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:

NORMA JORDANA MORENO,
Respondent,

and

CORONA-NORCO UNIFIED SCHOOL
DISTRICT,
Respondent.

Case No. 2018-1005
OAH No. 2019011195

PROPOSED DECISION


Rory J. Coffey, Senior Attorney, represented petitioner Anthony Suine, Chief, Benefit Services Division, California Public Employees’ Retirement System (CalPERS), State of California.

Respondent Norma Jordana Moreno represented herself.


The matter was submitted for decision on May 21, 2019.¹

¹ At petitioner's counsel's request, the record was held open until the following Tuesday, May 21, 2019, to allow him to provide a copy of an appellate court opinion to Ms. Moreno and the Office of Administrative Hearings. However, petitioner's counsel did not
ISSUE

Was Ms. Moreno substantially incapacitated from performing her usual and customary duties as a purchasing director for respondent Corona-Norco Unified School District on the basis of psychological (depression and anxiety) and rheumatology (fibromyalgia) conditions at the time she applied for disability retirement?

SUMMARY

Government Code section 20026 defines a disability for which a CalPERS member may receive disability retirement benefits as a “disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, . . . on the basis of competent medical opinion.” Petitioner asserted that CalPERS’s denial of Ms. Moreno’s disability retirement application should be affirmed because Ms. Moreno’s psychological condition did not substantially incapacitate her from performing her usual and customary duties as a purchasing director and her rheumatological condition did not constitute a disability of a permanent or extended duration as defined by Government Code section 20026. The psychiatrist who examined Ms. Moreno at CalPERS’s request opined that Ms. Moreno suffered from a Depressive Disorder, Not Otherwise Specified with Anxiety, but that she was still able to perform the substantial and material duties of her job from a psychiatric standpoint. The internist/rheumatologist who examined Ms. Moreno at CalPERS’s request diagnosed Ms. Moreno with fibromyalgia when he examined her in May 2018, determined Ms. Moreno was then substantially incapacitated from performing the duties of her occupation as a result of fibromyalgia, but he also opined that her inability to perform such duties was temporary and might not last longer than 12 months if she pursued appropriate pharmacological treatment.

Ms. Moreno asserted that she had remained incapacitated from performing her job duties up through the date of the hearing, but she did not present any medical evidence in support of her contention. Nor did she submit evidence that she had pursued pharmacological treatment that might alleviate her fibromyalgia symptoms. While it appeared that Ms. Moreno may have declined such medication therapy due to concerns about possible side effects, she did not present any evidence that she tried such medications or suffered any side effects that might impair her ability to benefit from such treatment.

Based on the evidence presented, Ms. Moreno failed to prove by a preponderance of the evidence that the duration of her substantial incapacity from performing her job duties at the time she filed her application for disability retirement would be expected to last at least 12 months based on competent medical evidence. CalPERS’s denial of her application is therefore affirmed.

submit anything to the Office of Administrative Hearings after the hearing, and on May 21, 2019, the record was closed.
FACTUAL FINDINGS

Jurisdictional Background

1. Ms. Moreno had been employed by respondent Corona-Norco Unified School District as a Purchasing Director I for four years when she filed her application for disability retirement. By virtue of her employment, Ms. Moreno was a state miscellaneous member of CalPERS under Government Code section 21151. Ms. Moreno last worked on March 7, 2017, and she has not worked since then. She resigned on July 17, 2017.

2. On September 25, 2017, Ms. Moreno signed a Disability Retirement Election Application seeking disability retirement, which CalPERS received on November 13, 2017. In section 3 of that application, Ms. Moreno asserted that her specific disability was “fibromyalgia-w/diagnosed severe depression and anxiety disorder,” and she “went on disability 3-9-17 and continue to be on dr’s note.” She wrote that the disability occurred as follows: “Stress & physical demands make it impossible for me to get thru day or work to standards.” And she described the limitations due to her illness as: “I’m in constant pain that never goes away-the demand just proved too much phys & mentally.” Ms. Moreno also wrote that her illness affected her ability to perform her job because: “[P]erformance was under management standards-my position demands longer days, more mental capacity than non-management, having 3 depts in 2 different cities and 21 employees made it hard to make it thru day.” Ms. Moreno also provided the following additional information on her application (punctuation as in original):

   I tolerate the intense daily pain, but the mental defeat is the worst. I was having to call out, go to dr’s appts, and then put on extended leave by dr. Supervisors pointed out this was affecting my performance. Severe pain in neck, back, hands/feet make it hard to do anything.

3. Ms. Moreno listed her treating physicians in her application as Kaiser Permanente doctors “Suzette Jumamil (Fam)” and “Joanne Kang Rheumatologist.” On April 11, 2018, Dr. Kang signed a Physician’s Report on Disability form which Ms. Moreno submitted to CalPERS in support of her disability retirement application. Dr. Kang’s Physician’s Report on Disability form was received in evidence as administrative hearsay; there was no Physician’s Report on Disability form submitted in evidence that was signed by Dr. Jumamil.

4. The Physician’s Report on Disability form completed by Dr. Kang indicated that Ms. Moreno saw Dr. Kang, a rheumatologist at Kaiser Riverside, for two “total visits,”

   2 The statement of issues erroneously alleged that she signed her application on October 25, 2018.

   3 Neither Dr. Kang nor Dr. Jumamil testified at the hearing.
and Dr. Kang last saw Ms. Moreno on March 22, 2018. Dr. Kang’s examination findings were “Pain, Fibromyalgia, Hand Pain.” Her “Diagnosis 1” was “Fibromyalgia” with “tenderness to palpation diffusely.” Dr. Kang also listed “Anxiety/depression” under Diagnosis 2, with the following note: “Defer to mental health.” Under the “Member Incapacity” heading, Dr. Kang checked the “Yes” box in response to the question: “Is the member currently, substantially incapacitated from performance of the usual duties of the position for their current employer?” Dr. Kang then noted: “Pt states stress of her job causes increased pain. She would benefit from a position which does not cause as much stress, which can increase pain. [N]o physical requirements.” Dr. Kang checked the “No” box in response to the question, “Will the Incapacity be permanent?” Dr. Kang did not check either the “Yes” or “No” box in response to the question: “If not, will the incapacity last longer than twelve months?” Instead of checking either box, Dr. Kang wrote “Not sure” after that question. At the bottom of the form, Dr. Kang wrote the following: “I am not a disability specialist. Please defer to a disability specialist for specifics.”

5. Petitioner notified Ms. Moreno by letter, dated August 21, 2018, that her disability retirement application had been denied. That letter explained that it had been determined that: (1) Ms. Moreno’s fibromyalgia condition did not “meet our duration requirements which is a disability expected to last at least 12 consecutive months or will result in death,” and (2) Ms. Moreno’s depression and anxiety condition “is not disabling.” The letter further stated, “[a]s a result, we find you are not substantially incapacitated from the performance of your job duties as a Purchasing Director I with Corona-Norco Unified School District.”

6. Ms. Moreno timely appealed the denial on September 17, 2018. Petitioner signed the statement of issues in his official capacity on January 30, 2019, and this hearing followed.

Customary Duties and Functions of Purchasing Director I Position

7. Ms. Moreno’s usual and customary duties as a Purchasing Director I were set forth in the CalPERS Physical Requirements of Position/Occupational Title form completed by Ms. Moreno and her employer, as well was in a job description published by Corona-Norco Unified School District. Ms. Moreno also testified about her job duties during the hearing.

8. The CalPERS Physical Requirements of Position/Occupational Title form completed by Ms. Moreno and her employer listed the physical activities required to perform her position, based on the following amounts of time someone in that position may engage in the activities: Never, Occasionally (up to three hours), Frequently (three to six hours), and Constantly (over six hours). According to that form, a purchasing director “never” runs, crawls, kneels, power grasps, lifts or carries items weighing over 76 pounds, works with heavy equipment, works at heights, uses special protective equipment, or works with bio hazards; “occasionally” sits, climbs, squats, bends neck and/or waist, twists waist, reaches above and/or below shoulders, pushes and pulls, engages in fine manipulation, lifts/carries 0
to 75 pounds one to three feet, walks on uneven surfaces, drives, is exposed to extreme
temperatures and humidity, and is exposed to dust, gas, and/or fumes; and “frequently”
stands, walks, twists neck, engages in simple grasping and repetitive use of hands, and uses
keyboard and mouse.

9. The school district’s job description stated the basic functions of a Purchasing
Director I as, “under the direction of an assigned administrator, to plan, organize, supervise
and direct the District’s purchasing warehousing/distribution and mail room operations
and to do related work as required.” “Major Duties and Responsibilities” included in the job
description were: “Oversees, manages and supervises the buying process,” “[d]evelops
programs and procedures for improving the operations of the department,” “[c]oordinates the
master purchasing calendar and ensures timelines are met,” “[o]versees the establishment of
vendor listings and explores alternative sources where major cost savings can be obtained,”
“[c]onfirms with administrative and instructional personnel on purchase and maintenance
needs,” “[i]nterviews vendors and maintains close liaison with other sources where major
cost savings can be obtained,” “[p]lan the continued development and refinement of the
District-wide central purchasing program,” “[s]upervises and prepares specifications and
approves scheduling of bids,” “[p]lan work related to the operation of a central receiving
and central standard stock warehouse,” “[d]etermines storage capacity space requirements
and optimum stock quantity,” “[c]onfirms with administrators department heads and
other staff to determine long-range needs,” “[e]stablishes cooperative and uniform operating
procedures,” “[e]valuates requisitions for large major items through on-site inspection and
consultation to determine actual requirements,” and “[s]chedules and reviews annual
physical inventory of warehouse and capital assets.” Additionally, the school district’s job
description included the following under the heading “PHYSICAL AND MENTAL
DEMANDS” (there was limited punctuation in the original):

The physical requirements indicated are examples of the
physical activities that this position classification must perform
in carrying out the essential job functions. Persons performing
service in this position classification may occasionally be
required to exert 50 to 70 pounds of force to carry, push pull or
otherwise move objects. This type of work may involve
ascending and descending ladders, stair s scaffolding, and
ramps. It may involve walking or standing for extended periods
of time as well as the manual dexterity and related physical
ability required to handle items operate computers and other
types of office and warehouse equipment. Perceiving the nature
of sound near and far vision visual acuity depth perception
providing and responding to oral information and handle and
work with various materials are important aspects of this
position. Exposure to hot or cold conditions caused by the
weather may occasionally be experienced.
While performing the duties of this class the employee is regularly required to use written and oral communication skills, read and interpret complex data information and documents, analyze and solve problems observe and interpret people and situations, use math and mathematical reasoning learn and apply new information or skills, perform highly detailed work concurrent tasks with constant interruptions, work under intense deadlines and interact with District administrators management staff and representatives of other agencies.

Ms. Moreno’s Testimony and Arguments She Made in the Letter Submitted with Her Appeal

10. Ms. Moreno is 39 years old; she has suffered from pain, anxiety, and depression since her 20s; and she testified that she was diagnosed with fibromyalgia in November 2016. Ms. Moreno did not contend her disabling conditions were caused by her work.

11. Ms. Moreno saw Dr. Kang for the first time in May 2017. The last time she saw Dr. Kang was on March 22, 2018, over one year before the hearing. It took over a year to rule out everything else that could have been causing her pain in order to arrive at the fibromyalgia diagnosis. According to Ms. Moreno, fibromyalgia has been recognized by the American Medical Association since 1987, it is a lifelong condition, it is not temporary, and there is no cure. Because she was diagnosed with fibromyalgia over two years ago, Ms. Moreno asserted that she had been incapacitated from performing her job for over 12 months.

12. Ms. Moreno loved working for the Norco-Corona Unified School District, and she worked hard in that job, which she described as highly demanding and stressful. It was a great place to work, so it was easy to give 100 percent, and Ms. Moreno would still be working there had it not been for her daily symptoms. As a result of her symptoms, Ms. Moreno realized that she could no longer give 100 percent. She missed a lot of work, and she could not keep up with driving back and forth between the two locations where she worked supervising three departments and over 20 employees. She oversaw warehouse employees and she had to be able to move boxes and organize inventory. She also needed to ensure that the district complied with the Education Code and state and federal regulations. She was responsible for negotiating over one million-dollar contracts. Her job became overwhelming near the end due to her fibromyalgia symptoms.

13. Ms. Moreno described her symptoms as follows: Her energy level was “completely gone,” she was “always tired,” she suffered from widespread pain, insomnia, “unrefreshed sleep,” morning stiffness, difficulty getting out of bed, memory loss, lack of

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4 Ms. Moreno also stated in documents that she was diagnosed in March 2017. There were no medical records offered as evidence to substantiate her testimony and written statements regarding when she was first diagnosed with fibromyalgia.
concentration, “memory fog,” and an inability to meet her employer’s expectations. She also suffered from “sensory overload,” sensitivity to light, nausea and vomiting from the pain, it could take her two to three hours to get out of bed, she woke up with swollen hands, she was easily bruised, and she went into early menopause. Ms. Moreno described the pain as similar to an electric shock in her shoulders, hands, and fingers, and she also experienced numbness and tingling of her hands. Carpal Tunnel Syndrome was ruled out. Sometimes the pain felt like someone had hit her with a bat to her ribs, and she could not breathe. She experienced confusion, memory loss, stuttering at meetings, and she did not make sense. She would forget familiar words. Her doctors recognized that she needed to find another position. Her condition also impacted her relationship with her daughter and her family.

Ms. Moreno explained that stress was a big factor that triggered her pain. She did not believe her depression and anxiety caused her to be incapacitated from performing her job. Instead, she became depressed because of the fibromyalgia pain. She woke up tired and in pain every day, and she needed to pick what she did. For example, she might be able to shop and cook, but not on the same day. If she went bowling with her daughter, it would take her three days to recuperate.

14. In a letter attached to her September 17, 2018, appeal, which was received as part of the jurisdictional documents, Ms. Moreno described her condition and asserted that she had met the 12-month duration threshold in the Government Code as follows (there was limited punctuation in original):

Being in the leadership position I was in for the last four years before resigning, definitely added stress—both positive and negative—but I was determined to succeed and I tried to persevere on a daily basis Every day I wake up in pain My neck is the most prominent pain—it’s like sleeping wrong and waking up with the kinked neck every day—then the morning stiffness makes it hard to get out of bed My hands are swollen most days, making mundane things you do with them difficult for me, such as, opening doors, jars, blow drying my hair, typing, writing, repetitive motions, etc My knuckles can feel broken and I wrap them with tape to keep them straight If I sit too long my lower back pain gets worse, same thing if I stand too long—so I have to take constant breaks This is just some of my normal battles, many days the pain is too much to get out of bed, or there is a new pain that surfaces These have not only made it difficult to last the whole workday (which was anywhere between 4 to 10 hours a day), but on my personal time many “fun” activities are limited And when I push myself past what I should, I suffer for days after with worse pain than normal On a scale from 1 to 10 I always tell people “10 is a good day”
As was submitted with my original PERs disability retirement packet, my doctors agreed I should not be working in the capacity I was in. My primary and rheumatologist have suggested this, yet I was still denied. I was diagnosed in March 2017, which means I’ve had this in my medical records for a year and a half-well over your duration requirement—which seems to be the only premise of the denial. Fibromyalgia is hard to diagnose, treat, and cure. In my case, not only have I been officially diagnosed for over 12 months, but it has progressively gotten worse. In fact, research suggests that there is no definite cure. I want the opportunity to be the best, healthiest and happiest version of me for myself and my daughter. I ask you to please reconsider your decision in my case.

**Expert Testimony**

15. At CalPERS’s request, Ms. Moreno was examined by psychiatrist Eugene Richard Dorsey, M.D., M.B.A., and internist and rheumatologist Quang Dinh Vo, M.D., to evaluate whether she was substantially incapacitated from performing her usual and customary job duties as a result of the psychological and rheumatological conditions identified in her disability retirement application. Dr. Dorsey and Dr. Vo testified at this hearing and their written reports, which were received in evidence as administrative hearsay, supplemented and explained their hearing testimony. Ms. Moreno did not call any expert witnesses to testify. The Physician’s Report on Disability form prepared by Dr. Kang was received in evidence as administrative hearsay. That document supplemented and explained Ms. Moreno’s testimony regarding when she saw Dr. Kang, and Dr. Vo testified that it was consistent with his expert opinions.

**DR. E. RICHARD DORSEY’S TESTIMONY AND REPORT**

16. Dr. Dorsey is a psychiatrist, and he has been licensed to practice medicine in California since 1986. He received his medical degree from West Virginia University in 1965, completed an internship at Medical College of Virginia in 1966, and completed a residency/fellowship at University of Cincinnati Hospitals in 1974. He served as Captain, Medical Corps, Flight Medical Officer, and Chief of Services for the United States Air Force Hospital at Dyess Air Force Base in Texas from 1966 to 1968; and was in general practice in

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5 Under Government Code section 11513, subdivision (d), hearsay evidence which is not admissible under a hearsay exception, may not support a factual finding on its own, but may be used to supplement or explain other evidence.

6 Dr. Kang’s responses to the questions on that form are discussed in paragraph 4, above.
Huntington, West Virginia from 1968 to 1971. He worked as Field Consultant in Peer Review for the American Psychiatric Association in Washington, D.C. from 1968 to 1971; Director of New Product Development, Associate Group Director, and Group Director for Merrell-National Labs in Cincinnati, Ohio from 1973 to 1978; Chief of Psychiatry, Epp Memorial Hospital, in Cincinnati, Ohio from 1978 to 1986; Director, Medical Psychiatry, Doctors Hospital, in Cincinnati, Ohio from 1980 to 1988; Chief Psychiatrist, Correctional Mental Health, County of Orange, California from 1987 to 1990; Medical Director, Crisis Stabilization Program, College Hospital, in Costa Mesa, California from 1992 to 1998; Medical Director and Chief of Psychiatry, County of Riverside, California from 1990 to 2004; and Staff Psychiatrist, Orange County Evaluation and Treatment Service, in Santa Ana, California from 1986 to 1987 and since 1998. He has been President of Telespsychiatry Inc., in Newport Beach, California since 2000 and has also maintained a private psychiatry practice in Newport Beach, California since 2003.

17. Dr. Dorsey examined Ms. Moreno on June 15, 2018. He took her medical history and conducted a mental status examination, and Psychologist Gale Schuler, Ph.D., administered the Minnesota Multiphasic Personality Inventory (MMPI). Dr. Dorsey reached the following diagnosis using the criteria set forth in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)*. Under Axis I, he diagnosed Ms. Moreno with meeting the diagnostic criteria for “Depressive Disorder, Not Otherwise Specified with Anxiety.” Under Axis III and IV, Dr. Dorsey noted that Ms. Moreno’s chief physical problems related to her fibromyalgia. Under Axis V, he rated Ms. Moreno’s “current global assessment of functioning” as “60, moderate mental symptoms and impairment. Best Global Assessment of Functioning prior to occupational stressor is 90, essentially no mental symptoms or impairment.”

18. Dr. Dorsey determined that Ms. Moreno was “mentally stable” and “able to perform the substantial and material duties of her job classification” and she was “not substantially incapacitated for the performance of her duties from a psychiatric standpoint.” He explained that the fact that she saw a psychiatrist every three to six months implied her condition was stable because she was seeing that doctor fairly infrequently.

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7 Dr. Dorsey explained his preference for the *DSM-IV*, which remains widely accepted by psychiatrists, over the Fifth Edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* because the *DSM-IV* uses five Axes diagnoses, including Axis V, which provides a “Global Assessment of Functioning” (or “GAF”) on a scale from 0 to 100.

8 During the hearing, Dr. Dorsey had no independent recollection of reviewing documentation regarding the duties and functions of Ms. Moreno’s position at the school district. Based on his usual practice when conducting evaluations for CalPERS, he believed he would have reviewed documents CalPERS sent him about Ms. Moreno’s job duties and functions. His report did not however list such documentation as among the records he reviewed.
19. Dr. Vo has been licensed to practice medicine in California since 2002. He has been certified by the American Board of Internal Medicine and the American Board of Rheumatology. Dr. Vo obtained his medical degree from the Medical College of Wisconsin in 2001, he completed an internal medicine residency at the University of Southern California in 2004, and he completed rheumatology fellowship training at the University of California Los Angeles, San Fernando Valley Program, in 2008. Dr. Vo is the president and chief executive officer of Quang Dinh Vo, MD Inc, doing business as MD Internet Telemedicine Specialist. He has practiced as a hospitalist for Healthcare Partners Medical Group, Long Beach Memorial Medical Center and St. Mary’s Medical Center in Long Beach since 2004; as a hospice and palliative care physician at several locations since 2011; as an investigator of clinical research for several employers since 2010; as Medical Director, Doctors Telehealth Network, Inc., since 2009; as Medical Director for Focus Medical Group since 2007; as a clinical instructor of health sciences for the UCLA Department of Medicine since 2008; as a correctional physician for primary care services for Centinela State Prison from 2008 to 2011; as Director of Aesthetic Medicine for Beverly Hills Surgical Institute from 2005 to 2006; as a clinical assistant professor of medicine at the University of Southern California from 2004 to 2005; as a per diem physician for walk in clinics/urgent care for Southern California Kaiser Permanente in 2005 and for Hartman Jones Medical Group from 2004 to 2005; and as a locum tenens hospitalist for Memorial Hospital of Los Banos, California in 2004 and 2005.

20. Dr. Vo stated that rheumatologists usually end up treating fibromyalgia patients and he has treated such patients. He explained that fibromyalgia is a “syndrome of widespread pain,” that consists of a “constellation of signs and symptoms.” The underlying cause is not clearly understood. According to Dr. Vo, fibromyalgia is a recognized medical diagnosis, although he acknowledged that some may disagree. The criteria for a fibromyalgia diagnosis consist of chronic widespread pain in at least 11 of 18 recognized trigger points. Besides obtaining subjective complaints of pain from the patient, during an examination the physician can make objective findings by reproducing pain in the 18 trigger point areas. The “chronic” nature of the pain is established through the patient’s history and by ruling out other causes of chronic pain.

21. Dr. Vo examined Ms. Moreno on May 23, 2018. The focus of Dr. Vo’s evaluation was her chronic pain, diagnosis of fibromyalgia, and the degree of disability she may suffer. Dr. Vo determined that Ms. Moreno suffered from fibromyalgia based on her reported medical history and his examination of her. During the May 23, 2018, examination, Dr. Vo focused on the 18 trigger points and found Ms. Moreno had pain in 14 of the 18 trigger point areas. She had no sensory loss or motor deficits. She had no arthritic joint pain, but she had soft tissue pain, which Dr. Vo stated was a “type” of fibromyalgia. Ms. Moreno had a history of pain starting in her 20s that overlapped with depression. Dr. Vo explained that depression can cause pain and make it difficult to treat fibromyalgia. Dr. Vo testified that there are pharmacological therapies that are often tried with patients with fibromyalgia.
and most patients respond to some of the medications. However, Dr. Vo noted that Ms. Moreno had not tried those medications to treat her fibromyalgia.

22. Dr. Vo reviewed the documentation regarding Ms. Moreno’s job functions, and he understood that her job involved occasional lifting of items weighing up to 75 pounds. It was also Dr. Vo’s impression that Ms. Moreno was “stressed out” at work, which contributed to her pain levels.

23. In Dr. Vo’s opinion, at the time he examined her during May 2018, Ms. Moreno’s fibromyalgia impaired her ability to perform her job functions, which included occasional lifting, pushing, and pulling up to 75 pounds. Therefore, in response to CalPERS’s question “In your professional opinion, is the member presently substantially incapacitated for the performance of his [sic] duties?” Dr. Vo wrote the following in his report:

Yes, given her widespread pain and its severe intensity as corroborated by the medical record as well as on my exam, concomitantly based on the job description, and therefore, Ms. Moreno is presently substantially incapacitated.

24. However, Dr. Vo testified that Ms. Moreno’s disability was temporary because she had not yet tried enough pharmacologic therapies, as he believed there was a good chance her condition would improve with such therapy. In his report, in response to CalPERS’s question regarding whether Ms. Moreno’s incapacity was permanent or temporary, and if it would last longer than 12 months, Dr. Vo wrote:

It is temporary. Based on the records reviewed and on the oral history provided, the claimant is able to exercise, perform limited yoga, walking [sic] the dog, and is currently not under adequate control pharmacologically. She had only started gabapentin last year without appropriate dose adjustment for titration yet to be affective [sic]. In my opinion, I believe her incapacity is currently temporary and can be improved significantly such that it will last no longer than 12 months.

25. During cross-examination, Dr. Vo acknowledged that there was no known cure for fibromyalgia. However, he explained that there were therapies that had been identified to improve pain and quality of life. He also conceded that even if Ms. Moreno tried medication therapy, it might not help. He had not seen patients have their fibromyalgia pain completely go away, and he agreed that it may last up to a lifetime or several years. However, with treatment it can improve and without a follow-up examination after appropriate attempts to treat her condition, Dr. Vo did not have enough information to change his opinion. In response to cross-examination questions about the side effects of
medications used to treat fibromyalgia, Dr. Vo noted that the medications were "pretty well tolerated."  

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for disability retirement has the burden of establishing eligibility by a preponderance of the evidence. (Evid. Code, §§ 115 and 500; See also, Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1332.)

2. "Preponderance of the evidence means evidence that has more convincing force than that opposed to it. [Citations.]" (Glage v. Hawes Firearms Company (1990) 226 Cal.App.3d 314, 324-325.) "The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the quality of the evidence. The quantity of the evidence presented by each side is irrelevant." (Ibid., italics in original.) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (People v. Mabini (2001) 92 Cal.App.4th 654, 663.)

Purpose of Disability Retirement

3. The Public Employees' Retirement Law is set forth in Government Code section 20000 et seq. The general purpose of the public retirement system is "to prevent hardship to state employees who because of age or disability are replaced by more capable employees. The pension system serves as an inducement to enter and continue in state service [citation] and the provisions for disability retirement are also designed to prevent the hardship which might result when an employee who, for reasons of survival, is forced to attempt performance of his duties when physically unable to do so." (Quintana v. Board of Administration (1976) 54 Cal.App.3d 1018, 1021.)

Applicable Statutory Authority

4. Government Code section 20026 defines "disability" and "incapacity for performance of duty" as follows:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive

9 From Ms. Moreno's cross-examination questions, it appeared that she may have been worried about possible side effects of taking medication. However, during her testimony, she did not state that she had tried medications or that she had experienced adverse side effects.
months or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

5. Under Government Code section 21152, subdivision (d), an application for disability retirement may be made by the member.

6. Government Code section 21154 states:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety 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. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

7. Government Code section 21156, subdivision (a), provides:

(a)(1) If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, 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, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.
In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

Case Law Regarding Incapacity for Performance of Duty

8. An employee is eligible for a disability retirement if she can demonstrate that she is incapacitated from performing the duties of her position. "Incapacitated" means the employee has a substantial inability to perform the usual duties of the position. (Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 876-877.)

In Mansperger, supra, there was no dispute that Mansperger, who was a fish and game warden, had suffered an injury that caused him to be unable to engage in heavy lifting. The sole issue in dispute was whether his physical limitations amounted to "incapacity for the performance of duty." (Mansperger, supra, 6 Cal.App.3d at p. 876.) After considering cases defining "incapacity" in other states, the court of appeal concluded that "incapacity for the performance of duty" under the Government Code meant "the substantial inability of the applicant to perform his usual duties." (Id. at p. 876.) The appellate court then assessed the facts in the Mansperger case as follows (Id. at pp. 876-877):

While it is clear that petitioner's disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do occur in petitioner's job, they are not a common occurrence for a fish and game warden. A fish and game warden generally supervises the hunting and fishing of ordinary citizens. Petitioner testified that, since his accident, he was able to perform all his required duties except lifting a deer or lifting a lobster trap out of kelp.

9. A similar result was reached in Hosford v. Board of Administration (1978) 77 Cal.App.3d 854. In that case, a California Highway Patrol officer applied for industrial disability retirement, claiming he feared his back injuries placed him in danger of further injury if he was required to overpower someone resisting arrest. CalPERS's determination that he was not substantially incapacitated from performing the usual duties of his job was upheld on appeal. The appellate court determined that the fact that a condition increases an

10 The Mansperger decision analyzed the language then contained in Government Code section 21022, which language is now contained in Government Code section 20026, as amended in 2018 to include the "at least 12 months" time frame.
individual’s chances of further injury does little more than demonstrate that the injury is prospective, hence, speculative, and presently not in existence. (Id. at pp. 862-863.) Accordingly, fear of further injury or fear of aggravation of an existing injury is insufficient to support a finding of disability. (Ibid.)

10. The Mansperger and Hosford cases were discussed in The Matter of the Application for Disability Retirement of Ruth A. Keck and Los Angeles County Schools (Keck) (2000) CalPERS’s Precedent Decision 00-05. In that case, it was determined that Keck was able to substantially perform her usual duties as a school clerk typist and secretary despite her orthopedic (neck and back) conditions. In Keck, the medical evidence consisted of the testimony and written report of CalPERS’s medical expert and written medical reports by other doctors who had evaluated Keck’s condition. Keck did not offer any expert testimony at the hearing. (Factual Finding 9.) In the proposed decision adopted by CalPERS, the administrative law judge found that Keck failed to present any expert testimony to controvert CalPERS’s expert’s opinions (Factual Finding 22) and Keck’s doctors’ written reports evaluating her condition did not specifically apply the “CalPERS disability standard” set forth in the Mansperger and Hosford cases (Factual Finding 22). The decision concluded Keck failed to present sufficient competent medical evidence to establish that her orthopedic conditions prevented her from performing the usual duties of her position as a clerical typist and secretary. (Legal Conclusion 8.)

Case Authority Regarding Failure to Undergo Recommended Treatment

11. An applicant for disability retirement is “not permanently disabled when he unreasonably refuses” treatment. (Reynolds v. City of San Carlos (1981) 126 Cal.App.3d 208, 216-217.) Reynolds appealed from the denial of disability retirement he sought after he injured his knee while working as a firefighter. He refused to undergo surgery recommended by his treating doctor, who had advised that if Reynolds underwent the recommended surgery, it could correct his knee condition and he could completely recover, he could remain the same, or his knee could be damaged during surgery and the condition could then worsen. (Id. at p. 218.) According to Reynolds, his doctor did not give him any percentages and gave each possibility equal weight. Reynolds was afraid of undergoing surgery and wanted a 100 percent guarantee that it would be successful. “There was no medical evidence recommending against surgery.” (Ibid.) During an evidentiary hearing, witnesses testified (without objection) that medical experts had told them that the chances of a successful surgical outcome were 90 and 98 percent. Following the hearing, the civil service commission found that Reynolds was unable to perform the usual duties of his position, but because “the medical probabilities were great that Firefighter Reynolds will be restored to normal functioning if he submits to surgery, his disability is not permanent.” (Id. at pp. 211, 218.)

Because Precedent Decision 00-05 does not contain page numbers, references are made to the factual finding and legal conclusion paragraph numbers in that decision.
On appeal, Reynolds argued that the commission did not have authority to determine that his disability was not permanent or that he unreasonably refused surgery to treat his condition. When upholding the denial of disability retirement in Reynolds, the appellate court explained (id. at p. 216-217):

The Commission found that appellant's disability was not permanent because the "probabilities are great that [he] will be restored to normal functioning if he submits to surgery..." In making this finding, the Commission relied on Labor Code section 4056 (see part A above), which denies workers' compensation benefits if an injured employee unreasonably refuses recommended medical treatment. Section 4056 merely codifies the common law rule requiring mitigation of damages (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 870, p. 3158), which is properly applied in determining eligibility for disability retirement. The Commission has inherent power under Government Code section 21025 to determine whether a claimant has undergone the medical treatment that reasonably could be expected to effect a cure.

Appellant argues that any doubt about application of the condition contained in Labor Code section 4850 must be resolved in his favor, since pension laws are to be liberally construed. We do not agree that the doctrine of liberal construction precludes the Commission from applying the common sense rule that appellant is not permanently disabled when he unreasonably refuses remedial surgery. As stated in Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873 [86 Cal.Rptr. 450], "The object of the disability allowance is not solely to compensate a member with a pension. The disability retirement allowance has as its objective the effecting of efficiency and economy in public service by replacement of employees, without hardship or prejudice, who have become superannuated or otherwise incapacitated. (Gov. Code, § 20001.) Therefore, the primary test... is whether petitioner is substantially incapacitated from the performance of duty, and the rule on liberality of construction does not change that test." (Id., at p. 877.)

Evaluation

12. CalPERS presented the only competent medical evidence. Dr. Dorsey testified, and wrote in his report, that Ms. Moreno suffered from Depressive Disorder, Not
Otherwise Specified with Anxiety, but that condition did not render her substantially incapacitated for the performance of her duties from a psychiatric standpoint. Dr. Vo testified, and wrote in his report, that Ms. Moreno suffers from fibromyalgia that rendered her substantially incapacitated for the performance of her usual and customary duties at the time Dr. Vo examined her in May 2018, but that her disability was temporary. According to Dr. Vo, Ms. Moreno may benefit from pharmacological therapy, which she had not yet tried, such that her symptoms could be alleviated so she might be able to perform the duties of her position.

13. Ms. Moreno did not offer any competent medical evidence at the hearing. Her rheumatologist, Dr. Kang, did not testify. Dr. Kang indicated on the Physician's Report on Disability form that she completed on April 11, 2018, that Ms. Moreno's incapacity was not permanent, and Dr. Kang was “not sure” if the incapacity would last longer than 12 months. Ms. Moreno did not present any evidence that she had tried the pharmacological therapy Dr. Vo opined might help her. And in response to her questions regarding whether such medication might have adverse side effects, Dr. Vo testified that patients responded well to such medications.

14. Given Dr. Vo's testimony that Ms. Moreno’s incapacity was temporary, and Ms. Moreno’s failure to present any competent medical evidence that her disability was permanent, Ms. Moreno failed to prove that she suffered a “disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death,” as defined by Government Code section 20026. Accordingly, Ms. Moreno’s application for disability retirement must be denied because Ms. Moreno failed to prove by a preponderance of the evidence that she was substantially incapacitated from performing the regular and customary duties of a probation purchasing director when she filed her application for disability retirement.

ORDER

Petitioner’s denial of Norma Jordana Moreno’s application for disability retirement is affirmed.

DATED: June 17, 2019

[Signature]

THERESA M. BREHL
Administrative Law Judge
Office of Administrative Hearings