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 Application for Disability Retirement of: BERTHA A. CHAPULA-SANCHEZ, and EMPLOYMENT DEVELOPMENT DEPARTMENT, Respondents.	Case No. 2016-0106 OAH No. 2016041017

PROPOSED DECISION

On September 27, 2016, a hearing in this matter convened before Marilyn A. Woollard, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, in Sacramento, California.

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

Respondent Bertha A. Chapula-Sanchez appeared and represented herself.

There was no appearance by or on behalf of respondent California Employment Development Department (EDD), which was timely served with the Statement of Issues and Notice of Hearing. The matter proceeded as a default against EDD. (Gov. Code, § 11520, subd. (a).)

Oral and documentary evidence was received and the parties offered oral closing arguments. The record was then closed and the matter was submitted for decision on September 27, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Oct 28 20 16

ISSUE

Is respondent is substantially incapacitated for the performance of her usual and customary duties as a Disability Insurance Program Representative (Customer Service Representative) for EDD based on the orthopedic conditions of: her neck; her right arm, shoulder, elbow and hand; her left trigger finger; and her low back?

FACTUAL FINDINGS

1. Respondent was employed with EDD as a Customer Service Representative (CSR) for approximately 12 years. She worked full-time until approximately March 9, 2015, and part-time through June 1, 2015, her last day of work. On May 13, 2015, respondent signed and filed her Disability Retirement Election Application (Application) with CalPERS, requesting "service pending disability retirement." Respondent indicated that she would retire from her position with EDD as a CSR, effective July 2, 2015.

Respondent described her specific disability as "neck, right arm, shoulder, elbow, hand. Left hand trigger finger. Lower back, coxicoigdosis." Respondent reported that, with the exception of her lower back condition, each of the specific conditions occurred due to repetitive cumulative trauma. In 1971, respondent's low back was hit with a shovel handle which fractured a disc. In 1991, respondent injured her low back further when she fell on stairs and landed on her "butt cracking her coxis."

As a result of these conditions, respondent reported being "unable to sit, stand for periods of time over 30 min. or 1 hour, pain on both arms, swelling on forearm, hand cramping when typing. Depression." These conditions affected respondent's ability to perform her job because: "job requires to sit [*sic*] 8 hrs. Constant typing throughout workday. My back, butt hurts due to prolonged sitting. Arms, hands, shoulders, neck hurt due to repeated motion for 8 hours. Depression."

2. On July 15, 2015, respondent participated in an Independent Medical Evaluation (IME) by Harry A. Khasigian, M.D. Dr. Khasigian prepared two IME Reports: an original 12-page IME report and records review summary dated July 15, 2015; and an August 11, 2015 Supplemental Report, following his review of additional records.

3. On August 24, 2015, Anthony Suines, Chief of CalPERS Benefit Services Division, notified respondent that based upon a review of all the medical evidence submitted, including reports by Olivia Garcia, M.D., and Dr. Khasigian, CalPERS had determined that her orthopedic conditions are not disabling. As a result, respondent was not substantially incapacitated for the performance of her job duties as an EDD CSR and her Application was denied.

4. On September 24, 2015, respondent filed her appeal and requested a hearing. The matter was set for an evidentiary hearing before an Administrative Law Judge of the

Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

At the September 27, 2016 hearing, respondent was the sole witness. She stipulated to the admission of Dr. Khasigian's two IME reports.

CSR Job Description

5. Respondent's CSR position was described in an EDD Position Statement dated June 1, 2007, and in a Job Analysis prepared by Disability Management Consultant Bonnie Drumwright, Ph.D., dated January 27, 2009. The Position Statement, in relevant part, describes job duties of a CSR as involving listening and responding to telephone inquiries (calls) from customers. The CSR gathers and documents information during these calls, and refers such calls to management and to other offices when necessary.

The Job Analysis, in relevant part, indicates that the CSR examines and analyzes disability insurance claims and employment data to determine claim eligibility and status. The CSR spends an average of 7.5 hours per day on the telephone, which includes: "keyboarding entering notes on the system form retrieval" and other duties as necessary. In addition to those previously identified, the CSR's essential functions include using appropriate EDD manuals to ensure accuracy and consistency, and documenting all claim actions and pertinent information in the Single Client Data Base (SCDB) for accountability and appropriate follow-up action.

