ATTACHMENT A

THE PROPOSED DECISION
PROPOSED DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 20, 2018, in San Bernardino, California.

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

Respondent Jameka M. Johnson represented herself.

No one appeared for or on behalf of respondent, Department of State Hospitals - Patton.

The matter was submitted on June 20, 2018.

ISSUE

Was Ms. Johnson permanently disabled or substantially incapacitated from performing the regular and customary duties of a Food Service Technician I due to
orthopedic (lumbar spine and left shoulder) conditions at the time she filed her application for a disability retirement?

FACTUAL FINDINGS

Procedural Background


2. Ms. Johnson was employed as a Food Service Technician I by the Patton State Hospital. By virtue of her employment, Ms. Johnson is a state miscellaneous member of CalPERS subject to Government Code section 21150.

3. On March 9, 2017, Ms. Johnson signed and filed an application for disability retirement based on orthopedic (lower back and left shoulder) conditions. CalPERS denied her application for disability retirement and notified her of that decision by letter dated September 27, 2017.

4. By letter dated October 9, 2017, Ms. Johnson timely appealed CalPERS's decision to deny her application for disability retirement. This hearing followed.

The Usual Duties of a Food Service Technician I

5. Two documents describing the usual duties required of a Food Service Technician I were received in evidence. Both of those documents, one entitled “Duty Statement” for the job title of “Food Service Technician I, Presentation/Patient Service,” and the other titled “Physical Requirements of Position/Occupation Title,” described the physical requirements of the position.

6. A Food Service Technician I must be able to perform all the critical physical and mental tasks listed in the two documents. The “major tasks, duties, and responsibilities” are described as “To serve or assist with the preparation of food and beverages, to clean and maintain food service equipment, utensils and work areas as required, to instruct and to work with helpers from the client/patient population.” The physical requirements of the position include: standing and walking frequently for three to six hours, squatting, bending, twisting, reaching, pushing, pulling, grasping, constant fine manipulation, and lifting and carrying up to 75 pounds.

Testimony of Nelson Cooper

7. Nelson Cooper is an investigator for CalPERS, a position he has held for the past 18 months. Mr. Cooper has 14 years of collective experience in investigations involving worker's compensation and other issues. In his position as an investigator for CalPERS, Mr.
Cooper is responsible for validating disability claims provided to him by his supervisor. As part of his duties, he obtains a photograph of the person whom he is investigating from the Department of Motor Vehicles and thereafter conducts undercover surveillance of the person, including monitoring the person's social media accounts. Mr. Cooper was assigned to conduct an investigation of Ms. Johnson in order to validate her disability claims. As part of his investigation of Ms. Johnson, Mr. Cooper and his colleagues conducted surveillance of Ms. Johnson’s home on four days in May 2017 and two days in August 2017 for a total of 34.5 hours of surveillance. Additionally, Mr. Cooper monitored Ms. Johnson’s social media accounts on Facebook and Instagram from which he obtained 20 different video clips of Ms. Johnson performing various tasks in a gym. Mr. Cooper testified about his observations of Ms. Johnson during his investigation, and he summarized his investigation of Ms. Johnson in a report, which was received into evidence.

8. Mr. Cooper testified that during the 34.5 hours of surveillance of Ms. Johnson at her residence, he and his colleagues were never able to observe Ms. Johnson during those attempts. However, through Mr. Cooper’s internet research he was able to obtain 20 different video clips posted by Ms. Johnson onto her social media accounts showing Ms. Johnson performing various exercises at a gym. Mr. Cooper stated that all of the videos he collected from Ms. Johnson’s social media sites had either the date of posting the video, which could be different than the date of taping, or Ms. Johnson announced on the video the date of the recording. Mr. Cooper testified that all of the video recordings he collected were recorded after the date of Ms. Johnson’s injury of July 13, 2015. The videos showed Ms. Johnson jumping rope, riding a stationary bicycle, lifting weights, and using a lateral pull-down weight machine showing her using her shoulders with no problems.

Testimony of Robert J. Kolesnik, M.D.

9. CalPERS retained Robert J. Kolesnik, M.D., to conduct an independent medical examination of Ms. Johnson to determine whether she could perform the duties of a Food Service Technician I. 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 conducts 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 workers’ compensation claims.

10. Dr. Kolesnik received a letter dated July 21, 2017, from CalPERS regarding his appointment to provide an independent medical examination of Ms. Johnson 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. Johnson prior to her physical examination. Dr. Kolesnik testified that he conducted a more thorough review of Ms. Johnson’s medical records after her physical examination and before completing his report. On September 6, 2017, Dr. Kolesnik conducted an independent medical evaluation of Ms. Johnson. He interviewed Ms. Johnson regarding her history of injury, mechanism of injury, current complaints, activities of daily
living, past medical history, and employment history. Ms. Johnson informed Dr. Kolesnik that her primary complaints were pain in the left shoulder and lower back as the result of an injury she sustained on July 13, 2015, while dumping a large chest full of ice and water into a sink. Ms. Johnson informed Dr. Kolesnik she had intermittent pain affecting the entirety of her left shoulder with any motion and lifting activities at all. Ms. Johnson informed Dr. Kolesnik that her left shoulder was sensitive to touch and if someone touched her it was like they were "socking" her. Ms. Johnson informed Dr. Kolesnik that the pain would keep her awake at night. As part of his assessment of Ms. Johnson, Dr. Kolesnik reviewed one of the two documents related to the job duties of a Food Service Technician I, as well as medical records for Ms. Johnson provided by CalPERS. He also conducted a physical examination and provided his diagnostic impressions of Ms. Johnson. He concluded that Ms. Johnson suffered from left shoulder sprain/strain, mild left shoulder subacromial bursitis, mild left shoulder supraspinatus tendinitis, and lumbosacral strain. Dr. Kolesnik summarized his findings in his report dated September 6, 2017.

Dr. Kolesnik performed a physical examination by observing various areas of Ms. Johnson'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. Johnson, Dr. Kolesnik noted that Ms. Johnson complained of a pulling sensation in her neck with all motions. Dr. Kolesnik observed that Ms. Johnson had mild tenderness to the front of her left shoulder when he touched it. Dr. Kolesnik noted that Ms. Johnson had no atrophy or deformity of her shoulders, but she complained of pain with all motions of her shoulder and pain in her armpit. Dr. Kolesnik noted that Ms. Johnson had minimally decreased loss of motion of her shoulders by five degrees. He stated that his test for rotator cuff range of motion showed that she had a slightly diminished range of motion, but that this test is dependent upon the patient giving a complete effort.

Dr. Kolesnik's evaluation of Ms. Johnson's hands included the measurement of strength using a dynamometer. Dr. Kolesnik noted that Ms. Johnson had markedly decreased grip strength in her left hand despite showing no atrophy or deformity in her hands or arms. However, he stated that he believed that Ms. Johnson was providing only poor effort because if a person had that poor of strength in the hand as Ms. Johnson demonstrated, you would expect to see a significant amount of atrophy in the hand and forearm but he saw none. He stated his judgment that he believed she was providing poor effort was based on his 33 years of experience observing thousands of patients. Accordingly, Dr. Kolesnik opined that Ms. Johnson was simply not providing the maximum effort of strength as he requested.

Dr. Kolesnik also examined Ms. Johnson'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, but that Ms. Johnson reported diffuse pain in her low back with all motions. Dr. Kolesnik also evaluated her lower extremities and noted that she 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 noted that Ms. Johnson reported mild and diffuse pain in her lumbar spine with all motions of both hips, but denied any hip pain with hip range of motion. Dr. Kolesnik also examined Ms. Johnson's knees by visual
inspection, palpation, and testing the ligaments and range of motion. Dr. Kolesnik reported that Ms. Johnson had no abnormal findings in her knees, but that she notes mild and diffuse lumbar pain when walking. He noted she had a normal gait, with normal cadence and stride and was able to toe to heel walk without difficulty or pain.

11. Dr. Kolesnik reviewed Ms. Johnson's medical records and notes. He stated that he reviewed diagnostic studies conducted on Ms. Johnson, including an MRI of her lumbar spine conducted on November 16, 2015, and an MRI of her left shoulder conducted on November 16, 2015. Dr. Kolesnik stated that the MRI of the left shoulder showed that she had mild bursitis and mild tendinitis, but otherwise normal findings. He also stated that the MRI of the lumbar spine was entirely normal with no pathology found.

12. Dr. Kolesnik also reviewed the videos taken from Ms. Johnson's social media sites. He testified that his observations from reviewing those videos showed that Ms. Johnson's abilities to perform those exercises did not match her complaints of pain in her left shoulder or lumbar spine.

13. 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 Food Service Technician I, there were no duties of a Food Service Technician I that Ms. Johnson would be unable to perform. Dr. Kolesnik also answered specific questions posed by CalPERS in his report regarding his assessment of Ms. Johnson. Dr. Kolesnik's report had the following three answers to those questions:

1. Based on my objective findings as documented in this report, there are no specific job duties that the member is unable to perform because of the above listed physical conditions [of left shoulder sprain/strain; mild left shoulder subacromial bursitis; mild left shoulder supraspinatus tendinitis; and lumbosacral strain]. I reviewed multiple surveillance videos, dating from March 25, 2016, through June 21, 2017. These served to confirm my medical opinion that there are no specific job duties that she is unable to perform.

2. In my professional opinion she is not presently and substantially incapacitated for the performance of her duties. Her examination today reveals no atrophy about the left shoulder, and review of the surveillance videos show her working out at the gym, with stressful use of the left shoulder and the left upper extremity, in no apparent pain. Additionally, the MRI findings of the left shoulder demonstrate only mild subacromial bursitis and mild supraspinatus tendinitis. In regard to her lumbar spine, again, there is no atrophy in the lower extremities and there
are no focal neurologic deficits. As noted in the surveillance videos, she is able to jump rope with no difficulty or pain. The MRI study of the lumbar spine was entirely normal, with no disc herniations, neural foraminal stenosis or nerve root impingement.

3. The patient cooperated with the exam, but she did not put forth her best effort in the performance of Jamar grip measurements of the left upper extremity.

14. Dr. Kolesnik testified that while he only reviewed one of the two documents regarding the duties of a Food Service Technician I prior to completing his independent medical evaluation of Ms. Johnson, his review of both the documents on the day of the hearing did not change his opinion regarding her ability to perform all of the duties listed on all two documents. Additionally, Dr. Kolesnik testified that on the day of her examination, Ms. Johnson provided him with specific information regarding her job duties as a Food Service Technician I and Dr. Kolesnik had a good understanding of Ms. Johnson’s job duties at the time of her examination.

15. On cross-examination Dr. Kolesnik stated that Ms. Johnson’s injury was in 2015 and his examination of her was in 2017 and during those two years it is very possible that Ms. Johnson’s injuries had improved such that she was able to perform the exercises as shown in the videos taken from her social media sites without pain. However, Dr. Kolesnik emphasized that her improvement did not meet the standards necessary for a disability retirement.

Testimony of Jameka M. Johnson

16. Ms. Johnson is 32 years old and began working as a Food Service Technician I at the California State Hospital - Patton, in June 2006. She stated that while working in the kitchen of Patton State Hospital washing dishes on July 13, 2015, she lifted a heavy ice chest and felt a sharp pain in her lower back and left shoulder. She immediately reported her injury to her supervisor who sent her to the clinic of the hospital and she was thereafter referred to a physician for evaluation for worker’s compensation reasons. Ms. Johnson stopped working in her position as a Food Service Technician I on July 13, 2015, but she is still technically employed in the position. After being evaluated by a physician for her injuries, on November 1, 2016, Ms. Johnson was given a restriction from lifting over 20 pounds.

17. Ms. Johnson met with her supervisors on November 18, 2016, to discuss her job. Ms. Johnson stated that after informing her supervisors that she was restricted from lifting over 20 pounds, her supervisors informed her that they could not accommodate her work restrictions. Ms. Johnson testified that her supervisors asked her to write a memo on November 18, 2016, summarizing her work restrictions. She did so on November 18, 2016, and that memo was received into evidence. Ms. Johnson stated that she filed her disability
retirement application in March 9, 2017, because her supervisors advised her to do so because they could not accommodate her work restrictions.

18. Ms. Johnson testified that after sustaining her injury in July 2015 she began receiving physical therapy and had great improvement of her injuries from the physical therapy. She stated that as a result of the physical therapy she is able to lift weights\(^1\) and do all the movements seen on the videos taken from her social media accounts. Ms. Johnson testified that her goal was to get back to her job, but that she has a "permanent restriction" to not lift more than 20 pounds and as a result cannot perform her job.

LEGAL CONCLUSIONS

Burden of Proof

1. Ms. Johnson 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 Food Service Technician I. (Evid. Code, § 500.) Ms. Johnson 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 March 9, 2017.

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.)

Applicable Statutes Regarding Applications for Disability Retirement

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 20380 provides:

"State miscellaneous member" includes all members employed by the state and university, except National Guard, industrial, patrol, state peace officer/firefighter, and state safety members.

\(^1\) No evidence regarding how much weight Ms. Johnson lifted as depicted in her social media videos was introduced.
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 to the satisfaction of the board . . . 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 . . . .
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

9. "Incapacitated for the performance of duty," means the "substantial inability of the applicant to perform [her] usual duties." (Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 876.) When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement. (Mansperger, supra, 6 Cal.App.3d, at pp. 886-887.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (Hosford v. Bd. of Administration (1978) 77 Cal.App.3d 854.) Further, respondent must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (Id. at p. 863.)

Evaluation

10. Ms. Johnson failed to prove by a preponderance of the evidence that she is substantially incapacitated to perform her usual job duties, and is therefore ineligible for a disability retirement. This conclusion is based upon Dr. Kolesnik's opinion after performing an independent examination of Ms. Johnson 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. Johnson did not put forth her best effort during the physical examination of her left extremities and that Ms. Johnson provided symptom magnification and exaggeration of her complaints of the left shoulder and lumbar spine which was contradicted by the videos she posted on her social media accounts.

Dr. Kolesnik provided objective findings that Ms. Johnson's orthopedic complaints and diagnoses did not render her substantially incapacitated to perform the duties of her position as a Food Service Technician I. Furthermore, Ms. Johnson failed to provide direct medical evidence to contradict Dr. Kolesnik's opinions that there is no medical evidence to establish that she is incapable of performing her required job duties. While Ms. Johnson may experience some pain as a result of her ailments, pain in performance of the usual and customary duties of one's job does not qualify them for a disability retirement under applicable law. The evidence provided is insufficient to establish that she was substantially incapacitated from performing her usual job duties at the time of her application for disability on March 9, 2017. While Ms. Johnson claims her injuries have improved substantially since 2015 after performing physical therapy, this information further supports a finding that she is not substantially incapacitated to perform her duties as a Food Service Technician I.
Cause Exists to Deny Ms. Johnson's Application

11. Cause exists to conclude that Ms. Johnson is not permanently disabled or substantially incapacitated from the performance of her usual and customary duties as a Food Service Technician I. As such, she does not qualify for a disability retirement and her application is denied.

ORDER

CalPERS's determination that Jameka M. Johnson was not permanently disabled or substantially incapacitated from the performance of her usual and customary duties as a Food Service Technician I as of the date of her application for disability is affirmed.

DATED: July 11, 2018

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