ATTACHMENT A

THE PROPOSED DECISION
In the Matter of the Application for 
Disability Retirement of: 

JENETTA K. THOMPSON, 
Respondent, 

and 

CALIFORNIA DEPARTMENT OF 
CORRECTIONS & REHABILITATION – 
DIVISION OF ADULT PAROLE OPERATIONS, 
Respondent. 

Case No. 2016-1182 
OAH No. 2017040184 

PROPOSED DECISION 

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, 
State of California, heard this matter on October 2, 2017, in San Bernardino, California. 

John Shipley, Attorney, represented petitioner Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees’ Retirement System (CalPERS), State of California. 

Respondent Jenetta K. Thompson represented herself. 

No one appeared for or on behalf of respondent, California Department of Corrections and Rehabilitation – Division of Adult Parole Operations. 

The matter was submitted on October 2, 2017.
ISSUE

When she filed her disability retirement application, was Ms. Thompson permanently disabled or substantially incapacitated from performing the regular and customary duties of a Program Technician due to orthopedic (back, neck, left arm, left knee, and shoulder) conditions?

FACTUAL FINDINGS

Procedural Background


2. Ms. Thompson was employed as a Program Technician by the California Department of Corrections and Rehabilitation, Division of Adult Parole Operations. By virtue of her employment, Ms. Thompson is a state industrial member of CalPERS subject to Government Code section 21150.

3. On July 6, 2015, Ms. Thompson signed and filed an application for disability retirement based on orthopedic (back, neck, left arm, left knee, and shoulder) conditions. CalPERS denied her application for disability retirement and notified her of that decision by letter dated August 25, 2016.

4. By letter dated September 19, 2016, Ms. Thompson timely appealed CalPERS’s decision to deny her application for disability retirement. This hearing followed.

The Usual Duties of a Program Technician

5. Three documents describing the usual duties required of a Program Technician were received in evidence. One of those documents, entitled “Program Technician Essential Functions,” described the physical requirements of the position.

6. A Program Technician must be able to perform all the critical physical and mental tasks listed in the three documents. The required tasks relevant to this matter, based on the testimony and reports of the medical expert, were: must be able to work 40 hours per week and over 40 hours per week in emergency situations; communicate effectively both verbally and in writing; mental capacity to be aware and alert at all times; data entry and typing; perform mathematic equations; answer and respond to telephone calls; process incoming and outgoing mail; file documents; follow oral and written instructions; read and decipher handwritten documents; lift and carry items such as mail bags, binders that may weigh up to 20 pounds; and operate various office machines such as computer, copier, telephone, fax machine, calculator and dictaphone.
Testimony of Robert J. Kolesnik, M.D.

7. CalPERS retained Robert J. Kolesnik, M.D., to examine Ms. Thompson to determine whether she could perform the duties of a Program Technician. Dr. Kolesnik is Board Certified in Orthopedic Surgery. He is licensed as a medical doctor in California and certified as eligible to conduct independent medical examinations for CalPERS. He has conducted about 10 to 15 independent medical evaluations for CalPERS to determine whether an employee was substantially incapacitated from performing his/her duties. Additionally, he has performed qualified medical evaluations for worker’s compensation claims.

8. Dr. Kolesnik received a copy of a letter dated June 17, 2016, from CalPERS regarding the July 15, 2016, appointment for Ms. Thompson to see Dr. Kolesnik for an independent medical examination regarding her disability application. After receiving this letter, Dr. Kolesnik reviewed the medical qualifications for disability retirement, as well as conducted a cursory review of the medical records related to Ms. Thompson prior to her physical examination. Dr. Kolesnik testified that he conducted a more thorough review of Ms. Thompson’s medical records after her physical examination and before completing his report. On July 15, 2016, Dr. Kolesnik conducted an independent medical evaluation of Ms. Thompson. He interviewed Ms. Thompson regarding her history of injury, mechanism of injury, current complaints, activities of daily living, past medical history, and employment history. Ms. Thompson informed Dr. Kolesnik that her primary complaints were pain in the neck, left arm, lower back, left elbow, left shoulder, and left wrist. As part of his assessment of Ms. Thompson, Dr. Kolesnik reviewed one of the three documents related to the job duties of a Program Technician, as well as medical records for Ms. Thompson provided by CalPERS. He also conducted a physical examination and provided his diagnostic impressions of Ms. Thompson. He concluded that Ms. Thompson suffered from chronic cervical strain, cervical osteoarthritis, left shoulder strain/sprain with calcific rotator cuff tendinitis and acromioclavicular arthritis, left carpal tunnel syndrome, status post release, chondromalacia of the left scaphoid and left radius at the radiocarpal joint, status post arthroscopic chondroplasty, synovectomy, and debridement of triangular fibrocartilage complex, chronic lumbosacral strain, and left knee strain/sprain with osteoarthritis. Dr. Kolesnik summarized his findings in his report dated July 15, 2016.

Dr. Kolesnik performed a physical examination by observing various areas of Ms. Thompson’s body, palpating them, percussing the nerves, testing her reflexes and motor strength, and performing range of motion exercises. Based on his physical exam of Ms. Thompson, Dr. Kolesnik noted that Ms. Thompson had diffuse tenderness in the back of her neck and her left shoulder when he put his hand on her head and pushed downward. She also had diffuse pain in her shoulders with all motions and showed a positive test for the Neer sign and supraspinatus test on the left shoulder. Dr. Kolesnik explained that these positive tests indicated that Ms. Thompson has tendonitis of the rotator cuff tendon. He also noted that she had no atrophy or deformity of her shoulders. Dr. Kolesnik noted that Ms. Thompson had diffuse lumbar pain with all motions, but found normal alignment of the spine. Dr. Kolesnik noted no abnormalities, atrophy or deformities in Ms. Thompson’s
upper arms and elbows and testified that they were normal. His evaluation of her forearms showed that she had normal range of motion and no atrophy. He stated that his test for carpal tunnel was negative. Dr. Kolesnik's evaluation of Ms. Thompson's hands included the measurement of strength using a dynamometer. Dr. Kolesnik noted that Ms. Thompson had such poor measurements on her left hand showing that she had little to no ability to grip. However, he stated that he believed that Ms. Thompson was providing only poor effort because if a person had that poor of strength in the hand, you would expect to see a significant amount of atrophy in the hand and forearm when in fact he saw no atrophy in her left hand and her left forearm was larger than her right forearm. Accordingly, Dr. Kolesnik opined that Ms. Thompson was simply not providing the maximum effort of strength as he requested.

Dr. Kolesnik also examined Ms. Thompson's lumbar spine with a visual inspection, palpation and testing of range of motion. Dr. Kolesnik stated that he found no abnormalities in her lumbar spine. Dr. Kolesnik also evaluated her lower extremities and noted that she had a scar on her right thigh from a dog bite, but had no atrophy on her thighs, normal range of motion with no pain in her hips, and found no abnormalities in her lower extremities. Dr. Kolesnik also examined Ms. Thompson's knees by visual inspection, palpation, and testing the ligaments and range of motion. Dr. Kolesnik stated that she complained that her left knee was "popping out of place" intermittently and she manipulates the knee cap to "pop it back into place." Dr. Kolesnik testified that he found nothing in his physical examination or review of records that would explain the knee cap "popping out." Dr. Kolesnik also evaluated her calves, ankles, and feet, as well as her walking gait, motor strength, and reflexes. Dr. Kolesnik found no abnormalities of her lower extremities. He noted that Ms. Thompson complained of pain with toe to heel walking.

9. Dr. Kolesnik reviewed Ms. Thompson's medical records and notes. He stated that he reviewed diagnostic studies conducted on Ms. Thompson, including an MRI of her left knee conducted on September 3, 2013, an MRI of her cervical spine conducted on July 15, 2014, x-rays of her cervical spine and left shoulder conducted on June 16, 2015, and an MRI of her cervical spine conducted on July 15, 2014. Dr. Kolesnik stated that the MRI of the left knee showed that she had early arthritis of her left knee cap, but otherwise normal findings. The x-ray of the cervical spine showed some degenerative changes in the disc spaces in her cervical spine, and the x-ray of her left shoulder showed some calcification in her shoulder.

10. Dr. Kolesnik testified that after consideration of his physical examination findings, his review of medical records and diagnostic tests, as well as his review of the requirements of the position of Program Technician, there were no duties of a Program Technician that Ms. Thompson would be unable to perform. Dr. Kolesnik also answered specific questions posed by CalPERS in his report regarding his assessment of Ms. Thompson. Dr. Kolesnik's report had the following three answers to those questions:
1. Based on my objective findings, there are no specific duties of a Program Technician II that the patient is unable to perform.

2. It is my professional opinion that the patient is not presently and substantially incapacitated for the performance of her duties as a Program Technician II, from an orthopedic standpoint.

3. She cooperated with the examination and did put forth her best effort, except in the performance of the Jamar grip strength measurements of the left hand. There was significant exaggeration of complaints.

11. Dr. Kolesnik testified that while he only reviewed one of the three documents regarding the duties of a Program Technician prior to completing his independent medical evaluation of Ms. Thompson, his review of all three documents on the day of the hearing did not change his opinion regarding her ability to perform all of the duties listed on all three documents.

12. On August 5, 2016, CalPERS sent Dr. Kolesnik a letter requesting clarification of his report findings for Ms. Thompson. Specifically, the letter noted that Dr. Kolesnik had some positive findings in his physical examination of Ms. Thompson and asked for clarification of why he found that she was not substantially incapacitated to perform the duties of a Program Technician. Dr. Kolesnik handwrote his answer to that question on August 9, 2016, follows:

None of her conditions/diagnoses preclude her from performing gripping, fine manipulation, computer use/mouse use and lifting/carrying up to 20 pounds. There is no atrophy of her left arm and no neurologic findings. Because of these physical examination findings, she is not substantially incapacitated.

13. On cross-examination Dr. Kolesnik stated that Ms. Thompson did not provide him with information regarding her long-term use of prednisone during his interview of her. He stated that the long-term use of prednisone can have a number of detrimental effects on the body. However, he stated that even with the knowledge that Ms. Thompson had been using prednisone for a long term, his opinion regarding her ability to perform the duties of a Program Technician remained the same.

14. Ms. Thompson is 55 years old and began working as a Program Technician at the California Department of Corrections & Rehabilitation, Division of Adult Parole Operations, on October 1, 1991. She stated that the duties of her job include dictation of
probation violation reports, filing, typing, faxing, shredding, and handling of incoming and outgoing mail. Ms. Thompson currently works in this same position and stated that she has been working on “modified duty” in the position since November 2, 2016.

15. Ms. Thompson stated that she filed her disability retirement application in September 2015 because she had been sent home from work by her parole administrator on three separate occasions because she could not perform her duties. Specifically, the first occasion she was sent home was in April 2014, the second occasion was three months later in July 2014, and the final occasion she was sent home was on August 5, 2015. After being sent home on August 5, 2015, for failure to be able to perform her job she filed application for disability retirement. Despite her testimony that she was working in 2014 and 2015 in her position, Ms. Thompson later stated that her last day of work was March 31, 2013, and she did not work for three years until her parole administrator contacted her in October 2016 asking her to return to work. According to Ms. Thompson, she returned to work on November 2, 2016, and has been working on “modified duty” since that date. Regardless of this discrepancy, Ms. Thompson testified that she is currently working in the same position for which she was hired in 1991 as a Program Technician, but does so on “modified duty” and does so in constant pain.

16. Ms. Thompson testified that she sustained a work-related injury in 2005 that resulted in her health beginning to deteriorate. Specifically, she claimed that in 2005 she was exposed to mold and rat droppings causing her to develop bronchitis and asthma. She stated that she was again exposed in 2012 to dust mites and mold causing her significant problems. As a result of the bronchitis and asthma, Ms. Thompson began taking prednisone to treat those conditions and has been taking prednisone ever since. She claimed that the long-term use of prednisone has caused her cartilage and bone to break down and arthritis to develop. Ms. Thompson stated that as a result of her prednisone use she was sometimes unable to walk because of the pain in her left leg, left arm and shoulder. Ms. Thompson stated that she sometimes gets “outbreaks” all over her body as a result of her exposure to dust mites, mold and rat droppings and must take prednisone for treatment of those conditions. She also stated that she has taken prednisone consistently since 2005. Ms. Thompson also stated that she suffered an automobile accident in December 2012 causing injury to her back.

17. Ms. Thompson testified that as long as she can continue to work, she will do so. However, she is currently working in pain and as a result takes medications to work. Those medications make her sleepy and cause her to have blurred vision.

Ms. Thompson’s Documentary Evidence

18. Ms. Thompson provided ten documents received into evidence. Specifically, she provided a document from Kaiser Permanente showing the medications she currently takes, as well as results from environmental allergy testing. The second document she provided was a receipt for her co-pay for two different visits to doctors at Kaiser Permanente on July 6, 2017, and July 19, 2017. Ms. Thompson testified that these were for urgent care visits as a result of exposure to dust mites at work on those dates. The third document she
provided was a “work status report” from Dr. Albert Carrasco stating a diagnosis of “rhinitis, urticarial, and cough” (commonly known as nasal congestion, hives and cough) with onset on July 18, 2017, and that “[t]his patient was off work from 7/19/2017 through 7/20/2017,” and that “[t]he patient was evaluated and deemed able to return to work at full capacity on 7/21/2017.” The fourth document was from a Kaiser Permanente pharmacy showing the name, dosages, uses and side effects for three medications Ms. Thompson stated she was taking. Those medications were diphenhydramine, prednisone, and famotidine. Ms. Thompson provided this document to show that she was taking prednisone.

The fifth document provided was a document from Ms. Thompson’s primary care provider Dr. John Sungjin, of Kaiser Permanente, showing that he prescribes prednisone to Ms. Thompson. The sixth document provided was an “After Visit Summary” from Dr. Albert Carrosco from a patient visit on July 19, 2017, where the health problems reviewed were nasal congestion, hives and cough. The document also showed that Ms. Thompson is taking prednisone. Ms. Thompson testified that she provided the sixth document to show that she suffers from hives as a result of “being exposed to different things at work.” The seventh document was obtained by Ms. Thompson from her pharmacist and shows the long-term and short-term side effects of prednisone. The eighth document Ms. Thompson provided was obtained from her pharmacist and showed that she is taking Ventolin, which is a brand name for albuterol, which, like prednisone, is also a steroid. Ms. Thompson provided this document to show that she is taking another steroid in addition to prednisone. The ninth document was also obtained by Ms. Thompson from her pharmacist and showed the long-term and short-term side effects of prednisone. The final document was a “work status report” from Dr. Syed Ahmed of Kaiser Permanente urgent care. The document showed that Ms. Thompson was diagnosed with an “allergic reaction” and placed off work “from 8/1/2017 through 8/2/2017.” Ms. Thompson stated that she provided this document to show that she had an “outbreak” from being exposed to dust mites while she was at work and to show that she was prescribed prednisone, although the document does not show that prednisone was prescribed during this visit.

LEGAL CONCLUSIONS

Burden of Proof

1. Ms. Thompson has the burden of proof to establish that CalPERS’s determination that she is not eligible for disability retirement is incorrect and that she is substantially incapacitated from performance of her duties as a Program Technician. (Evid. Code, § 500.) Ms. Thompson did not meet her burden to show that she was substantially incapacitated from the performance of her job duties at the time she filed her application on July 6, 2015.

2. The Public Employees’ Retirement Law (Retirement Law) governs disability retirement and reinstatements and grants sole jurisdiction to CalPERS to make such determinations. (See Gov. Code, §§ 20026, 20125, 21154, 21156, 21190, 21192 and 21193.)
3. Government Code section 20026 provides in part:

"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. Government Code section 20382 provides in part:

"State industrial member" includes all state employees... employed in the state prisons or facilities of the Department of Corrections...

Except as expressly otherwise provided, the provisions of this part applicable to state miscellaneous members apply to state industrial members...

5. Government Code section 21150, subdivision (a), provides:

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, unless the person has elected to become subject to Section 21076, 21076.5, or 21077.

6. Government Code section 21152 provides:

Application to the board for retirement of a member for disability may be made by:

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

(b) The university if the member is an employee of the university.

(c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.

(d) The member or any person in his or her behalf.
7. Government Code section 21154 provides in part:

The application shall be made only (a) while the member is in state service. On receipt of an application for disability retirement of a member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty.

8. Government Code section 21156 provides in part:

(a)(1) If the medical examination and other available information show that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability.

(2) In determining whether a member is eligible to retire for disability, the board shall make a determination on the basis of competent medical opinion.

Case Law Defining Disability Retirement


Evaluation

10. Ms. Thompson failed to meet her burden to prove that she is substantially incapacitated to perform her usual job duties, and she failed to prove that she is eligible for a disability retirement. This conclusion is based upon Dr. Kolesnik’s opinion after performing an independent examination of Ms. Thompson and reviewing medical records provided to him. Dr. Kolesnik’s testimony was credible and forthright. He provided objective observations to substantiate his conclusions that Ms. Thompson did not put forth her best effort during the physical examination of her left hand and that Ms. Thompson provided symptom magnification and exaggeration of her complaints of the left hand. Dr. Kolesnik provided objective findings that Ms. Thompson’s orthopedic complaints and diagnoses did not render her substantially incapacitated to perform the duties of her position as a Program Technician. Furthermore, Ms. Thompson failed to provide direct medical evidence to contradict Dr. Kolesnik’s findings that there is no medical evidence to establish that she is incapable of performing her required job duties. While Ms. Thompson may experience some pain as a result of her ailments, which she claims arise from her prednisone use, the evidence provided is insufficient to establish that Ms. Thompson was substantially incapacitated from performing her usual job duties at the time of her application for disability.
Cause Exists to Deny Ms. Thompson's Application

11. Cause exists to conclude that Ms. Thompson is not permanently disabled or substantially incapacitated from the performance of her usual and customary duties as a Program Technician, the position in which she currently works. As such, she does not qualify for a disability retirement and her application is denied.

ORDER

CalPERS's determination that Jenetta K. Thompson, was not permanently disabled or substantially incapacitated from the performance of her usual and customary duties as a Program Technician as of the date of her application for disability is affirmed.

DATED: October 31, 2017

[Signature]

DEBRA D. NYE-PERKINS
Administrative Law Judge
Office of Administrative Hearings