

**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:

DEBERA A. PAGLIAROLI,

Respondent,

and

DEPARTMENT OF REHABILITATION,

Respondent.

Case No. 2010-0822

OAH No. 2013030225

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on October 31, 2013, in Sacramento, California.

The California Public Employees' Retirement System (CalPERS) was represented by JeanLaurie Ainsworth, Senior Staff Counsel.

There was no appearance by, or on behalf of Debera Pagliaroli or the Department of Rehabilitation. Debera Pagliaroli and the Department of Rehabilitation were duly served with Notices of Hearing. The matter proceeded as a default against both respondents, pursuant to California Government Code section 11520, subdivision (a).<sup>1</sup>

Evidence was received, the record was closed, and the matter was submitted for decision on October 31, 2013.

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<sup>1</sup> At hearing, Ms. Ainsworth, counsel for CalPERS, contacted Debera Pagliaroli to inquire as to whether she intended to appear at the hearing. Ms. Pagliaroli informed Ms. Ainsworth that she "forgot" about the hearing and that she was leaving the state to visit her sick father. Ms. Pagliaroli did not request a continuance of the hearing.

## PROCEDURAL FINDINGS

1. On April 7, 2010, Debera Pagliaroli (respondent) signed and thereafter filed an application for service retirement pending disability retirement (application) with CalPERS. At the time, she was employed as a Program Technician by the Department of Rehabilitation (Department). By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150.

2. In filing the application, respondent claimed disability on the basis of orthopedic conditions, which include her bilateral wrists and hands, right elbow, and back (orthopedic conditions).

3. CalPERS obtained medical records and reports prepared by H. Relton McCarroll, M.D., Raymond Koch, M.D., Russell Gustavson, PA-C, Bruce Kessler, M.D. and Mohinder Nijjar, M.D., concerning respondent's orthopedic conditions. After reviewing the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of her duties as a Program Technician at the time her application was filed.

4. On August 16, 2010, CalPERS notified respondent that her application for disability retirement was denied. Respondent was advised of her appeal rights. Respondent filed an appeal and request for hearing by letter dated September 9, 2010.

5. On July 31, 2012, Mary Lynn Fisher, in her official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, made and thereafter filed the Statement of Issues.

6. The issue on appeal is whether respondent was permanently disabled or incapacitated on the basis of an orthopedic condition from performance of her duties as a Program Technician with the Department when she filed her application for disability retirement.

## FACTUAL FINDINGS

### *Independent Medical Evaluation*

7. On July 29, 2010, Mohinder Nijjar, M.D. conducted an independent orthopedic medical evaluation of respondent. Dr. Nijjar prepared a report and testified at the hearing in this matter. Dr. Nijjar is a qualified medical evaluator, a Diplomate of the American Board of Orthopedic Surgery and a Fellow of the American Academy of Orthopedic Surgery.

## BACKGROUND

8. During the evaluation, Dr. Nijjar took a detailed history from respondent. Dr. Nijjar noted that respondent was 52 years old and born in 1958. Respondent informed Dr. Nijjar that until she retired on December 30, 2008, she was employed as a Program Technician for the Department. She worked for the Department for approximately 20 years and has not worked since she retired. Respondent explained that as a Program Technician she worked eight hours per day, five days per week. Her duties included writing, using a computer keyboard and mouse and repetitive use of her hands. Respondent utilized computer software applications and equipment. Respondent would sit for over six hours per day and would also frequently walk at work.

9. Respondent reported that as of December 30, 2008, she had been experiencing pain and discomfort in the upper portion of her back, in both of her hands and her right elbow, for over 6 months.

Prior to retirement, respondent had x-rays performed which indicated that she had degenerative changes in her left thumb carpometacarpal joint. Respondent was also diagnosed with medial epicondylitis and advanced thumb trapeziometacarpal joint arthritis with subluxation.<sup>2</sup> Respondent was treated with medications and injections of steroids. By December 29, 2008, respondent had surgery on her right carpometacarpal thumb joint in the form of excision arthroplasty of the trapeziometacarpal joint of the thumb. On September 11, 2009, respondent had surgery on her left carpometacarpal thumb joint in the form of excision arthroplasty.

Respondent also stated that she pain in her upper-back and the nape of the neck. Respondent reported that she had a work-related injury in 1980 and since that time she had problems with her neck. Respondent explained that the pain and discomfort in her neck was treated with medication.

Respondent also had tendinitis in both elbows. In 1995 she had surgery on one elbow and in 2000 had surgery on the other. The surgeries were successful and respondent reported no symptoms related to those surgeries.

## RESPONDENT'S COMPLAINTS AND PHYSICAL EXAMINATION

10. Respondent's complaints at the time of the evaluation included:

1. Pain in her upper back, going to the lower part of her neck. Respondent explained that the pain was constant. Respondent stated that the pain

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<sup>2</sup>The Merriam-Webster Medline Plus online medical dictionary defines "epicondylitis" as "inflammation of an epicondyle or of adjacent tissues--compare tennis elbow." "Subluxation" is defined as a "partial dislocation."

increased with prolonged sitting more than hour at a time and also with repetitive turning of her neck.

2. Bilateral wrist pain usually when gripping with her hand for more than 15 to 20 minutes at a time, when doing data entry, or keyboarding for more than one-half hour at a time.
3. Constant pain in hands. Pain and discomfort along the little and ring fingers. Respondent generally felt weakness.
4. Constant right elbow pain that increases with repetitive gripping or constant repetitive gripping.

11. Dr. Nijjar conducted a physical examination of respondent. Concerning respondent's cervical spine, Dr. Nijjar noted that respondent had no increased muscle tone, no localized tenderness and that all aspects of her range of motion were normal. Dr. Nijjar noted that respondent's thoracic spine revealed slight tenderness in the upper dorsal spine in the intrascapular area, with a slight increase in muscle tone. The range of motion for the dorsal spine was limited by 10%.

Respondent's bilateral shoulders revealed no localized tenderness over the "AC joint" or over the shoulder joint. There were also no signs of impingement syndrome, "SLAP" lesion, or rotator cuff tear in the shoulders. Respondent's range of motion was normal.

Respondent's right elbow noted a well-healed surgery scar on the lateral aspect of the elbow. Dr. Nijjar did not detect any signs of lateral epicondylitis. Dr. Nijjar found good medial and lateral stability of the elbow. The medial epicondyle was tender to the touch. However, there were no signs of medial epicondylitis on the "provocative" tests. Respondent's right and left elbows had the same range of motion, which were normal.

Respondent's right wrist revealed a scar over the radial and anterior aspect of the carpometacarpal joint and signs of excision arthroplasty of the trapezium. The base of the thumb was well stabilized. Respondent's right wrist carpometacarpal joint of the thumb had normal range of motion. Respondent's right wrist and thumb had range of motion within normal limits.

Respondent's left wrist revealed signs of excision arthroplasty and interposition of the trapezial metacarpal joint of the left thumb. The joint was stable and showed no fusion. Respondent had no loss of function in the extensor or flexor tendon of the thumb. Respondent left wrist and thumb had range of motion within normal limits.

#### REVIEW OF MEDICAL RECORDS

12. Dr. Nijjar also reviewed respondent's medical records from September 10, 2008, through May 17, 2010, related to respondent's orthopedic conditions. The medical

records confirmed the surgeries performed on respondent's right and left carpometacarpal thumb joints. In addition, "right elbow epicondylitis" was noted for the first time by Bruce Kessler, M.D., on December 10, 2009. There is no discussion in Dr. Nijjar's report indicating that the medical records he reviewed contained information or a diagnosis related to respondent's back or neck.

#### DIAGNOSIS AND OPINION

13. Dr. Nijjar diagnosed respondent with: (1) bilateral trapeziometacarpal joint excision arthroplasty with interposition for the left and right thumb; (2) medial epicondylitis right elbow; (3) history of release lateral epicondylitis bilaterally; and (4) history of injury to the upper back with current complaints.

14. Based on the medical evaluation, Dr. Nijjar's opined that from an "orthopedic surgical point of view," based on his review of the Program Technician job duties, respondent can perform all the functions of the position. He further opined that respondent was not substantially incapacitated from the performance of her duties.

#### *Discussion*

15. Respondent presented no evidence in connection with her appeal. As a result, Dr. Nijjar's opinions were not contested. Furthermore, the medical evidence is persuasive that respondent is not disabled or substantially incapacitated from performance of the duties of a Program Technician with the Department, due to bilateral wrists and hands, right elbow, or back orthopedic conditions. As a result, respondent's application for disability retirement must be denied.

#### LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21150, subdivision (a), which provides in pertinent part, that "[a] member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age..."

2. To qualify for disability retirement, respondent must prove that, at the time she applied, she was "incapacitated physically or mentally for the performance of his or her duties..." (Gov. Code, § 21156, subd. (a)(1).) 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. (Bolding added.)**

3. "Incapacity for the performance of duty" under Government Code section 21022 [now section 21151] "means the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Substantial inability to perform usual duties must be measured by considering applicant's abilities. Discomfort, which makes it difficult to perform ones 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. Board of Administration* (1978) 77 Cal.App.3d 854, 862.) A condition or injury that may increase the likelihood of further injury, as well as a fear of future injury, do not establish a present "substantial inability" for the purpose of receiving disability retirement. (*Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal. App. 3d 854, 863-864.) As the court explained in *Hosford*, prophylactic restrictions imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature.

4. The burden of proof is on respondent to demonstrate that she is permanently and substantially unable to perform her usual duties such that she is permanently disabled. (*Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.)

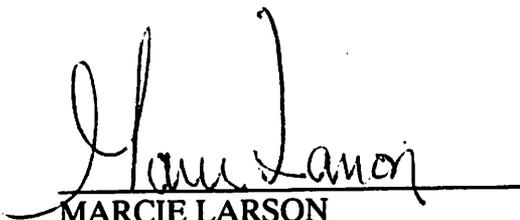
5. An applicant for disability retirement must submit competent, objective medical evidence to establish that, at the time of application, he or she was permanently disabled or incapacitated from performing the usual duties of his or her position. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697.)

6. Respondent did not establish through competent medical evidence that she is permanently and substantially disabled or incapacitated from the performance of her job duties as a Program Technician with the Department. Therefore, based on the Factual Findings and Legal Conclusions, respondent is not entitled to retire for disability pursuant to Government Code section 21150.

#### ORDER

Respondent's application for disability retirement is DENIED.

DATED: November 18, 2013

  
MARCIE LARSON  
Administrative Law Judge  
Office of Administrative Hearings