

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:

EVELINA ORTEGA,

Respondent,

and

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

Agency Case No. 2020-0922 (Statement of Issues)

OAH No. 2020120547

PROPOSED DECISION

Deena R. Ghaly, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on April 22, 2021, via videoconference.

Austa Wakily, Senior Attorney represented Complainant Keith Riddle, Chief of the Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS). Respondent Evelina Ortega (Respondent) represented herself. No

appearance was made by or on behalf of Respondent Los Angeles Unified School District (LAUSD).

Testimony and documentary evidence was received, and argument was heard. The record closed, and the matter was submitted at the conclusion of the hearing.

ISSUE

Is Respondent permanently disabled from performing the regular and customary duties of an LAUSD senior office technician and thereby eligible for industrial disability retirement?

FACTUAL FINDINGS

Background

1. Respondent was last employed as a senior office technician with LAUSD on March 24, 2015. On July 16, 2019, she signed an application for disability retirement based on a rheumatology (rheumatoid arthritis) condition and asthma. By virtue of her employment, Respondent is a state miscellaneous member of CalPERS subject to Government Code section 21151.

2. CalPERS obtained medical reports concerning Respondent's medical condition and commissioned an independent medical examination (IME). After reviewing the records and the results of the IME, CalPERS personnel determined Respondent did not qualify for a disability retirement. Respondent timely appealed and this hearing followed.

CalPERS' Independent Medical Evaluation

3. CalPERS selected Dan La, M.D. to perform an independent medical evaluation of Respondent. Dr. La is a diplomate of the American Board of Rheumatology. He obtained his medical degree from the American University of the Caribbean School of Medicine in Montserrat, West Indies and completed his residency in internal medicine and a fellowship in rheumatology at the University of Southern California (USC) Medical Center. Dr. La maintains a rheumatology private practice and is also an assistant clinical professor at USC School of Medicine.

4. On January 22, 2020, Dr. La examined Respondent and prepared a report of his findings. Dr. La's physical examination of Respondent lasted 40 minutes. He spent an additional 30 minutes reviewing Respondent's medical records.

5. In his report, Dr. La described Respondent's work as follows:

The claimant is [a] Senior Office Technician. She works in the attendance office in the Los Angeles School District. Her job duties involve standing, typing, answering phones, filing, moving boxes weighing up to 25 pounds.

(Exh. 8, p. 2.)

6. CalPERS included specific questions for Dr. La to answer as part of the IME. The questions (in bold text) and Dr. La's answers are as follows:

1. Does the member have an actual and present Rheumatological/Arthritis (rheumatoid arthritis) impairment that arises to the level of substantial incapacity to perform their usual job duties?

[Respondent] has seropositive arthritis with positive rheumatoid factor 191 and positive anti-CCP antibody 250, diagnosed in 2015. She developed an allergy to Plaquenil and denies improvement with methotrexate. She was treated with Enbrel 50 mg subcutaneous weekly with improvement. She was briefly tried on Xeljanz but developed side effects. She resumed treatment with Enbrel since it seems to work best. She continues to have joint pains involving the wrists and hands without obvious synovitis. Based on rheumatoid arthritis disease activity with morning stiffness lasting more than 30-minutes, the claimant currently has impairment that arises to the level of substantial incapacity to perform her usual job duties.

2. If you find the member to be substantially incapacitated, is the incapacity permanent or temporary? (As specified in California Public Employee Retirement Law G. C. 20026). If temporary, will the incapacity last longer than 12 months? Please explain in detail.

Rheumatoid arthritis can be a treatable condition with appropriate management using targeted therapy and biologic therapy. Her symptoms of joint pain involving the neck, fingers, hands, related to rheumatoid activity can be improved with appropriate management. Her incapacity is temporary, expected to last 6 months until she can be placed on more appropriate medications to control the

rheumatoid arthritis symptoms. [Respondent] can continue close follow-up and treatment with her rheumatologist. If the current biologic agent does not provide adequate symptom relief, it is standard of care to change to a different agent in hopes of diminishing joint inflammation, stiffness, and disease activity caused by rheumatoid arthritis. Since [Respondent] continues to have joint pains involving the wrists and hands, current therapy may be suboptimal as she continues to have evidence of disease activity.

3. What objective findings (or lack thereof) lead you to the conclusion the member is or is not, substantially incapacitated? Please explain fully.

The member currently has pain involving her fingers and impingement of the left shoulder possibly related to rheumatoid arthritis. She cannot fully flex the left shoulder to raise the arm beyond the horizontal plane. She has positive left shoulder [nerve] impingement sign. She also reports pain and stiffness involving the hands that will interfere with her ability to type and perform basic office duties. There is no evidence of rheumatoid joint deformities involving the hands, which if present would lead to a more permanent disability. Since [Respondent] does not have rheumatoid deformities, her function status can be preserved with adequate management of rheumatoid arthritis.

4. Please list the specific Job Duties and/or Physical Requirements of Position the member is unable to perform for each substantially incapacitated body part/condition.

[Respondent] has pain and stiffness involving the hands. Small joint involvement of the wrist and fingers are frequently involved with rheumatoid arthritis. Claimants with small joint involvement will have difficulty grasping objects, opening bottles, typing, answering the phone, and carrying even light workloads. Additionally, she has impingement and pain in the left shoulder that will affect her ability to lift 25 pounds.

5. As of what date did the member's condition become "substantially incapacitating"?

According to the medical records, [Respondent] was diagnosed with rheumatoid arthritis in 2015 based on positive serologies and joint symptomology. Medical records received from Sue Yeon Chung, M.D. on December 8, 2014 revealed evidence of joint pains involving the fingers with mild swelling involving the feet. Based on this office visit note, [Respondent] would have had a hard time performing her job duties since December 8, 2014.

6. Is the member cooperating with the examination and putting forth their best effort, or do you feel there is exaggeration of complaints?

Yes, the member is answering questions appropriately and putting forth her best effort. I did not sense she is exaggerating any of her complaints. She is participating with the physical examination and exhibiting adequate force during muscle strength testing.

(Exh. 8, pp. 5-8 [original underscoring].)

Respondent's Testimony

7. In 2014, Respondent began to experience pain in 2014 which interfered with her ability to stand or sit for prolonged periods and affected her ability to complete many of her work tasks, including filing. Respondent tried multiple medicines to treat her condition, taking several weeks off from work while she waited to see if her conditions improved but the medications either had intolerable side effects or lost their effect. After Respondent exhausted all her leave, LAUSD terminated her employment. Respondent's last day of employment with LAUSD was on March 24, 2015.

8. Respondent continues to see her doctor on a yearly basis and continues to take some medication intended to control the symptoms of her rheumatoid arthritis but at half the normal dose because it impacts her immune system, and she fears contracting the COVID-19 virus. Respondent has not been vaccinated against COVID-19.

9. Respondent has not worked in any capacity since leaving LAUSD. She states she can perform some aspects of self-care and routine household tasks but her symptoms, particularly the associated pain, can be so intolerable she requires a great deal of assistance from her grown children, who reside with her.

LEGAL CONCLUSIONS

General Principles of CalPERS-Provided Disability Retirement

1. The Public Employees' Retirement Law (Retirement Law) governs disability retirement and reinstatements and grants sole jurisdiction to CalPERS to make such determinations. (See Gov. Code,¹ §§ 20026, 20125, 21154, 21156, 21190, 21192 and 21193.)

2. "'Disability' and 'incapacity for performance of duty' as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion." (§ 20026.)

3. "Incapacitated for the performance of duty," means the "substantial inability of the applicant to perform [her] usual duties," as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.)

Disability Retirement Application Process

4. Members who have been denied benefits on their initial application may appeal the disability retirement determination. The appeal hearing must be conducted

¹ Further statutory references are to the Government Code unless otherwise indicated.

by an administrative law judge in accordance with the formal hearing provisions of the Administrative Procedure Act (APA), codified at § 11500 et seq.)

Appeals Process

5. An applicant for disability retirement has the burden of establishing eligibility by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.) “Preponderance of the evidence means evidence that has more convincing force than that opposed to it. [Citations.]” (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) “The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the quality of the evidence. The quantity of the evidence presented by each side is irrelevant.” (*Ibid.*)

6. The moving party has the burden to prove the elements of the claim. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 175.)

Analysis

7. Here, Complainant’s expert, Dr. La, confirmed Respondent’s stated medical condition; however, he also opined that her condition is temporary, not expected to last longer than six months, and can be controlled through ongoing medicine management by her physicians. Thus, by his determination, the condition does not meet section 20026’s element of an expected 12 month or more duration. Respondent did not present any medical evidence, including any to establish that her condition is likely to continue for at least 12 months. Accordingly, CalPERS’ denial of her application for disability retirement must be affirmed as set out in the order below.

ORDER

Complainant's denial of Evelina Ortega's application for an industrial disability retirement is affirmed.

DATE: 04/27/2021

Deena R. Ghaly
Deena R. Ghaly (Apr 27, 2021 11:28 PDT)

DEENA R. GHALY

Administrative Law Judge

Office of Administrative Hearings