6. The Job Analysis listed the physical demands of the CSR position as including:

- Sitting: "frequently" (from three-to six-hours in an eight-hour day) to "continuously" (over six hours in an eight-hour day);
- Communication frequently to continuously;
- Handling/Fingering frequent though intermittent use of hands for keyboarding, mousing, handling paperwork, picking up the telephone and headset; making notes, grasping forms, etc. Macros (which allow the CSR to populate entire fields of data with several keystrokes) are utilized to decrease the amount of keyboarding required;
- Keyboarding/ Mousing Keyboarding occurs "occasionally" (up to three hours in an eight-hour day), intermittent with other activities and averaged 18.40 minutes per hour. Mousing occurs "rarely (up to 30 minutes total in an eight-hour day), with an average of 3.8 minutes per hour;

- Looking Downward/Upward (neck flexion/extension) — Neck flexion occurs "rarely" to occasionally up to a 15• angle as the worker intermittently looks down at the desk while writing, keyboarding or looking at paperwork or manual. Neck extension occurs rarely to look up at a person or object while seated;

- Twisting (waist and neck) — Occurs rarely at the neck if the worker is looking at manual. Occurs very rarely at the waist;

- Reaching (shoulder chest or above shoulder level) — Occurs rarely at the chest to shoulder level to reach for the phone, headset, supplies, paperwork resource information or to place envelopes in outgoing mail.

In addition, CSRs rarely to occasionally engage in standing. They occasionally engage in simple grasping but never engage in power grasping. They "rarely" walk, lift or carry items weighing up to 1.2 pounds; push or pull; bend at waist; kneel, stoop or crouch; or engage in fine manipulation or handwriting. Each workstation is designed to facilitate the ergonomic needs of the individual worker.

Dr. Khasigian's IME Reports

7. Dr. Khasigian is a Diplomate of the American Board of Orthopedic Surgery, with a subspecialty certification in Orthopedic Sports Medicine. He is also a Diplomate of the Arthroscopy Board of North America, a Diplomate of the National Association of Disability Evaluating Physicians, and a Qualified Medical Examiner (QME) in California. Dr. Khasigian is in a private orthopedic surgery and sports medicine practice in Sacramento.

8. <u>July 15, 2015 IME Report</u>: At CalPERS request, on July 15, 2015, Dr. Khasigian met with respondent for a comprehensive orthopedic examination and IME. As part of his evaluation, Dr. Khasigian reviewed respondent's duty statement, job description, physical requirements and medical records, including an MRI of her cervical spine dated September 3, 2014, and an MRI of her lumbar spine with a comparison to an MRI dated May 17, 2011. Respondent's medical records included an April 21, 2014 notation that she had a stress-related breakdown at work, a history of neck and back pain, and a February 18, 2015 diagnosis of major depressive disorder and generalized anxiety disorder.

Respondent's presenting complaints were of left thumb "trigger finger" that was locking and catching; carpal tunnel syndrome of her right hand; aching of her right elbow; right shoulder pain on reaching out in front of her below shoulder level to use a mouse and telephone; chronic ache in her cervical spine from having to look up and sideways at dual computer screens; and chronic low back pain without radiculopathy. These problems made it hard for respondent to grab handles and hold objects when cooking. She could lift 10 pounds but found certain activities to be painful (bending, stooping, squatting, kneeling, crawling, lifting and pushing). Respondent told Dr. Khasigian that she had seen a psychiatrist because

she was "overwhelmed" at work and reported suffering from "anxiousness and stress from workers' compensation papers." Respondent had received physical therapy, "but all of her body parts still hurt." She had a 10-year patient relationship with a chiropractor with whom she treated once or twice a month as needed. Respondent was scheduled to have surgery for her left trigger finger on July 20, 2015.

9. Dr. Khasigian noted that respondent was in no acute distress, could sit, stand and lie without difficulty, and moved in a smooth and coordinated manner. A review of respondent's systems was generally unremarkable, except for the above-reported complaints and a notation that respondent has anxiety. Dr. Khasigian conducted a physical examination of respondent's lumbar, thoracic and cervical spine, her shoulders and her upper extremities. He also conducted a neurological examination of respondent's bilateral upper and lower extremity reflexes. Respondent's motor exam was "normal to grade 5/5" for both her upper and lower extremities.

10. Based on his review of respondent's medical records, MRIs and his physical examination, Dr. Khasigian's diagnoses for respondent were as follows:

1. Degenerative disc disease cervical spine C5-6 and C6-7, without radiculopathy;
2. Degenerative disc disease lumbar spine L4-5, without radiculopathy;
3. Subjective shoulder pain;
4. Subjective elbow pain;
5. Carpal tunnel syndrome right arm by history;
6. Left thumb trigger finger;
7. Generalized anxiety disorder;
8. Undifferentiated somatoform disorder;
9. Major depressive disorder.

In summary, Dr. Khasigian reported that respondent "has a litany of somatic complaints superimposed upon her depression." She reported having had a nerve conduction study showing carpal tunnel syndrome, but she had no clinical presentation of carpal tunnel syndrome in her right hand and was not scheduled for surgery. An examination of respondent's right shoulder and elbow were clinically "relatively normal." Dr. Khasigian noted that respondent's job description reflects work in a reaching position rather than in an overhead position. This ruled out impingement syndrome as a cause for her shoulder

symptoms. Respondent had "mild degenerative problems" in her cervical and lumbar area "which do not produce significant dysfunction on a clinical basis and her MRI findings are not substantial."

11. Regarding the impact of respondent's orthopedic conditions on her specific job duties, Dr. Khasigian opined that applicant was "presently and temporarily" unable to type with her left hand due to her trigger finger. This condition "should be alleviated and resolved completely with her surgery on 7/20/2015 and she should be able to perform unrestricted activities three weeks subsequent to the surgery."

Dr. Khasigian placed a limit on respondent's pushing and pulling with her right arm. Specifically, he opined that respondent's "total reaching forward 90 degrees anteriorly from her body with her right arm should be limited to no greater than 3 hours in an eight hour day."

12. In Dr. Khasigian's opinion, respondent was "presently substantially incapacitated for the performance of her duties" due to her left trigger thumb. As a consequence, respondent "has disability temporarily" due to this thumb condition. He estimated that this disability began on June 1, 2015. The expected duration of respondent's temporary disability was "less than six months." Dr. Khasigian anticipated that respondent would be able to resume unrestricted activities "three to four weeks" after her left trigger thumb surgery. He concluded that, after resolution of her left trigger thumb, respondent "would not be considered substantially incapacitated and she should be able to perform her job duties except for reaching with the right shoulder as described."

13. August 11, 2015 Supplemental Report: In August 2015, CalPERS provided Dr. Khasigian with additional diagnostic imaging studies for respondent which he personally reviewed. These included x-rays and MRIs of respondent's lumbar spine from 2009, 2013 and 2014; MRIs of her cervical spine from 2009 and 2014; and hand x-rays from 2015. Dr. Khasigian reported these additional records revealed that respondent:

> ...has had treatment in 2010 for her cervical and lumbar spine[1] as well as a stated radiculopathy on the right side at C5-6, without an EMG in the records.
>
> Her physical examination on 7/15/2015, as well as her examinations in the records, does not reveal radiculopathy.
>
> The review of MRIs of her lumbar and cervical spine show progression of degenerative disc disease with asymmetrical bulges, but on the cervical spine, it is on the left side and not the right side. Her right side is relatively clear. In the lumbar spine,

[1] Respondent received neck injections on August 25, 2010 and February 5, 2015.

it is also left-sided asymmetry, but, again, she has no radicular symptomatology.

Ms. Chapula-Sanchez exhibits significant psychosocial/ psychological behavior, which may well be a basis for disability.

On a solely musculoskeletal basis, there does not appear to be a substantial incapacity unless her subjective complaints were supported by an EMG showing radiculopathy. That EMG has not been done and is not present at this time. Presently, her examination is not positive despite the degenerative disc disease present on her MRI.

Dr. Khasigian's review of these additional documents did not alter his previously expressed opinions. He did indicate that, "if an EMG indicating radiculopathy is submitted, then modification of opinions would be indicated."

Respondent's Testimony

14. Respondent provided detailed testimony about her education, employment history and work at EDD. Her testimony is paraphrased as relevant below.

Respondent grew up in Mexico and came to the United States at age 17. She worked as a field laborer, housecleaner and caterer and performed strenuous physical labor in each position. Due to her low back injury, respondent was aware of the need to maintain her physical fitness and to keep active as recommended by her doctors. At age 32, after raising children, respondent went to college. She then worked in the welfare system, where she believed she suffered discrimination from managers who perceived her as a "Mexican from the streets."

As an EDD disability insurance program representative/CSR, respondent took approximately 120 calls each day. These calls often involved speaking with people who were desperate and ill. Respondent took her obligations seriously and did the most she could to help facilitate claims which were often delayed due to processing backlogs. She wrote detailed reports to different EDD field offices and managers to try to "help move the cases along." Because she is certified as bilingual in English and Spanish, respondent also often worked the front desk, filling in as needed with Spanish speaking claimants.

When respondent's low back hurt from sitting so long due to her coxis injury, EDD provided her with an elevated desk so she could work standing up. She experienced "repetitive cumulative trauma" from using the mouse, keyboard and phone in a work setting that was not ergonomically correct. The EDD office had an employee who was designated to perform ergonomic evaluations. Respondent believed that this worker did not have much ergonomic training.

At a time not established, respondent began to experience problems with her right arm and shoulder. Her right arm was swollen and painful. When she reached out to touch the mouse, respondent felt "electric shocks" down her arm. Respondent estimated that she had to reach out to the phone in front of her 60 to 100 times each day, and more frequently during her last two years of work. In 2010, this condition was so bad she could not touch the mouse anymore. Respondent got epidural shots in her shoulder and in the base of her neck. This was eventually reported as a workers' compensation injury and she was diagnosed as having tennis elbow. Respondent was sent to a QME, who returned her to work without restrictions. Respondent went back to work where she tried to limit her typing and to use her left hand. Within a year, she felt the same pains.

Two years before she stopped working, EDD updated its system to add a new program, called the DIA program.[2] As a result of this update, respondent was required to use to mouse "five times more than in the past." Instead of up to two hours a day, she now used the mouse five-to-six hours a day. After this change, EDD never updated its Position Statement. Respondent "dragged" herself to work until age 55 so she could retire, paying out of pocket for treatments.

Respondent explained that the reason she left EDD was that: "I was ready to kill myself." Respondent was forced to sit next to a woman who was insulting, demeaning and who engaged in "monologues about crazy stuff" all day long. Although respondent complained and repeatedly asked to be moved, no action was taken. She endured these conditions "daily for over a year." This experience was very depressing.

Respondent finds her current condition depressing. Although physically active all of her life, there are many activities she can no longer do. She has arthritis in her back. Her right arm is "worthless" and she cannot carry more than two-to-three pounds. Her left trigger finger straightened out after surgery, but then became bent again and now her left arm is swelling up as well. The swelling occurs mainly at night. Respondent rarely uses the computer anymore and does so only for an hour at a time. She cannot mow the lawn and has to hold one plate with two hands. She tries to keep active.

Respondent believes she is disabled and does not believe Dr. Khasigian performed a comprehensive evaluation of her conditions. In her estimation, Dr. Khasigian's only concern was whether she could bend down and touch the floor. She explained that she is a thin person who can walk appropriately. She does not "play the part of a disabled person." She is in pain, but does not like to be "stupefied with medicines." She does not take depression medications due to concerns about side effects. Respondent addresses her depression by staying away from negative things and working with things that make her feel better.

Respondent truly misses her work place and the opportunity it provided her to help people. She stated that it was "a triumph for me to help out." She would like to find a way

[2] This acronym was not explained.

to work and contribute, but does not believe she is ready to "do a regular job" that involves computer work. Respondent currently has a social security disability application pending.

15. *Discussion*: Respondent testified that she has continuing difficulty using her right arm, shoulder, elbow and hand, that her left trigger finger was not cured by surgery, that she has ongoing low back pain and experiences depression due to these conditions. Respondent also testified that she left work due to what she believed to be an intolerable working condition, rather than an inability to perform her job. Respondent did not offer any competent medical opinion to support her testimony that she is substantially incapacitated for the performance of her duties as a CSR with EDD. The only competent medical opinions were provided in Dr. Khasigian's IME reports, in which he found that respondent had a temporary disability but no substantial incapacity for the performance of her CSR duties on any of the claimed orthopedic conditions.

LEGAL CONCLUSIONS

1. The purpose of the Public Employees Retirement Law (PERL), Government Code section 20000 et seq., is "to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits." (Gov. Code, § 20001.)

2. Respondent is a state miscellaneous member of CalPERS, subject to Government Code section 21150. As such, she shall be retired for disability if she is credited with five years of state service and becomes "incapacitated for the performance of duty." The terms "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." (Gov. Code, § 20026.)

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 an 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.)

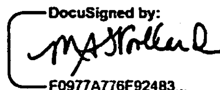
4. "As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence…." (*McCoy v. Board of Retirement* (1986) 183 Cal. App. 3d 1044; Evid. Code 500; *Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 691 [in context of County Employees' Retirement Law, Gov. Code, § 31724].) In this matter, respondent bears the burden of establishing all required elements for her claim for disability retirement and she must establish these elements through "competent medical opinion." (Gov. Code, § 20026.)

5. Respondent offered no competent medical opinion to establish that she has an "incapacity for performance of duty" as a CSR at EDD. Respondent challenged the comprehensiveness of Dr. Khasigian's examination which formed part of the basis for the opinions he expressed in two IME reports, but she offered no competent medical opinion testimony in its stead. Based on a review of the record as a whole, CalPERS offered the only medical opinion evidence regarding respondent's claimed orthopedic conditions. Dr. Khasigian's conclusion that respondent is not permanently substantially incapacitated for the performance of her CSR duties was undisputed.

ORDER

The appeal of respondent Bertha Chapula-Sanchez is DENIED.

DATED: October 26, 2016



MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings