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 Disability Retirement of: SAFIA S. ALI, Respondent, and CALIFORNIA FRANCHISE TAX BOARD, Respondent.	Case No. 2014-0413 OAH No. 2015010448

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on January 19, 2016, in Sacramento, California.

John L. Shipley, Senior Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Respondent Safia S. Ali was present at the hearing and represented herself.

Pursuant to Government Code section 11435.55, respondent's daughter Saba Hashmat, was provisionally certified to provide Urdu interpreter services to respondent as needed.

There was no appearance by or on behalf of the California Franchise Tax Board (Department). The Department was duly served with Notices of Hearing. The matter proceeded as a default against the Department, pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on January 19, 2016.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED January 26, 2016
Kathie R. Schmitz

ISSUE

The issue on appeal is whether, on the basis of rheumatologic conditions (bilateral hand and cervical spine), respondent is permanently disabled or incapacitated from performance of her duties as a Tax Program Technician I for the Department?

PROCEDURAL FINDINGS

1. On June 26, 2013, respondent signed and filed with CalPERS an application for service retirement pending disability retirement (application). Until approximately September 30, 2013, respondent was employed as a Tax Program Technician I (Technician) with the 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 rheumatologic conditions, which included tendinitis in both hands and arthritis in her cervical spine.

3. CalPERS obtained reports concerning respondent's condition, prepared by Yi Yi Myint, M.D., Mimi Ogawa, M.D., Soheil Payvandi, D.O., Raul Romea, M.D. and Scott T. Anderson, M.D., Ph.D., who conducted an Independent Medical Evaluation (IME) of respondent. After reviewing the reports, CalPERS determined that respondent was not permanently disabled or incapacitated from performance of her duties as a Technician, based on her rheumatologic conditions, at the time she filed her application.

4. On March 7, 2014, CalPERS notified respondent and the Department that the application for disability retirement was denied. Respondent was advised of her appeal rights.

5. By letter dated March 21, 2014, respondent filed an appeal and request for hearing. Respondent referenced additional documents from her medical providers regarding her rheumatologic conditions, and requested that CalPERS reconsider the denial of her application.

6. On April 11, 2014, Helen Louie, Retirement Program Specialist for CalPERS, sent respondent a letter which explained that any additional medical information she submitted would be reviewed and considered. Thereafter, Harry Khasigian, M.D., conducted an IME of respondent's conditions.

7. On September 16, 2015, Nicole Herrera, Retirement Program Specialist for CalPERS sent respondent a letter which explained that based upon Dr. Khasigian's evaluation and recommendation, the initial denial of her application was affirmed.

8. On January 14, 2015, Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, signed and thereafter filed the Statement of Issues.

FACTUAL FINDINGS

Respondent's Employment History and Duties as a Technician

1. Respondent worked for the Department as a Technician from 1997, until her last date of service effective on September 30, 2013. Respondent was 55 years old when she retired.

2. As set forth in the Department's position statement, 50 percent of the duties of a Technician for the Department include review and validation of "business entity income tax returns in accordance with business entities tax law and section policies and procedures." Respondent was required to perform account adjustments to accurately post the return and payment information. Approximately 35 percent of the time, respondent was required to verify that any return given was properly posted to the account, resolve outstanding review items and contact tax payers by phone or letter to obtain information needed to resolve any discrepancies. Approximately 10 percent of the time, respondent was required to provide information to her supervisor regarding any training issues that arose during the work day, provide review and input on procedures and training material, attend meetings, complete timesheets and report on her daily production. Approximately five percent of the time, respondent was required to assist with training.

3. On June 26, 2013, CalPERS received a completed "Physical Requirements of Position/Occupational Title" (Physical Requirements), signed by respondent. According to the Physical Requirements, when working as a Technician, respondent: (1) frequently (three to six hours per day) sat, repetitively used her hands, used a keyboard and mouse; (2) occasionally (up to three hours a day) bent and twisted her neck and wrists, reached above her shoulder; and (3) never stood, ran, walked, crawled, climbed, kneeled, squatted, reached below her shoulder, pushed and pulled, simple grasped, lifted any weight, walked on uneven ground, drove, worked with heavy equipment, was exposed to: excessive noise, extreme temperature, dust, gas fumes, chemicals, worked at heights, operated foot controls or repetitive movements, used special visual or auditory protective equipment or worked with bio-hazards.

Independent Medical Evaluations

SCOTT T. ANDERSON, M.D., PH.D

4. On January 31, 2014, at the request of CalPERS, Scott T. Anderson, M.D., Ph.D, conducted an IME of respondent. Dr. Anderson prepared two reports and testified at the hearing in this matter. Dr. Anderson is a Clinical Professor of Medicine at the University

of California, Davis, Division of Rheumatology, Allergy, and Diplomate in Internal Medicine and Rheumatology by the American Board of Internal Medicine. Dr. Anderson has added qualifications in Geriatric Medicine by the American Board of Internal Medicine. Dr. Anderson's practice includes supervising and training residents. Dr. Anderson treats patients and conducts geriatric rounds at a resident care facility five days per week. Dr. Anderson also conducts IMEs and is an expert medical reviewer for the California Medical Board.

5. As part of the IME of respondent, Dr. Anderson interviewed respondent, obtained a personal and medical history, had respondent complete a rheumatology and internal medicine questionnaire, conducted a physical examination, and reviewed respondent's medical records related to her rheumatologic conditions. Dr. Anderson also reviewed respondent's duty statement and the physical requirements of her position as a Technician.

BACKGROUND

6. During the evaluation, Dr. Anderson took a detailed background and history of complaints from respondent, related to her rheumatologic conditions. Respondent explained that she worked for the Department until she retired. She described that her job duties mostly involved typing on a keyboard in an office setting. Respondent informed Dr. Anderson that in 2005 she began to experience pain in her right hand with the "triggering of her middle finger." Respondent stated that she was treated with cortisone injections and ultimately underwent a surgical procedure to "free up a trigger finger that was associated with a peritendinous area fibrosis."

7. While respondent recovered from the surgery on her right hand, at work she used her left hand to control the computer mouse. In 2008, respondent developed pain in her left hand, similar to the pain she experienced in her right hand. She did not undergo surgery on her left hand. Respondent informed Dr. Anderson that she believed that the repetitive use of a mouse and keyboard caused her hand conditions. She also developed pain in her neck in the form of "tension-like discomfort in the trapezius region."

8. The Department provided respondent with the Dragon Dictation system to reduce the use of her hands at work and other ergonomic adjustments. Despite these accommodations, respondent contended that she was not able to work.

9. Respondent explained that she is able to drive, walk and shop, but she has difficulty with cooking, housecleaning and physical exercise. Respondent also stated that she was limited in her ability to bend, walk, sit, and lift, and she cannot stoop or climb. She also stated on the questionnaire she completed that she could only "minimally" care for herself, such as brushing her teeth, washing her face and preparing small meals. She contended that these activities caused her hand pain and numbness. Respondent's complaints at the time of the IME, were bilateral pain in her hands and neck.

PHYSICAL EXAMINATION

10. Dr. Anderson conducted a physical examination of respondent. He found that her hands had "normal digital alignment." She had full range of motion of the "intrinsic joints of the hands and wrist including distal and proximal interphalangeal joints, metacarpophalangeal joints and wrist." Dr. Anderson found "some slight fusiform swelling of the second and third proximal interphalangeal joints consistent with Bouchard's nodes." Tinel's tests and Phalen's maneuver revealed "localized wrist discomfort but no radiation of pain and therefore appeared to be grossly negative." Respondent also had full range of motion at the wrists and shoulders. "There was no synovial inflammation in the hands, wrists, elbows, or shoulders and no rheumatoid nodules [were] noted."

11. Dr. Anderson observed a "scarcely visible fine scar extending from the third finger across the MTP joints of the palmar surface to the fourth finger corresponding to incisions at the base of the long and ring finger" on respondent's right hand. "Flexion and extension" failed to reveal triggering. Dr. Anderson administered the Jamar Dynamometer hand strength measurement test. Respondent failed to exert any effort with her right hand.

12. Dr. Anderson's examination of respondent's neck revealed "no paravertebral spasm." Respondent made "suboptimal effort" during the testing of her cervical spine range of motion. Her shoulders reveal "grossly normal range of motion."

13. Dr. Anderson noted for the neurological examination that:

> In handling clipboard, questionnaires and other data, [respondent] does not appear to have a lack of dexterity or strength in her upper extremities and formal muscle strength testing is limited... In testing median, ulnar and radial nerves, [respondent] appears to have 5/5 strength and normal sensation that rapidly gives way and appears to then have little or no strength. Thus, it is somewhat inconsistent.

14. Dr. Anderson opined that respondent had exaggerated her complaints to a "significant degree." Her hand grip strength of zero was "not consistent with good effort." He found her joint examination "fairly unremarkable except for Heberden's nodes or early degenerative changes." Dr. Anderson expected her to be able to give better effort and to have at least 20 kilograms of hand grip strength bilaterally.

REVIEW OF MEDICAL RECORDS

15. At the time Dr. Anderson issued his initial report on February 5, 2014, he had reviewed an extensive amount of respondent's medical records from November 1, 2005, to October 8, 2013, related to respondent's rheumatologic conditions. Based on his review of the medical records, Dr. Anderson found that the records:

> ...tends to show overuse syndrome tendonitis and non-specific complaints of the upper extremities with relative paucity of objective findings. Possibility of osteoarthritis has been noted, however there was a tenovaginotomy of the right long and ring fingers with some intermittent residual discomfort and the preoperative MRI showed some triangular fibrocartilage changes were non specific.

Dr. Anderson also opined that the medical records indicated that respondent "has been viewed as having repetitive strain injury."

16. On July 25, 2015, CalPERS provided Dr. Anderson with 50 pages of additional medical records that included outpatient notes by Raul Romea, M.D., a rheumatologist. Dr. Anderson issued a supplement report dated July 20, 2015, after he reviewed the additional medical records. The additional records indicated that respondent was "worked up for inflammatory arthritis and had a negative antinuclear antibody (ANA) as well as negative rheumatoid factor." In addition, the "erythrocyte sedimentation rate," which is a "marker for inflammatory arthritis was negative." Dr. Anderson noted that respondent is "known to have degenerative changes and scatter pain secondary to degenerative changes."

DIAGNOSIS AND OPINION

17. Dr. Anderson diagnosed respondent with:

(1) Status post stenosing tenosynovitis, right long and ring fingers, successfully treated with local debridement surgery;

(2) Osteoarthritis of hands;

(3) Cervical stain.

18. Dr. Anderson opined that respondent has a "mild cervical strain." He found that her range of motion of the cervical spine was "not what [he] expected to see in somebody with mild cervical strain." He also opined that respondent "may have some mild underlying degenerative arthritis which is more or less normal for her age." Her cervical spine and hand condition "should be considered quite mild and amenable for conservative management."

19. Dr. Anderson opined that based on his medical evaluation, review of respondent's medical records and review of respondent's 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, as a result of her rheumatologic conditions.

HARRY A. KHASIGIAN, M.D.

20. On August 18, 2015, at the request of CalPERS, Harry A. Khasigian, M.D., conducted a comprehensive orthopedic examination of respondent. Dr. Khasigian prepared an IME report and testified at the hearing in this matter. Dr. Khasigian is an orthopedic surgeon. He is a Diplomate of the American Board of Orthopedic Surgery and has a subspecialty certification in orthopedic sports medicine. He is also a fellow of the American Board of Orthopedic surgeons. Approximately 80 percent of Dr. Khasigian's practice consists of treating patients and performing surgery. Approximately 20 percent of his practice is dedicated to performing medical evaluations for legal proceedings.

21. As part of the IME of respondent, Dr. Khasigian interviewed respondent, obtained a personal and medical history, conducted a physical examination, and reviewed respondent's medical records related to her rheumatologic conditions. Dr. Khasigian also reviewed respondent's duty statement and the physical requirements of her position as a Technician.

BACKGROUND

22. During the evaluation, Dr. Khasigian took a detailed background and history of complaints from respondent, related to her conditions. Respondent complained of pain in both of her hands and her back, neck and shoulders.[1] Respondent explained that she had a right long finger release. She still had pain in the palm of her right hand and the dorsum of the right arm and left palm at the distal palmar crease. She also complained of pain from the lumbar spine to the cervical spine and then the posterior left thigh. The pain was caused by any type of movement. She did not have any numbness, tingling or weakness in the extremities. When respondent discussed the pain in her spine and lower extremities, she bent forward to touch her toes to describe her pain. Dr. Khasigian did not observe any limitations on her movement.

23. Respondent reported to Dr. Khasigian that she found it difficult to brush her teeth or take a shower. After doing these activities she has to lie down for three hours. Other painful activities include bending, stooping, squatting, knelling, crawling, lifting, climbing, and pushing/pulling above the shoulder. Respondent stated she could sit for two to three minutes. She also stated that she could not stand any time, could not lift any weight, could not lift grocery sacks, do lawn work, wash a car or vacuum. She felt best lying on her side.

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[1] Respondent also complained of pain in both feet and her left leg. As a result, Dr. Khasigian's evaluation and report contain references to those complaints. At hearing, respondent testified that she did not want to amend her disability retirement application to include her feet and leg conditions as part of the basis for disability retirement. Therefore this decision does not reference those conditions.

