, "[m]y position is that in order to justify such a course of action [of retiring someone for substantial incapacity], one needs to find some evidence of overt physiological abnormalities that would impact the functioning of the human body. In this case, none of that is revealed in the record review." He again stated his conclusion that respondent is not substantially incapacitated from the performance of her job duties. He also noted that respondent "left her job over a decade and a half ago," yet her subjective complaints are still present. This is "even a more remote possibility that she had objective pathology that far back in time that would have rendered her unable to continue to work."

Independent Medical Examination by Pramila R. Gupta, M.D.

41. On November 11, 2021, CalPERS sent respondent to Pramila R. Gupta, M.D., for an IME. Dr. Gupta is board-certified in Psychiatry and Neurology. She received her medical degree in India and resumed her medical training at Sinai Hospital in Detroit, Michigan. She completed her residency in Neurology and a Clinical Neurophysiology Fellowship at Stanford University Medical Center. She currently performs Qualified Medical Examinations and IMEs.

42. Dr. Gupta's IME consisted of interviewing respondent, conducting a physical examination, and reviewing respondent's medical records and the sub-rosa

video. She thereafter wrote an IME Report, dated November 11, 2021, and testified at hearing consistent with her IME Report.

43. Dr. Gupta noted respondent's occupational history as having worked for the State of California since 1994. Respondent worked for multiple state agencies including the Department of Real Estate for seven years, and the Veterinary Board at DCA for nine months. Dr. Gupta reviewed respondent's job duties and physical requirements as an AGPA at the Veterinary Board and identified them in her report.

44. Dr. Gupta noted respondent's chief complaint as "migraine headaches." She described respondent's headache history. Respondent, who was 49 years old at the time of Dr. Gupta's examination, complained of headaches for the past 16 years. Respondent described her headaches as "throbbing associated with photophobia[3] and phonophobia[4], occurring three times per month." She treated her headaches with medication and an anti-depressant.

45. In August 2009, respondent's headaches occurred daily, and in 2010, she saw a neurologist at UC Davis who advised her to "stretch her sleep." She began taking Excedrin Migraine medication and underwent massage therapy for vertigo. She then began seeing Dr. Priest at Sutter Health who provided "Relpax" and craniosacral manipulations. Respondent also began taking vitamins. She also goes to a friend's house for meditation. Respondent reported she is "functional only two hours per day" when she can grocery shop and wash her clothes. She can swim in a lake, drive, and has a pain level of 6 to 7 out of 10.

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[3] Photophobia is eye discomfort in bright light.

[4] Phonophobia is a persistent, abnormal, unwarranted fear of sound.

46. Respondent's current complaints are daily headaches, which can last three to five days. Her headaches are associated with vomiting. She has "lost elasticity of her entire body," and sees "black spots." Her headaches are associated with vomiting. Her pain level on the left side of her head is 10 out of 10.

47. Dr. Gupta's physical examination of respondent did not reveal any objective findings. She noted respondent's subjective feelings of "tenderness" over her scalp, complaints of pain during motor testing, pain while standing on her heels and toes, and pain in her Achilles tendons. Dr. Gupta did not find any swelling or deformities upon examination of respondent's head, found "cranial nerves II through XII" intact, strength "generally intact on resistance training," sensory nerves intact, and reflexes "normally active and symmetric bilaterally." She noted respondent's "antalgic gait" and negative "Romberg's sign." Respondent performed the tandem walk (walking in a straight line, heel to toe) without complaint.

48. Dr. Gupta reviewed and summarized numerous medical records dated from February 13, 2008, through August 4, 2021. The records included Dr. Anderson's April 21, 2021 IME Report, Dr. Priest's manipulative therapy notes, CalPERS' re-evaluation reports, and treatment records from the Fibromyalgia Treatment and Learning Center. Dr. Gupta concluded the medical records showed respondent receiving treatment "predominantly for fatigue and pain symptoms," and that "complaints of headaches were noted." Respondent was diagnosed with "headache tension" in 2010 and has had over a decade of continued complaints of "electrical static in the head," dizziness, and throbbing and pulsing headaches. She was later diagnosed with "benign positional vertigo, transformed migraine likely related to long history of analgesic overuse." She has also had a "longstanding sensory integration disorder."

49. After reviewing the sub-rosa video, Dr. Gupta noted respondent is capable of driving, socializing, going to restaurants, shopping, and swimming in a lake. She noted: "It appears [respondent] is quite an active out going [*sic*] individual" and can perform "daily living activities without much difficulty."

50. Dr. Gupta provided the following diagnoses based upon respondent's clinical history and examination:

> (1) Chronic headaches, history of migraine headaches/tension[,] headaches/analgesic headaches.
>
> (2) Chronic pain, ?fibromyalgia [*sic*].

51. Dr. Gupta concluded respondent has "some headaches, has presence of probable neurological headache impairment, but it does not arise to the level of substantial incapacity to perform her usual job duties." Further, respondent can perform all essential job duties. Dr. Gupta opined:

> [Respondent's] headaches [tend] to vary in the description and other associated symptoms. [Respondent's] treatment of the headaches has not been any specifically [*sic*] directed towards migraine headaches. Additionally, there is a clear discrepancy in the examinee's history and limitation in the activities due to the headaches and the activities observed in [respondent's] surveillance film and investigation report.

Dr. Gupta also noted respondent was cooperative with the interview and examination process but exaggerated her complaints of extensive limitation in her activities due to her headaches. Dr. Gupta further opined that respondent's headache

treatments like craniosacral manipulation are "conservative maintenance," and respondent's "pharmacological treatment has been only minimal."

Dr. Gupta's Supplemental IME Reports

52. Dr. Gupta issued Supplemental IME Reports dated March 30, 2022, and July 15, 2022, after respondent submitted additional medical records for Dr. Gupta's consideration. She found no indication of any objective findings in the medical records from a neurological perspective. Dr. Gupta's medical opinions remained unchanged, and she continued to opine that respondent's neurological condition "does not rise to the level of causing any substantial incapacity to perform her job duties." Moreover, the records showed respondent "is receiving treatment for her generalized symptoms, not anything specifically for the headaches."

Respondent's Evidence

TESTIMONY OF ANNE M. PRIEST, D.O.

53. Dr. Priest is board-certified in Family Medicine. Her curriculum vitae was not submitted in evidence, and she did not testify about her medical education, training, or background. She does not perform research, is not affiliated with any medical schools, and does not teach. She has worked for Sutter Health in Folsom, California, since 2005. Respondent became her patient in 2016. Dr. Priest treated respondent "in conjunction with other doctors." Dr. Priest said that respondent currently sees a neurologist and cardiologist, in addition to herself. She listed respondent's health ailments as fibromyalgia, low thyroid, migraines, anxiety, chronic fatigue, hypertension, and somatic dysfunction. She has treated respondent's somatic dysfunctions with osteopathic manipulative therapy. Dr. Priest conceded that

respondent's medical condition has not significantly changed since she began treating respondent for her somatic dysfunction and fibromyalgia.

54. Dr. Priest opined that somatic dysfunction is diagnosed by tissue texture changes, asymmetry, and tenderness. If she sees these characteristics, she can treat the patient "with [her] hands." She further opined that all joints should have a free range of motion.

55. Dr. Priest is familiar with fibromyalgia. She described the symptoms as widespread pain, fatigue, headaches, cognitive difficulties, brain fog, anxiety, and sometimes irritable bowels. She opined that respondent has suffered from fibromyalgia from the first day she began treating respondent. There is "no specific treatment for fibromyalgia as a whole."

56. Dr. Priest added that respondent's neurologist, Dr. Perkins at Sutter Health, treats respondent for her headaches. Dr. Priest stated that "nothing has made [respondent's] headaches better." Respondent is only provided "temporary relief."

57. Dr. Priest reviewed respondent's job description. The job requires "sustained focus to complex tasks." She opined that respondent cannot maintain focus, and she cannot work well in an environment under fluorescent lights, in front of a computer. Respondent is also "incapable of travel." She cannot perform sustained work of 40 hours per week. When respondent exerts herself beyond her capacity, she ends up with rebound symptoms of "worsening pain and headaches." Respondent's prognosis is "very poor," and her "incapacity is permanent."

58. Dr. Priest reviewed the IME Reports of Drs. Anderson and Gupta. She disagrees with their conclusions, stating that she has treated respondent "consistent[ly] over a long period of time." She has observed respondent's discomfort

due to her headaches and extreme pain. She does not believe that respondent has exaggerated her symptoms. Dr. Priest does not know CalPERS' standards in determining disability retirement.

RESPONDENT'S TESTIMONY

59. Respondent began her employment with the State of California in 1994 or 1995. Her first job was as a student assistant at the State Controller's Office. She then worked for different state agencies. Her last day of work was in the summer of 2009. Respondent has "not worked at all" because she cannot "commit to any schedule," she is unable to be on the computer, and she does not talk on the phone. She cannot do math, which her job required. She stated that she has a "very limited life," "hates being home," and "would love to be able to work." However, if she is reinstated, she will suffer from "electrical overload" in her head, all her symptoms will flare up, she will feel like she is having a panic attack, and her office "will be calling an ambulance."

60. Respondent "refused" to watch the sub-rosa video, and believes her ex-husband is "using the state" to harass her and their children. She believes being surveilled by CalPERS is "a major invasion of privacy." If she has no stress and does not do anything requiring physical or mental exertion, she is able to go to the store for necessities only. Going to the lake helps alleviate her symptoms, as she practices "earthing" for pain relief. She described earthing as being barefoot or laying outside in the grass.

Rebuttal Testimony of Drs. Anderson and Gupta

61. After hearing the testimony of Dr. Priest and respondent, Dr. Anderson did not change his opinion that respondent is not substantially incapacitated from her

usual job duties. He did not dispute that respondent "has a lot of subjective complaints." However, based upon his review of the records, sub-rosa video, and his IME examination, he opined that respondent can engage in complex activities, use executive skills, and is not limited mentally. He described driving, socializing, carrying objects, going in and out of stores, and negotiating terrain as complex tasks. He described making purchases, carrying bags, interacting with others, and prioritizing tasks as executive skills. Moreover, respondent has adequate short-term and long-term memory, and she can speak clearly. Dr. Anderson does not believe respondent has fibromyalgia. He opined that fibromyalgia is a "controversial diagnosis," and during his examination, he needed to "see trigger points with sensitivity applying five mils of pressure." This, he said, is the criteria which form the framework for considering a fibromyalgia diagnosis. Dr. Gupta's opinion, after hearing Dr. Priest's and respondent's testimony, similarly did not change.

Respondent's Contention of Denied Due Process

62. Respondent contends that she was denied due process when CalPERS failed to identify the medical condition for which this matter has been brought in its issue statement in paragraph IX in the Accusation. This lack of notice rendered respondent unable to adequately participate in the instant case. CalPERS disagrees, contending Government Code section 21192 authorizes the Board of Administration to evaluate whether she is "still incapacitated, physically or mentally, for duty." "The term 'still incapacitated' suggests the scope of the board's evaluation is limited to determining whether the conditions for which disability retirement was granted continue to exist." (*California Dept. of Justice v. Bd. Administration, supra*, 242 Cal.App.4th 133, 141–142.) Moreover, CalPERS cited the rheumatological (fibromyalgia)

condition for which respondent was disabled in paragraph III of the Accusation. Respondent's contention that she was denied due process lacks merit.

Analysis

63. To be substantially incapacitated, there must be competent medical evidence that respondent cannot perform the usual and customary duties of an AGPA. Dr. Anderson testified credibly that respondent is not substantially incapacitated to perform her job duties based upon a rheumatological (fibromyalgia) condition. His opinion is based upon his physical examination of respondent, review of the medical records, and review of the sub-rosa video.

64. Dr. Gupta also testified credibly that respondent is not substantially incapacitated to perform her job duties based upon a neurological (headache) condition. Like Dr. Anderson, her opinion was based upon her physical examination of respondent, review of the medical records, and review of the sub-rosa video.

65. Dr. Priest's testimony was less persuasive and given less weight that Drs. Anderson and Gupta. Dr. Anderson is board-certified in Internal Medicine and Rheumatology. Dr. Gupta is a board-certified neurologist. Both doctors reviewed respondent's copious medical documentation and examined her. Dr. Anderson opined that respondent has no diagnosis of any objective rheumatological pathology did not find trigger points with sensitivity. Trigger points form the framework for considering a fibromyalgia diagnosis. He persuasively concluded that respondent can engage in complex activities, use executive skills, and is not mentally limited.

66. Dr. Gupta persuasively opined that there were no objective findings in the medical records from a neurological perspective. She further opined respondent was not specifically receiving treatment solely for her headaches.

67. Dr. Priest is board-certified in Family Medicine and treats respondent's somatic dysfunctions. She did not know the CalPERS standards for disability and did not testify about whether she reviewed all the medical records that Drs. Anderson and Gupta reviewed, or whether she reviewed the sub-rosa video.

68. When all the evidence is considered, the opinion of Drs. Anderson and Gupta that respondent is not substantially incapacitated from performing the usual duties of an AGPA was persuasive, credible, and reliable. Dr. Anderson has specialized knowledge from rheumatological standpoint, having those skills, experience, and training, and knowledge concerned with conditions involving the joints, muscles, ligaments, and bones, including fibromyalgia. Similarly, Dr. Gupta has specialized knowledge from a neurological standpoint and has the skills, experience, and training, and knowledge concerned with the brain and spinal cord.

69. Respondent's complaints of continued pain and fear of exacerbating her fibromyalgia symptoms, including headaches, are not supported by any objective findings and are insufficient to establish substantial incapacity. In the absence of sufficient competent medical findings to support respondent's pain complaints, respondent is not substantially incapacitated from performing the usual duties of an AGPA. (*Peter Kiewitt Sons v. Industrial Accident Com.* (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"].)

70. CalPERS bears the burden of establishing that respondent is no longer substantially and permanently disabled from performing the usual duties of an AGPA. CalPERS presented sufficient competent medical evidence to meet its burden of proof.

Consequently, its request that respondent be reinstated from disability retirement is granted.

LEGAL CONCLUSIONS

1. CalPERS has the burden of proving respondent is no longer substantially incapacitated from performing the usual duties as an AGPA for DCA. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence of nonexistence of which is essential to the claim for relief or defense that he is asserting."].) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Bd. of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

2. In accordance with Government Code section 21192, CalPERS re-evaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

> The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination .....The examination shall be made by a physician or surgeon, appointed by the board ..... Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency.....where he or she was employed and in the

> position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

3. Government Code section 21193, governing the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty, provides, in relevant part:

> If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

4. Government Code section 20026 defines "disability" and "incapacity for performance of duty," as follows:

> "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.

5. 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 his usual duties." In *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862, the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury, which might then cause disability or incapacity, was insufficient. Moreover, discomfort, which may make it difficult to perform one's duties, is insufficient to establish permanent incapacity from performance of one's position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Bd. of Administration, supra*, 77 Cal.App.3d 854, 862.)

6. As set forth in the Factual Findings as a whole, CalPERS met its burden of proof that respondent is no longer substantially incapacitated from performing the usual duties of an AGPA for the Veterinary Medical Board at DCA. Consequently, CalPERS's request that respondent be reinstated from disability retirement must be granted.

7. As set forth in Factual Findings 8 and 9, CalPERS has jurisdiction to reinstate respondent from disability retirement. (Gov. Code, § 21193; *California Dept. of Justice v. Bd. of Administration, supra*, 242 Cal.App.4th 133, 141–142.)

8. As set forth in Factual Finding 62, respondent was not denied due process when CalPERS failed to identify the medical condition for which this matter has been brought in its issue statement in paragraph IX in the Accusation. (*Ibid.*)

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ORDER

CalPERS's determination that respondent Amy M. Edelen is no longer disabled or substantially incapacitated from the performance of the usual duties of an AGPA for the Veterinary Medical Board, DCA, due to rheumatology (fibromyalgia) condition is AFFIRMED. Respondent's appeal is DENIED.

DATE: April 3, 2023

Danette C. Brown

DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings