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
FERNANDO M. MALASAN,
Respondent,

and

DEPARTMENT OF STATE HOSPITALS
NAPA

Respondent.

Case No. 2018-0934
OAH No. 2018110171

PROPOSED DECISION

Administrative Law Judge Paul J. Slavit, State of California, Office of Administrative Hearings, heard this matter on March 7, 2019, in Oakland, California.

Senior Attorney Cynthia Rodriguez represented petitioner California Public Employees’ Retirement System.

Respondent Fernando M. Malasan represented himself.

There was no appearance by or on behalf of respondent Department of State Hospitals Napa.

Following the hearing, the record remained open for the submission of a complete copy of a letter dated September 8, 2016, from CalPERS to Dr. Joseph Anthony Matan. The letter was timely filed and received into evidence as Exhibit 12. The record then was closed and the matter submitted on March 13, 2019.
FACTUAL FINDINGS

1. Respondent Fernando M. Malasan was employed by the Department of State Hospitals Napa (hospital) as a Food Service Technician I. By virtue of his employment, respondent is a member of the California Public Employees' Retirement System (CalPERS). On July 13, 2016, respondent signed and submitted to CalPERS an application for disability retirement. Respondent has sufficient service credit to qualify for retirement. On the application form, respondent stated the nature of his disability as “chronic lower back pain.” On November 10, 2016, CalPERS notified respondent that it had denied the application. Thereafter, on December 1, 2016, respondent filed this appeal.

Respondent’s job duties

2. When he last worked, respondent was a Food Service Technician I at respondent hospital. Respondent’s primary responsibilities included food preparation and service; lifting containers of milk, boxes and cans from deliveries; loading onto, and unloading food from carts; walking; and occasionally, climbing a ladder. According to respondent, the job required him to stand for most of the day.

Respondent’s employment and medical history

3. At the time of the hearing, respondent had just turned 50 years old. He apparently started work at Department of State Hospitals Napa in 2000. Respondent has two minor children, and states that he is the sole source of support for his family.

4. Respondent’s testimony at hearing regarding the history of his injuries was abbreviated. Based on his testimony and the medical records submitted, it appears that he first injured his back on June 8, 2015. In that incident, respondent was lifting a tray out of the oven, slipped and fell backwards, hitting his buttocks on a table or counter. He was treated at Kaiser Permanente by Dr. Zilue Tang, who diagnosed a lower back strain, and recommended physical therapy.

5. On April 22, 2016, respondent apparently was transferring containers of milk from a cart to a refrigerator when he felt dizziness and pain in his low back. He finished his shift that day, but later consulted Dr. Tang at Kaiser Permanente. Dr. Tang examined respondent, recommended physical therapy, and ordered work restrictions on lifting, extended standing and walking.

6. Medical records related to respondent, and prepared incident to a workers’ compensation case, indicate that he could anticipate additional physical therapy, or similar therapeutic treatment for a year following his return to work. However, the record does not

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1 The record does not provide the exact date of first employment, and the evidence is contradictory.
indicate whether he did so. Similarly, it appears from the testimony and evidence that respondent is not currently receiving treatment or care for his injury.

7. Respondent testified that he is unable to perform the lifting and carrying duties of his job as a Food Technician I. He states that he would like to return to work, but that respondent hospital told him that it does not have any alternative position to offer him.

Medical opinions

8. Dr. Joseph Anthony Matan, a board certified orthopedic surgeon, testified at the hearing. At the request of CalPERS, Dr. Matan examined respondent on September 27, 2016, and prepared a report on that date. He also prepared a supplemental report dated October 26, 2016; and a further supplemental report on May 1, 2018.

Dr. Matan’s testimony and curriculum vitae established that he has extensive experience as an orthopedic surgeon, and has conducted numerous independent medical examinations for CalPERS disability claims. His testimony in this matter was credible.

9. At the September 27, 2016 examination, Dr. Matan took a history from respondent; reviewed medical records that were provided to him; reviewed respondent’s job description and a description of the physical requirements of his job; and performed a physical examination.

Respondent told Dr. Matan that he had continuing low back pain, which interferes with his sleep. The low back pain radiates up to his neck, and occasionally causes numbness in his back and legs. Upon examination, Dr. Matan found that respondent had full range of motion in his cervical and thoracic spine. There was some tenderness across the low back and into the sacroiliac joint and buttocks.

As part of the examination, Dr. Matan had respondent perform a test whereby he walked on his heels. Respondent had difficulty doing so and staggered. However, Dr. Matan felt that respondent was not fully cooperative during the examination, and had exaggerated his staggering during that test.

Dr. Matan concluded that respondent had chronic lumbosacral strain, and that there were no objective findings to substantiate the need for work restrictions. In his opinion, respondent was not substantially incapacitated for purposes of his work as a Food Technician I. At the time of the IME, however, respondent had just submitted to a QME in connection with his related worker’s compensation claim. Dr. Matan asked to review the QME report if CalPERS required a “more definitive opinion.”
10. Dr. Matan issued two supplemental reports:

On October 26, 2016, in response to an inquiry by CalPERS, he clarified his opinion that respondent is not substantially incapacitated for purposes of his work as a Food Technician I.

On May 1, 2018, at CalPERS’ request, Dr. Matan reviewed the report of the QME performed by Dr. Manijeh Ryan, with supporting records. CalPERS sought Dr. Matan’s opinion whether the QME report would change his opinion concerning respondent’s claimed disability.

The QME was performed, and the report issued, on September 20, 2016. On or about May 1, 2018, Dr. Matan reviewed his own IME report, the QME report of Dr. Ryan, and its accompanying evaluation by physical therapist Dr. Asshin Ryan. Although the QME found respondent to be permanently disabled from his job as a food technician, this did not change Dr. Matan’s opinion. He felt that degenerative changes of the spine which were noted in an MRI could be normal and age-related, and that other studies were normal. He confirmed his opinion that respondent is not substantially incapacitated from work as a food technician.

Other evidence

11. Respondent did not call his treating physicians or other providers as witnesses, nor did he submit any of those doctors’ records or reports. The only medical evidence respondent submitted was the “Panel Qualified Medical Evaluation – Medical Legal Report” by Dr. Manijeh Ryan, which was prepared incident to respondent’s workers’ compensation claim. Dr. Ryan did not testify at the hearing.

CalPERS timely objected to the QME report as hearsay, and it was admitted pursuant to Government Code section 11513, subdivision (d). That section states that “hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.” The medical opinions offered in the QME report are hearsay, and cannot support a finding of disability in this proceeding.

LEGAL CONCLUSIONS

1. A miscellaneous member of CalPERS who becomes “incapacitated for the performance of duty,” and who has sufficient service credit, shall be retired. (Gov. Code, § 21150.) The term “incapacitated for the performance of duty” is defined by the Public Employees’ Retirement Law to mean “disability of permanent or extended and uncertain duration . . . on the basis of competent medical opinion.” (Gov. Code, § 20026.) To determine whether an applicant is “incapacitated for the performance of duty,” the courts look to whether the applicant is substantially disabled from performing his usual duties.

2. The burden of proof is on respondent. (Harmon v. Board of Retirement (1976) 62 Cal.App.3d 689, 691.)

3. To meet his burden, respondent must establish by competent medical evidence that he is incapacitated for the performance of duty within the meaning of Government Code section 21150. Respondent did not meet his burden. Under Government Code section 11513, subdivision (d), the hearsay medical report of Dr. Manijeh Ryan is not sufficient to support a finding that respondent is incapacitated for the performance of duty. Instead, competent evidence—the testimony and reports of Dr. Joseph Anthony Matan—do not establish disability.

ORDER

The application for disability retirement of respondent Fernando M. Malasan is denied.

DATED: April 11, 2018

[Signature]

PAUL J. SLAVIT
Administrative Law Judge
Office of Administrative Hearings