PHYSICAL EXAMINATION

24. Dr. Khasigian conducted a physical examination of respondent. Dr. Khasigian did not find spasm in the lumbar spine. Respondent indicated that when she rotates or bends to the left, she develops left trapezial pain. Respondent's thoracic spine was normal. There was no spasm or guarding of the cervical spine. When respondent rotated or bent to the left she jumped suddenly and twisted suddenly to indicate pain, but her motions were not restricted.

25. Dr. Khasigian administered the Jamar Dynamometer hand strength measurement test. Respondent groaned and moaned indicating effort, but the needles did not lift off the peg. As a result, the measurements were zero.

REVIEW OF MEDICAL RECORDS

26. Dr. Khasigian was provided approximately two inches of medical records to review. He determined that respondent had been diagnosed with arthritis in her hands, however the x-rays reports that he reviewed did not indicate that there were any degenerative changes and her wrists are normal.

DIAGNOSIS AND OPINION

27. Dr. Khasigian diagnosed respondent with the following relevant diagnoses:

(1) Post trigger finger releases, right long and ring finger on 4/25/2007 without residual;

[¶] ... [¶]

(3) Mild osteoarthritis of bilateral hands by history (no x-rays available)

(4) Subjective cervical pain (no x-rays available for review).

28. Dr. Khasigian opined that on clinical examination, respondent did not exhibit any "deformities, limitations, restrictions, or impairment of diagnostic pattern." He found a "great deal of Waddell's findings" that were present, which are symptoms that are not produced by any physical impairment. In addition, he found a "high level of psychosocial overlay with respect to the inconsistences in her examination, particularly the make-and-break weakness, the Jamar readings and her globality of symptomatology." He also opined that respondent's "limited ability to perform only limited tasks in light of her very limited activity during the days does not appear to be consistent with her relatively normal physical presentation on examination."

29. Dr. Khasigian opined that based on his orthopedic opinion, respondent was not substantially incapacitated from the performance of her duties. He further opined that she is capable of performing all the duties of her position.

Respondent's Evidence

30. Respondent contends that she is in chronic pain from her wrist to her shoulders and spine. The chronic pain makes it difficult for her to function. She has attempted to take medication to manage the pain, but she feels that medication adversely affects her health. She denied that the surgery performed on her right hand improved her condition. Respondent is concerned that further use of her hands at work would cause additional injury that may result in the in ability to use her hands. As a result, she does not believe she can work as a Technician.

31. At the hearing, respondent submitted medical records and letters from her treating physicians, which were admitted as administrative hearsay, and have been considered to the extent permitted under Government Code section 11513, subdivision (d). [2] Respondent did not call any doctors to testify at the hearing. The medical records and letters do not state that respondent is substantially incapacitated from the performance of her duties as a Technician for the Department.

Discussion

32. When all the evidence is considered, Dr. Anderson's and Dr. Khasigian's opinions that respondent is not permanently disabled or substantially incapacitated from performance of the duties of a Technician were persuasive. Respondent's physical examinations and the medical records reviewed by Dr. Anderson and Dr. Khasigian did not reveal any objective evidence that her rheumatologic conditions would prevent her from performing the usual and customary duties of a Technician.

33. Respondent did not present competent medical evidence to support her disability retirement application. In the absence of supporting medical evidence, respondent's application for disability retirement must be denied.

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[2] Government Code section 11513, subdivision (d), in relevant part, provides:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

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.

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 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. 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. An applicant for disability retirement must submit competent, objective medical evidence to establish that at the time of 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.) In *Harmon*, the court found that a deputy sheriff was not permanently incapacitated from the performance of his duties, because "aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for [the sheriff's] condition are dependent on his subjective symptoms."

5. Findings issued for the purposes of worker's compensation are not evidence that respondent's injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at 207; *English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego,* (1989) 214 Cal.App.3d 563.)

6. The burden of proof was 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*, *supra*, 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) Although respondent asserted subjective complaints of disability, she did not present competent, objective medical evidence to establish that she was permanently disabled or incapacitated from performance of her duties as a Technician for the Department at the time she filed her disability retirement application. Therefore, based on the Factual Findings and Legal Conclusions, respondent is not entitled to retire for disability pursuant to Government Code section 21150.

ORDER

The application of Safia Ali for disability retirement is DENIED.

DATED: January 25, 2016

DocuSigned by:
Marcie Larson
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MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings