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:

CHAU V. NGUYEN,

and

DEPARTMENT OF DEVELOPMENTAL SERVICES, FAIRVIEW STATE HOSPITAL,

Respondents.

Case No. 2017-1064

OAH No. 2018020952

PROPOSED DECISION

This matter was heard by Laurie R. Pearlman, Administrative Law Judge with the Office of Administrative Hearings, on October 1, 2018, in Orange, California. The California Public Employees’ Retirement System (CalPERS) was represented by Rory J. Coffey, Senior Staff Attorney. Respondent Chau V. Nguyen (Respondent) was present and represented himself. No appearance was made by, or on behalf of, Respondent Department of Developmental Services, Fairview State Hospital (Respondent Fairview). Respondent Fairview had adequate and proper notice of the hearing and is deemed to be in default.

Oral and documentary evidence was received. The record was left open until October 15, 2018, for CalPERS to file a Memorandum of Points and Authorities in Support of CalPERS’ Determination (Memorandum) and for Respondent to file a response thereto. The Memorandum was timely filed and was marked as Exhibit 12 for identification. No response was submitted by Respondent. The record was closed, and the matter was submitted for decision on October 15, 2018.

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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
FILED November 13, 2018
FACTUAL FINDINGS

1. Anthony Suine, Chief of the Benefit Services Division of CalPERS, filed the Statement of Issues while acting in his official capacity.

2. Respondent was employed by Respondent Fairview as a Psychiatric Technician. By virtue of his employment, Respondent is a local “miscellaneous” member of CalPERS, subject to Government Code section 21150. He had the minimum service requirements to qualify for retirement. Respondent retired for service effective January 31, 2017, and has been receiving his retirement allowance from that date.

3. On March 8, 2017, Respondent signed an application for disability retirement. In filing the application, he claimed he was disabled on the basis of an orthopedic (right wrist) condition.

4. After review of medical reports, CalPERS determined that Respondent was not substantially incapacitated for performance of his duties as a Psychiatric Technician at the time the application was filed. Therefore, Respondent’s application was denied.

5. In a letter dated August 14, 2017, CalPERS notified Respondent of its determination. In the letter, CalPERS noted that Respondent would continue to receive his service retirement benefits.

6. In a letter dated August 30, 2017, Respondent timely appealed the denial and requested a hearing. In his letter, in addition to the injury to his right wrist, Respondent noted that his nose had been broken in the course of performing his job duties and that he “still suffers from anxiety and nervous breakdown.” (Exhibit 5.) This matter ensued.

7. The issue on appeal is whether, on the basis of an orthopedic condition involving his right wrist, Respondent is substantially incapacitated for performance of his duties as a Psychiatric Technician with Respondent Fairview. Respondent’s "usual duties" in this position include the following: assist developmentally disabled adults in all activities of daily living; provide nursing and behavior management support; report changes; document findings; provide supervision; provide positive intervention and active treatment; perform nursing procedures, such as administering medications and treatments; and develop and implement program plans.

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1 In his application for disability retirement, Respondent did not assert that he was disabled due to a nose injury, anxiety or “nervous breakdown.” Moreover, he failed to present sufficient evidence to establish that any of those conditions rendered him substantially incapacitated from the performance of his duties as a Psychiatric Technician at the time he filed for disability retirement.
The evidence presented at the hearing included two reports and testimony from Stephen P. Suzuki, M.D. (orthopedics), and a report from Sameer Gupta, M.D., Q.M.E. (internal medicine).^ 

At a June 26, 2017 examination by Dr. Suzuki, Respondent, then 63 years old, complained of intermittent left shoulder pain and intermittent right wrist pain, without radiculopathy. Dr. Suzuki diagnosed Respondent with: primarily left upper trapezial muscle group strain; cervical strain without radiculopathy with slight decrease in range of motion; and status post-2014 reported right distal radius fracture with residual diminished range of motion, which Dr. Suzuki described as “slightly decreased.” (Exhibit 7, p. 9.) Having reviewed Respondent’s job description, Dr. Suzuki stated that he had insufficient information to determine whether Respondent has substantial incapacity to perform his usual and customary duties on a permanent basis, and would need to review diagnostic tests “to assess the level of objective pathology versus subjective complaints.” (Id., p. 10.) In his report, Dr. Suzuki noted that Respondent had been performing his usual and customary duties at the time of his retirement in January 2017.

On July 18, 2017, Dr. Suzuki issued a supplemental report after he was informed that his evaluation must be confined to records that had been sent to him previously for review. He stated that, “based on information sent to me and my examination, [Respondent] does not have sufficient orthopedic findings to indicate that he is incapacitated from performing his usual and customary duties.” Dr. Suzuki noted that while Respondent “did sustain a right distal radius fracture, it did occur in 2014 and he obviously was able to continue working for three years following the injury.” (Exhibit 8.)

Dr. Suzuki testified credibly at the administrative hearing and reiterated the findings he stated in his June 26, 2017 and July 18, 2017 reports. Based on the physical examination he performed, and his review of Respondent’s history and medical records, Dr. Suzuki opined that Respondent does not meet the criteria for a substantial incapacity to perform his usual and customary work duties from an orthopedic standpoint.

Respondent testified at the hearing and was respectful of the proceedings. His right hand was injured at work in February 2014. Respondent received physical therapy and two cortisone injections, which afforded him significant relief, and he subsequently returned to his job at Respondent Fairview. He has intermittent right wrist pain, as well as intermittent neck and shoulder pain on the left side.

The report from Dr. Gupta was admitted into evidence as administrative hearsay. The term “administrative hearsay” is a shorthand reference to the provisions of Government Code section 11513, subdivision (d), to the effect that hearsay evidence that is objected to, and is not otherwise admissible, may be used to supplement or explain other evidence but may not, by itself, support a finding. It may be combined with other evidence to provide substantial evidence sufficient to support a finding. (Komizu v. Gourley (2002) 103 Cal.App.4th 1001.)
13. On May 17, 2018, Dr. Gupta performed a medical re-evaluation in connection with Respondent’s workers’ compensation claim. In his report, Dr. Gupta noted that Respondent complains of intermittent pain in his right hand, which is alleviated by resting and wearing a brace. Regarding work restrictions, Dr. Gupta did not impose any, stating that Respondent is currently retired. (Exhibit A.)

14. Respondent failed to present sufficient evidence to establish he was substantially incapacitated from performing his duties as a Psychiatric Technician at the time of his application for disability retirement. Despite a restricted range of motion in his right wrist and complaints of intermittent pain, the evidence presented did not establish that Respondent was unable to perform the usual duties and functions of a Psychiatric Technician for Respondent Fairview at the time of his application. Therefore, Respondent is not eligible for disability retirement benefits.

LEGAL CONCLUSIONS

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327.)

2. Respondent has not established by a preponderance of the evidence that he is entitled to retirement for disability, as set forth in Factual Findings 3 through 14, and Legal Conclusions 3 through 8.

3. Government Code section 21150 provides, in pertinent part:

   Any 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 . . .

4. Government Code section 20026, states, in pertinent 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.

5. “Incapacitated for the performance of duty,” means the “substantial inability of the applicant to perform his usual duties,” as opposed to mere discomfort or difficulty. (Mansperger v. Public Employees’ Retirement System (1970) 6 Cal.App.3d 873, 877; Hosford v. Board of Administration (1978) 77 Cal.App.3d 854.) The increased risk of further injury is not sufficient to establish current incapacity; the disability must exist at the present time. Restrictions which are imposed only because of a risk of future injury are
insufficient to support a finding of disability. (Hosford, supra, 77 Cal.App.3d 854, 862 - 863.)

6. When an applicant can perform customary duties, even though doing so may sometimes be difficult or painful, the applicant does not qualify for a disability retirement. (Harmon v. Board of Retirement (1976) 62 Cal.App.3d 689.)


8. In this case, Respondent asserted in his application that he is disabled on the basis of an orthopedic (right wrist) condition. However, the evidence presented at hearing did not establish that Respondent is substantially incapacitated from performing his usual duties as a Psychiatric Technician for Respondent Fairview.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The appeal of Respondent Chau V. Nguyen, seeking retirement for disability as a local miscellaneous member of CalPERS, is denied.

DATED: November 13, 2018

Dated: November 13, 2018

[Signature]
Laurie Pearlman
Administrative Law Judge
Office of Administrative Hearings