ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Application for the Disability Retirement of: TERESITA H. ILAGAN, Applicant/Respondent, and SONOMA DEVELOPMENTAL CENTER, Respondent.	Case No. 2014-0176 OAH No. 2014030984

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 4, 2014, in San Diego, California.

Christopher C. Phillips, Staff Attorney, California Public Employees' Retirement System (CalPERS), represented petitioner Anthony Suine, Chief, Benefit Services Division.

Teresita H. Ilagan, applicant/respondent, represented herself in these proceedings. She was assisted by her husband.

No appearance was made by or on behalf of respondent Sonoma Developmental Center (SDC).

ISSUE

Was Ms. Ilagan permanently disabled or incapacitated from performing the regular and customary duties of a Food Service Technician I with SDC due to an orthopedic (left shoulder) condition when she filed her application for a disability retirement?

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED October 3, 2014

FACTUAL FINDINGS

Preliminary Matters

1. Ms. Ilagan was employed by the SDC as a Food Service Technician I. By virtue of her employment, Ms. Ilagan was a local miscellaneous member of CalPERS subject to Government Code section 21150.

2. On October 1, 2012, Ms. Ilagan filed a Disability Retirement Election Application with CalPERS. She claimed the right to receive a disability retirement because of a left shoulder injury suffered when a client at SDC assaulted her. Ms. Ilagan asserted that she cannot raise her left arm without pain and cannot perform heavy lifting.

3. CalPERS obtained medical records and reports related to Ms. Ilagan's orthopedic condition. CalPERS selected an orthopedic surgeon to perform a disability evaluation. That physician provided CalPERS with narrative reports of his findings and conclusions. After reviewing the records and reports, CalPERS determined that, when Ms. Ilagan filed her application for a disability retirement, she was not permanently disabled or incapacitated from performing the usual and customary duties of a food service technician.

4. On November 1, 2013, CalPERS notified Ms. Ilagan that her claim was denied. CalPERS advised her of her right to appeal that adverse determination.

5. On November 19, 2013, Ms. Ilagan filed her appeal.

6. On March 26, 2014, petitioner filed a statement of issues in his official capacity. The statement of issues and other jurisdictional documents were served on all respondents. Ms. Ilagan requested a hearing. SDC did not respond to the statement of issues or appear in this matter.

Evidence Presented at Hearing

7. Thomas F. Moyad, M.D., M.P.H., a board-certified orthopedic surgeon, performed an independent medical evaluation and testified in this hearing. Dr. Moyad examined Ms. Ilagan on April 24, 2013. He reviewed her medical records. He found that Ms. Ilagan was injured on October 6, 2010, when a SDC client punched her in the neck and pulled her hair. Ms. Ilagan underwent physical therapy, acupuncture treatments, and was prescribed medication. An MRI demonstrated mild tendinopathy of the distal supraspinatus tendon, but no rotator cuff tear. Ms. Ilagan was referred to an orthopedic surgeon, who performed a subacromial decompression and distal clavicle excision on September 30, 2011. Ms. Ilagan had physical therapy after surgery but continued to have decreased range of motion. She was eventually deemed permanent and stationary and assigned a four percent whole person worker's compensation rating due to her lack of full range of motion. Her treating physician restricted her to no more than two hours of reaching above her shoulder per day and restricted her from lifting, carrying, pushing, or pulling more than 25 pounds.

Despite her treating physician's modified work restrictions, workplace modifications could not be accommodated, and Ms. Ilagan was placed off work.

As part of his evaluation, Dr. Moyad interviewed Ms. Ilagan. She told him she had pain over the left trapezius area. She felt the surgery had improved her pain 20 percent. She denied having neck pain or radiating pain or numbness in her left arm or fingers. Her pain increased with carrying heavier weight and performing repetitive reaching overhead. Ms. Ilagan was not taking prescription medications but was taking over-the-counter pain medication as needed. She had been off work since February 27, 2012. When Dr. Moyad discussed Ms. Ilagan's work duties with her, she told him that occasionally she was required to lift up to 30 pounds and occasionally she was required to perform overhead reaching and lifting. Dr. Moyad testified that, based on his discussions with Ms. Ilagan, he believed that her actual job duties of reaching above her shoulder and carrying heavy items required much less time than the amount of time that was listed in the duty statement and other physical requirement documents he had reviewed.[1]

Dr. Moyad performed a physical examination and found mild tenderness to palpation over the left trapezius muscle and biceps. Ms. Ilagan complained of pain over the left trapezius with overhead motion and cervical rotation to the right side. She did not complain of cervical spine pain with full range of motion. Dr. Moyad did not believe that Ms. Ilagan was exaggerating her complaints. Objective testing demonstrated decreased range of motion and pain to the affected area. X-rays did not demonstrate any evidence of fracture, dislocation, or degenerative findings. Dr. Moyad diagnosed Ms. Ilagan with bilateral rotator cuff tendinopathy on the left shoulder, left shoulder biceps tendinopathy, and left shoulder chronic trapezius strain.[2] Dr. Moyad concluded that Ms. Ilagan could not perform frequent, repetitive overhead motion or frequent heavy lifting of more than 25 pounds, but she was not substantially incapacitated from performing her usual and customary job duties.

8. CalPERS requested that Dr. Moyad provide clarification regarding whether Ms. Ilagan was substantially incapacitated from performing her job duties given his finding that she could not perform frequent repetitive overhead motion. In a June 18, 2013, supplemental report, Dr. Moyad again noted that Ms. Ilagan was not substantially incapacitated from performing her job duties. Dr. Moyad based that opinion on his discussions with Ms. Ilagan during the history taking portion of his examination when he was told that her actual duties required less time than had been listed in her employment documents. Dr. Moyad also based his opinion concerning Ms. Ilagan's current shoulder pathology on his examination of her. Dr. Moyad again recommended that Ms. Ilagan limit her overhead reaching to three hours or less per day, which Ms. Ilagan told Dr. Moyad she had been able to do in the past.

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[1] Those documents indicated that three to six hours per day were spent reaching overhead and that Ms. Ilagan was required to lift up to 50 pounds.

[2] Dr. Moyad and also found knee pain and diagnosed early right knee degenerative joint disease, but those findings were not relevant as the basis for Ms. Ilagan's disability application was her left shoulder complaints.

9. Dr. Moyad testified in this hearing in a manner that was consistent with his reports. He presented as a very careful, conscientious, thoughtful practitioner. He was very polite when explaining his findings to Mr. and Mrs. Ilagan during cross-examination. He was sympathetic to their position. Dr. Moyad's opinions were supported by his findings and appeared well reasoned. He was a credible and persuasive witness.

10. Ms. Ilagan and her husband testified about Ms. Ilagan's physical limitations caused by her injury. Her condition worsened following shoulder surgery. Ms. Ilagan has difficulty sleeping and has pain in her left shoulder and arm. She said she was unable to return to work because there was no modified work available. She said her employer recommended she file for disability retirement since she could no longer perform her job duties. Ms. Ilagan would love to continue working, but she said she is physically unable to do so.

Ms. Ilagan's husband echoed his wife's testimony. He testified that they do not understand why Ms. Ilagan does not qualify for disability retirement when modified work is unavailable and when all the physicians agree about her work restrictions due to her injury. While their testimony was sincere and heartfelt, and their confusion understandable, it did not constitute competent medical opinion and was insufficient to refute the opinions of Dr. Moyad or to meet their burden of demonstrating that Ms. Ilagan was permanently disabled or incapacitated from performing the regular and customary duties of a Food Service Technician I with SDC when she filed her application for a disability retirement.

Ms. Ilagan was a very credible witness. She testified in a straightforward manner, made eye contact, and did not appear to be exaggerating her complaints. Her husband also was a sincere and credible witness. Both wanted Ms. Ilagan to recover from her injuries, or, in the alternative, be given modified work duty, so she could return to work. However, since her employer was not offering that modification, she was advised to file for disability retirement. The employer's refusal to accommodate her injury and recommendation to file for a disability retirement does not constitute competent medical opinion.

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.)

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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.

4. Government Code section 21156 provides that if the medical evaluation or other evidence demonstrates that an eligible member is incapacitated physically or mentally, CalPERS shall immediately retire the member for disability.

Appellate Authority

5. "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, 886-887.)

6. The fact that an injury increases an individual's chances of further injury does little more than demonstrate that the injury is prospective, hence, speculative, and presently not in existence. If is insufficient to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863).

Evaluation

7. Ms. Ilagan's confusion concerning her eligibility for a disability retirement was understandable. She was injured at work and all physicians who examined her have recommended work restrictions. However, her employer claims that no modified work is available. Thus, she is being forced to retire from a job she enjoys, yet does not understand why she does not qualify for a disability retirement.

In order to qualify for a disability retirement, Ms. Ilagan must demonstrate that she was permanently disabled or incapacitated from performing the regular and customary duties of a Food Service Technician I when she filed her application based on competent medical opinion. The competent medical opinion and other evidence did not demonstrate that she was permanently disabled or incapacitated from performing those regular and customary duties. Her application must be denied.

Cause Exists to Deny the Application

8. Cause exists to deny Ms. Ilagan's application for a disability retirement. A preponderance of the evidence did not establish that Ms. Ilagan's orthopedic condition resulted in her being permanently disabled or incapacitated from performing the regular and

customary duties of a SDC Food Service Technician I when she filed her application for a disability retirement with CalPERS.

ORDER

The application for a disability retirement filed by Teresita H. Ilagan with the California Public Employees Retirement System on October 1, 2012, is denied. CalPERS's denial of Ms. Ilagan's application is affirmed.

DATED: October 2, 2014

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings