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:

ANQUINETTE L. FLEMMINGS,

Respondent.

and

FRANCHISE TAX BOARD.

Respondent.

Case No. 2016-1272
OAH No. 2017040055

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 20, 2017, in Sacramento, California.

The California Public Employees Retirement System (CalPERS) was represented by Charles Glauberman, Senior Staff Attorney.

Anqunette L. Flemmings (respondent) represented herself.

There was no appearance by or on behalf of Franchise Tax Board (FTB). CalPERS properly served FTB with the Notice of Hearing. Consequently, this matter proceeded as a default hearing against FTB under Government Code section 11520.

Evidence was received. the record was closed, and this matter was submitted for decision on June 20, 2017.

ISSUE

The issue for determination in this matter is whether, at the time respondent applied for disability retirement, on the basis of an orthopedic (neck and low back) condition, she was permanently disabled or substantially incapacitated from the performance of her duties as a Customer Service Specialist for FTB.
FACTUAL FINDINGS

1. Respondent began her employment with FTB in 2001. She last worked for FTB in December 2015. At that time, she was a Customer Service Specialist. Respondent retired for service effective December 19, 2015, and has been receiving her service retirement allowance since that date.

Respondent’s Disability Retirement Application

2. On November 2, 2015, respondent submitted a Disability Retirement Election Application, seeking service pending disability retirement. On her application, she designated her last day on the payroll as December 18, 2015, and her effective retirement date as December 19, 2015. She described her disability as:

Severe chronic back pain
No tissue between lower vertebrae in spine

She stated that her disability occurred on June 1, 2008, as follows:

Over time no tissue is between lower vertebrae had disintegrated and back curvature [sic]

She described her limitations/preclusions as:

I cannot sit for more than one hour without severe pain and I cannot stand for more than 30 minutes at a time.

She stated that her condition has affected her ability to perform her job as follows:

It affects my ability to perform my duties because I have to set [sic] the pain makes it difficult to think while in pain having to sit for more than 6 hours every day and not being able to move around.

She noted that she was still working full time assisting customers “at counter window for 8 hours a day with collections and tax issues from notices to [illegible] business entities.” She provided the following additional information, “I also have a 4 hour commute a day in van pool which is causing more pain daily.”

3. On January 26, 2016, CalPERS sent respondent a letter denying her disability retirement application and advising her of her right to appeal from the denial. Respondent filed a timely appeal.
Respondent's Duties as a Customer Service Specialist

4. Respondent worked as a Customer Service Specialist for FTB. At the hearing, CalPERS submitted two documents describing respondent's duties in that position: (1) a Position Duty Statement; and (2) a completed Physical Requirements of Position/Occupational Title form.

5. The Position Duty Statement stated that Customer Service Specialists, under the general direction of a supervisor, "independently work the most complex Filing Program questions and activities and act as a technical resource for Tax Technicians." They are "responsible for implementation of the business goals of the Field & Complex Account Collection Bureau." They are "expected to demonstrate a high degree of initiative, prudence, analytical ability, verbal and written communication skills, and independent judgment in making decisions."

6. As set forth in the completed Physical Requirements of Position/Occupational Title form, Customer Service Specialists: (1) never run, crawl, kneel, climb, squat, bend and twist at the waist, reach above and below the shoulder, push and pull, power grasp, lift over 10 pounds, walk on uneven ground, drive, work with heavy equipment, are exposed to excessive noise, extreme temperatures, humidity, wetness, dust, gas fumes, or chemicals, work at heights, operate foot controls or repetitive movement, use special visual or auditory protective equipment, or work with biohazards; (2) occasionally (up to three hours a day) stand, walk, and bend at the neck; (3) frequently (up to six hours a day) twist at the neck; and (4) constantly (over six hours a day) sit, engage in fine manipulation, simple grasping, and repetitive use of their hands, use a keyboard and mouse, and lift up to 10 pounds.

Evaluation and Testimony by CalPERS's Expert

7. CalPERS retained Harry A. Khasigian, M.D., to conduct an Independent Medical Evaluation (IME) of respondent, review her medical records, and issue an IME report setting forth his findings and opinions. Dr. Khasigian is a board-certified orthopedic surgeon, with subspecialty certification in sports medicine. On December 22, 2015, he conducted an IME of respondent, reviewed her medical records, and issued his IME report.

8. During the IME, respondent described her complaints as: (1) lower back pain, which was severe and throbbing; (2) mid-back tension; and (3) neck stiffness and irritation. She told Dr. Khasigian that she could not do her job, which primarily involved sitting, because of her pain and loss of disc space in her spine. She asserted that she has had chronic pain since 2004. She described her pain in her lumbar spine as "constant," which radiated down both lateral thighs, but did not go past her knees. On a scale of 1 to 10, the pain was at level 10 all the time, but could elevate up to a level "50" to the point where she "want[ed] to cry it hurt[ ] so bad." She stated that when it hurt at that level, even lying down did not help. She also stated that she had chronic pain in her cervical spine, which was constant, ached, and radiated up to her trapezius. The level of pain in her cervical spine could reach level 10, but could be intermittent. There was no numbness, tingling, or weakness in her hands, nor
was there any numbness, tingling or weakness in her lower extremities. Her symptoms were decreased with heat, cold and medications. She took Vimovo for her pain. She was no longer taking narcotics or Flexeril, which she did before.

9. Dr. Khasigian conducted a physical examination of respondent. He noted that she was 62 years old, five feet three inches tall, and weighed 209 pounds. She was a “well-developed, well-nourished female in no acute distress.” She did not wear any orthopedic devices or appliances. Her movements were “smooth and coordinated.” She was “able to sit, stand and lie without assistance.” She complained of pain in the trapezius, mid-thoracic, lumbar, paraspinal, and L5-S1 regions upon palpation, which Dr. Khasigian described as “basically brushing of the skin with light touch.” She had no swelling, masses, redness, induration, guarding, or spasms in these areas. Dr. Khasigian examined respondent’s lumbar spine, thoracic spine, cervical spine, shoulders, and upper and lower extremities. He conducted range of motion and other tests. He performed a neurological examination. He reviewed the diagnostic test reports he had received as well as x-rays and imaging studies respondent had brought on a CD.

10. After conducting an IME and reviewing the diagnostic test reports, x-rays, imaging studies, and job description, Dr. Khasigian’s impressions of respondent were as follows:

1. Mild degenerative disc disease L4-5 and L5-S1 without disc protrusion and without radiculopathy.
2. Mild lumbar facet disease L4-L5 and L5-S1 without significant neural foraminal or central spinal stenosis.
3. Cervical spine C5-6 moderate degenerative disc disease and spondylosis without radiculopathy.
5. Migraines.
6. High cholesterol.
7. High blood pressure.
8. Anxiety and Depression.

11. Based on his objective findings, Dr. Khasigian found there were no specific job duties that respondent could not do. Instead, he found that she was able to perform all the duties of a Customer Service Specialist for FTB. He opined that respondent was not substantially incapacitated from performing her duties. Although respondent claimed that she had bone-on-bone and level 50 pain, Dr. Khasigian found respondent’s “x-rays are relatively mild and show only mild facet degeneration, and her disc spaces are actually well maintained.” He found that she did not have “any evidence of a nerve root irritation on clinical examination,” and her x-rays and MRI were “much more benign than the subjective statements” that respondent presented. As Dr. Khasigian explained, there was a “discontinuity between the level of subjective complaints and the relatively benign nature of her objective MRI and x-ray and examination.” He stated that, while respondent was cooperative and put forth her best effort on physical examination, there were “subjective
statements regarding the levels of pain that are extremely high and lack consistency with the mild findings on x-ray and examination.”

12. At the hearing, Dr. Khasigian testified that when he examined respondent, he found that the examination results were all relatively normal. The diagnostic test reports, MRIs and x-rays that he reviewed showed that she had mild arthritis, mild stenosis, and mild degenerative disc disease that were consistent with her age and weight. After conducting the IME and reviewing her diagnostic test reports, MRIs and x-rays, he found no objective evidence to support that she was substantially incapacitated from performing the usual duties of a Customer Service Specialist for FTB.

Respondent's Testimony

13. At the hearing, respondent testified that she began working for FTB in 2001. Her back began hurting in 2004. In 2015, she was promoted to the position of Customer Service Specialist in Oakland. Because she lived in Sacramento, she took the vanpool for one and one-half hours every morning and evening. Her new position in Oakland required her to sit for significant periods of time, and she was not able to get up and walk around as much as she could when she worked in Sacramento. After five months as a Customer Service Specialist in Oakland, she was in so much pain, she decided to retire.

14. Respondent described her pain as “debilitating,” “excruciating,” and “severe.” She could not take narcotic medications while at work because they made her sleepy. She was off work for two weeks before seeing Dr. Khasigian. She spent that two-week period lying down, so her body was “rested” at the time of the IME. She asserted that Dr. Khasigian could not determine her comfort level or the amount of pain she was experiencing.

Discussion

15. When all the evidence is considered, respondent failed to offer sufficient competent medical evidence to establish that, at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a Customer Service Specialist for FTB. Dr. Khasigian’s opinion that respondent was not substantially incapacitated from performing her usual job duties was persuasive. His IME report was detailed and thorough, and his testimony at hearing was comprehensive. The results of his physical examination and his review of respondent’s medical records supported his opinion.

16. The burden was on respondent to offer sufficient competent medical evidence at hearing to support her disability retirement application. She failed to do so. She did not call an expert witness to testify. She offered no medical records to support her application.

17. In sum, because respondent failed to offer sufficient competent medical evidence at hearing to establish that, at the time she applied for disability retirement, she was
permanently and substantially incapacitated from performing the usual duties of a Customer Service Specialist for FTB, her disability retirement application must be denied.

LEGAL CONCLUSIONS

1. By virtue of respondent's employment as a Customer Service Specialist for FTB, she is a state miscellaneous member of CalPERS subject to Government Code section 21151.

2. A CalPERS member who seeks disability retirement bears the burden of proof. (McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051, fn. 5; Gov. Code, § 11504.)

3. To qualify for disability retirement, respondent had to prove that, at the time she applied, she was "incapacitated physically or mentally for the performance of [her] duties." (Gov. Code, § 21156.) 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.

4. In Mansperger v. Public Employes' Retirement System (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the substantial inability of the applicant to perform his usual duties." (Italics in original.) The court in Hosford v. Board of Administration (1978) 77 Cal.App.3d 855, 863, explained that prophylactic restrictions that are 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. In Smith v. City of Napa (2004) 120 Cal.App.4th 194, 207, the court found that discomfort, which may make it difficult for an employee to perform her duties, is not sufficient in itself to establish permanent incapacity. (See also, In re Keck (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.)

5. When all the evidence in this matter is considered in light of the analyses in Mansperger, Hosford, Smith, and Keck, respondent did not establish that her disability retirement application should be granted. She failed to submit sufficient evidence based upon competent medical opinion that, at the time she applied for disability retirement, she was permanently and substantially incapacitated from performing the usual duties of a Customer Service Specialist for FTB. Consequently, her disability retirement application must be denied.
ORDER

The application of respondent Anquenette L. Flemmings for disability retirement is DENIED.

DATED: July 7, 2017

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings