

**ATTACHMENT A**

**THE PROPOSED DECISION**

**BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA**

**In the Matter of the Reinstatement from Disability**

**Retirement of:**

**SARAH A. ZUNIGA and CORRECTIONAL TRAINING FACILITY,  
CALIFORNIA DEPARTMENT OF CORRECTIONS AND  
REHABILITATION, Respondents.**

**Case No. 2019-0278**

**OAH No. 2019060242**

**PROPOSED DECISION**

Marcie Larson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on October 30, 2019, in Sacramento, California.

Helen L. Louie, Attorney, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

Respondent Sarah Zuniga appeared at the hearing and represented herself.

There was no appearance by or on behalf Correctional Training Facility (Training Facility), California Department of Corrections and Rehabilitation (Department). The

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM

FILED November 18, 2019

JEH

Department was duly served with a Notice of Hearing. The matter proceeded as a default against the Department pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on October 30, 2019.

## **ISSUE**

The issue on appeal is whether respondent is still disabled or substantially incapacitated from performance of her usual job duties of an Office Technician (OT) for the Department due to her bilateral upper extremities and low back conditions (orthopedic conditions)?

## **FACTUAL FINDINGS**

### **Procedural History**

1. Respondent was employed as an OT with the Department from approximately 2001 until approximately 2015. On November 19, 2015, respondent signed and thereafter filed an application for disability retirement (application) with CalPERS. By virtue of her employment, respondent is a state industrial member of CalPERS.

2. In filing the application, respondent claimed disability on the basis of carpal tunnel syndrome in her right and left hands, and her "low back." Respondent wrote that her disability occurred on June 28, 2012. Respondent stated that her disability occurred from a "sprained wrist, which seriously aggravated prior years of

pain.” Respondent wrote that she also “endured chronic pain due to manually issuing and transporting hundreds of pounds of property to hundreds of inmates” for over a decade. Respondent also wrote that she had “limited” use of her hands and wrists. She also suffered from lower back pain and neck pain.

3. On May 5, 2016, CalPERS notified respondent that her application for disability retirement was approved, effective on the first day of the month CalPERS received her application. The letter stated that respondent was found to be substantially incapacitated from the performance of her usual duties as an OT for the Department based upon her orthopedic conditions. Respondent was informed that she may be reexamined periodically to determine her qualification for reinstatement if she was under the minimum age for service retirement. Respondent was 39 years old at the time of the effective date of her retirement. She was under the minimum age for service retirement.

4. On April 8, 2018, CalPERS notified respondent that it would conduct a reexamination of her disability retirement. Part of the reexamination included an Independent Medical Evaluation (IME) performed by Harry Khasigian, M.D., on August 21, 2018.

5. On September 18, 2018, CalPERS notified respondent that based upon a review of medical evidence and reports, CalPERS determined that respondent was no longer substantially incapacitated from performing the job duties of an OT for the Department. Respondent was informed that she would be reinstated to her former position. Respondent was advised of her appeal rights. She filed an appeal and request for hearing by letter dated September 27, 2018.

6. On May 21, 2019, Anthony Suine, in his official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, signed and filed the Accusation. Thereafter, the matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

### **Duties of an OT**

7. As set forth in the OT Typing Job Description dated July 9, 2015, respondent's duties as an OT required her to work under the direction of a Correctional Sergeant. Respondent was required to "ensure accurate programing and generating reports" and maintain accurate training records for employees at the Training Facility. Respondent was also required to process the paperwork for new employees. She was responsible for supervising inmate workers, and coordinating teleconferences for staff.

8. On December 9, 2015, respondent signed a "Physical Requirements of Position/Occupational Title" (Physical Requirements) for her position. According to the Physical Requirements, when working as an OT respondent: (1) constantly (over six hours per day) sat, engaged in fine manipulation, used a keyboard and mouse; (2) frequently (three to six hours per day) reached below her shoulders and engaged in simple grasping; (3) occasionally (up to three hours) stood, walked, kneeled, squatted, bent and twisted at the neck and waist, reached above the shoulders, pushed and pulled, power grasped, carried between 0 and 50 pounds, walked on uneven ground, and drove; and (4) never ran, crawled, climbed, carried over 50 pounds, worked with heavy equipment, was exposed to excessive noise, extreme temperature, humidity and wetness, dust, gas, fumes and chemicals, worked at heights, operated foot controls or

repetitive movement, used special visual or auditory protective equipment, or worked with worked with biohazards.

9. Respondent explained at hearing that for the majority of the 12 years she worked for the Department, she did not perform the sedentary job of an OT. Rather, after four months of working as an OT, she was transferred to the Property Unit at the Training Facility. Due to budget cuts, respondent worked alone for three years. She was responsible for issuing property to 3,000 inmates. Daily, respondent issued property to approximately 150 inmates. The property included everything issued to the inmates, varying from televisions to clothing. The position was physically demanding and required her lift heavy items on to a cart and push the cart through the prison to deliver the property to the inmates.

Respondent explained that she tried to have her position changed because she was working out of class and not performing OT work, but her request was denied. Respondent did not transfer back to a sedentary OT position until she was injured and could no longer perform the physical requirements of the property position. She only worked in the OT position for several weeks before she went off work permanently in 2012.

### **Independent Medical Evaluation by Harry Khasigian, M.D.**

10. On August 21, 2018, at CalPERS's request, Harry Khasigian, M.D., conducted an IME of respondent. Dr. Khasigian prepared an initial report and two supplemental reports. He testified at the hearing. Dr. Khasigian is a board-certified orthopedic surgeon. He obtained his medical degree from the University of Southern California (USC) in 1974. Between 1974 and 1975, he completed a rotating internship at the USC, Los Angeles County Medical Center. From 1975 to 1979, he completed an

orthopedic residency at the University of California, Irvine Medical Center. Dr. Khasigian has practiced orthopedic medicine for approximately 40 years. He operates a private practice, treating patients and performing surgeries related to orthopedic conditions.

11. As part of the IME, Dr. Khasigian interviewed respondent, obtained a medical history, and conducted a physical examination. He also reviewed the Physical Requirements form and job description for respondent's position. Dr. Khasigian reviewed respondent's medical records related to her orthopedic conditions, including diagnostic reports.

### **RESPONDENT'S EMPLOYMENT, COMPLAINTS, AND TREATMENT**

12. Dr. Khasigian obtained a history of respondent's employment, orthopedic conditions, treatment, and complaints. Respondent explained that she retired from her position as an OT in 2015, due to low back pain and chronic pain in both hands from carpal tunnel syndrome. She had bilateral carpal tunnel release, which helped alleviate her pain. Respondent explained that although her position was an OT typist, she worked in the property room at the Training Facility. She described the position as "very strenuous." Approximately 150 times per day had to "sling boxes" weighing 30 to 80 pounds. She also logged, stored, and retrieved property.

13. Respondent complained of pain in her lumbar spine, which caused aching in her buttock. Occasionally all ten of her toes became numb. The symptoms "come and go." On a scale of 1 to 10, with 10 being the worst pain, respondent reported that her pain level is generally a 6, and at worst 8.5 even when she is taking medication. She also reported that her condition seemed to get worse over the previous year. Respondent reported that she had three epidural steroid shots. The first

shot helped "about 50 percent." The second shot provided no improvement. The third shot gave her "25 percent improvement."

Respondent also reported that her carpal tunnel syndrome was not cured with bilateral carpal tunnel release surgery, but the condition was better. She still had aching, weakness, and numbness in her hands. She reported dropping objects. She also reported feeling as if she were wearing "tight gloves." Respondent rated the pain in her hands as an average of 5. She used "Tiger Balm" on her hands to treat the pain.

14. Respondent reported that she had not worked in any capacity since she left the Department on medical leave in October 2012. In 2015, she moved to Oregon with her family. She is a stay-at-home mother. She tries to avoid lifting or carrying heavy objects. Her husband helps with household chores and shopping. Respondent reported that she was not receiving any treatment for her orthopedic conditions. She sees a pain management specialist who prescribed her Methadone for her restless leg syndrome, Motrin, and Hydrocodone, 10 milligrams (mg.) two times per day. Respondent also reported suffering from fibromyalgia.

#### **PHYSICAL EXAMINATION AND REVIEW OF MEDICAL RECORDS**

15. Dr. Khasigian conducted a physical examination of respondent. He observed that respondent was overweight. She was able to "sit, stand, and lay without assistance." She did not wear any "orthopedic devices or appliances" and her movements were "smooth and coordinated." Dr. Khasigian examined respondent's lumbar spine and found no "swelling, masses, or redness." There was no evidence of tenderness on palpation. She had normal reflexes and her motor examination was normal. Her thoracic spine was also normal. Her cervical spine had no "spasm or

guarding." Respondent complained of "severe pain in the right cervical paraspinals radiating up to her head."

16. Dr. Khasigian also conducted a neurological examination. He tested respondent's lower extremity nerves using two sciatic tests. During the Sciatic Stretch Test (SST), Dr. Khasigian did not explain the test and respondent was not aware the area tested was supposed to be producing pain, if any. The SST produced no sciatic nerve pain at 90 degrees. However, when Dr. Khasigian tested the same area after he explained the supine straight leg raise and had respondent perform the test, she complained of pain and was only able to raise her right leg 20 degrees and left leg 30 degrees. Dr. Khasigian explained respondent's complaint of pain is a "Waddell's finding," which is non-physiological behavior involving exaggeration.

Respondent complained of numbness in circumference of her right leg, which Dr. Khasigian described as "stocking-glove dysesthesias." Dr. Khasigian explained that her complaint was a sign of exaggeration and an attempt to emphasize something wrong, because nerves are not effected in a circumference pattern.

17. Dr. Khasigian also measured the circumference of respondent's bilateral thighs and calves, which were normal and exactly the same on each side. Dr. Khasigian opined that if respondent had a condition effecting the use of her lower extremities for six to eight years she would have secondary changes to her lower extremities, including atrophy.

18. Dr. Khasigian examined respondent's upper extremities. Respondent complained of pain at the site of her endoscopic scars on her wrists. Dr. Khasigian observed no swelling, redness or induration. The range of motion in her fingers was normal. The Phalen's maneuver, which tests for carpal tunnel syndrome, was negative.

Respondent also had no atrophy in her upper extremities, her neurological examination and reflexes were normal. Respondent complained of numbness in her right upper extremity in a glove pattern from her humerus to her fingertips. Dr. Khasigian explained that the nerves in the upper extremities nerve are distinct and do not run in a pattern which was produce glove-like numbness. Respondent's complaint of numbness in the entire arm demonstrates that her complaints are non-physiological.

19. Dr. Khasigian reviewed diagnostic tests reports from 2012 through 2015. A report from October 10, 2012, concerning an electromyography (EMG) nerve study demonstrated respondent had mild left and moderate right carpal tunnel syndrome. Respondent had left and right endoscopic carpal tunnel release in approximately 2015.

An MRI conducted on March 8, 2013, of respondent's lumbar spine showed "[m]inimal multilevel disc desiccation through the spine." Respondent's spine in the "L3-4 shows diffuse bulging combined with facet joint hypertrophy with moderate bilateral neural foraminal narrowing." A second MRI performed in January 2015, showed lower lumbar spondylosis and no significant changes from the 2013 MRI. Dr. Khasigian explained the MRI studies showed mild degenerative changes in two of the five disk spaces, which he described as "age appropriate changes." He further explained that the physical examination he conducted demonstrated that the degenerative changes did not affect respondent's ability to perform her job duties.

20. Additionally, on August 21, 2018, Dr. Khasigian ordered x-rays to be taken of respondent's cervical and lumbar spine. Dr. Khasigian explained that he ordered the x-rays because the basis of respondent's disability is degeneration of her spine. Dr. Khasigian also wanted current x-ray images and reports to determine the extent of the degeneration. The images and report indicated that respondent has a

normal cervical spine and a close to normal lumbar spine with some mild arthritis in the joints that he described as "age appropriate changes."

### **DIAGNOSIS AND OPINIONS**

21. Dr. Khasigian diagnosed respondent with right and left post endoscopic carpal tunnel release, "degenerative disc disease at the L3-4 and L4-5 of the lumbar spine with moderate neural foraminal stenosis bilaterally at L3-4 and L4-5." Dr. Khasigian opined that respondent "has significant Waddell's findings" with respect to her lumbar spine. He also found that she had "inconsistencies in regard to her presentation." Specifically, "she had stocking-glove dysesthesias and inconsistencies between sciatic stretch testing examinations." He opined that respondent "does not have dermatomal abnormalities or evidence of radiculopathy.

He also found that she had no clinical findings on her upper extremities. She complained of "stocking-glove dysesthesias but no motor abnormalities, no atrophy and no positive diagnostic tests." He also opined that respondent's carpal tunnel surgeries should have fully resolved her condition and that it would be "unlikely to have any type of ongoing condition that was not represented by a significant and obvious clinical deformity."

22. Dr. Khasigian opined that respondent is not substantially incapacitated from the performance of her duties as an OT. He opined that respondent is able to perform all of the duties of her OT typing position, as described by the Physical Requirements form and job description. He also noted that respondent reported that her duties were different than those listed for an OT. Dr. Khasigian also considered the duties respondent described were required of her position in the Property Unit. He

opined that she would also be able to perform those duties as well, including lifting and carrying 50 pounds.

## **Supplemental IME Reports**

### **JANUARY 11, 2019 REPORT**

23. On December 28, 2018, CalPERS sent Dr. Khasigian a letter and additional information concerning respondent's orthopedic conditions. Specifically, Dr. Khasigian was asked to review an August 30, 2018 report from Chris Weinman, Physician's Assistant (PA), in which he opined that x-rays taken on August 21, 2018, for the IME Dr. Khasigian conducted, showed "severe disc space narrowing at the L5-S1" and "disc space collapse." Dr. Khasigian was also asked to review October 9, 2018 and November 13, 2018 "Work and Disability status" forms completed by Kim Phan, M.D., in which he opined that respondent was unable to return to work at a correctional facility and an October 23, 2018 "Physician Re-Evaluation of Current Disability form" completed by Dr. Phan.

CalPERS requested Dr. Khasigian prepare a supplemental report and include his opinions as to whether, based on the additional information he reviewed, were there any specific job duties respondent is unable to perform because of her orthopedic conditions. Dr. Khasigian was also asked to opine as to whether respondent is substantially incapacitated from the performance of her duties as an OT.

24. On January 11, 2019, Dr. Khasigian issued a supplemental report. He explained that after review of the additional information forwarded on December 28, 2018, review of the imaging studies and reports, and information gathered for the August 21, 2018 IME he conducted, he found "no basis for changing [his] previously expressed opinions."

Dr. Khasigian noted that there was "a discrepancy" between what PA Weinman found on the x-ray performed on respondent on August 21, 2018, and what the board certified radiologist reported. Specifically, PA Weinman noted that the x-rays showed "severe L5-S1 narrowing and disc collapse." However, the radiologist report found that the L5-S1 was normal. Dr. Khasigian also opined that the Work and Disability status forms "simply reiterate based on [respondent's] subjective complaints, but do not have any objective basis to support them." Additionally, the "re-evaluation of current disability simply reiterates her carpal tunnel situation, which is resolved because she has had surgical decompression of both of her wrists and clinically does not have any neurological deficits."

25. Dr. Khasigian opined that based on objective findings, there are no job duties respondent is unable to perform and she is not substantially incapacitated from the performance of her job duties.

### **JANUARY 30, 2019 REPORT**

26. On January 30, 2019, Dr. Khasigian issued a supplemental report to address the discrepancy between the opinions of PA Weinman and the radiologist who issued the report concerning the x-rays taken of respondent's spine on August 21, 2018. Dr. Khasigian explained at hearing that after he reviewed the report issued by PA Weinman in which PA Weinman opined that the x-ray revealed severe L5-S1 narrowing and disc collapse, he contacted the radiologist, John Winn, M.D., who issued the report opining that the L5-S1 was normal.

27. Dr. Khasigian explained in his supplemental report that on January 17, 2019, Dr. Khasigian called Dr. Winn to discuss his findings. Dr. Winn pulled the x-rays

up at Mercy Folsom Hospital. Dr. Khasigian and Dr. Winn were able to review them “concurrently.” Dr. Khasigian explained that Dr. Winn:

. . . indicated that there were six lumbar vertebrae and there may be a mild sacralization of the lowest vertebrae, but that the disc space at L5-S1 which is above the L6 vertebral body is entirely within normal limits and does not show any spondylosis at all. He does say that there is some mild facet arthropathy present at L5-S1 and L6 but the space and vertebral body are normal.

28. Dr. Khasigian opined that based on the x-ray findings “there is no condition that prevents [respondent] from performing her usual and customary occupation.” He further opined that respondent “is able to perform all of her work activities and is not substantially incapacitated.”

### **Respondent’s Evidence**

29. Respondent is 43 years old. She has not worked in any capacity since she stopped working for the Department in approximately 2012. Respondent explained that a decade of working in the Property Unit at the Training Facility caused her orthopedic conditions. She was required to lift, carry, push, and pull heavy objects all day. She sought medical attention after she could no longer tolerate the pain in her wrists and back.

30. In 2015, respondent moved to Oregon. She has not undergone any surgeries since her carpal tunnel surgeries. Respondent receives medication for pain management from Johnny Payne, a Family Nurse Practitioner at Quave Clinic. Respondent is not receiving any other treatment for her orthopedic conditions. She

also saw PA Weinman at Southern Oregon Spine Care for an evaluation after her August 21, 2018 IME. Respondent produced a copy of the medical record from her visit. PA Weinman did not opine whether respondent is substantially incapacitated from the performance of her duties as an OT for the Department.

31. Respondent explained that she is not disagreeing with Dr. Khasigian's opinions, but she does not believe it is fair for him to make findings about her ability to perform her job based on a 45-minute evaluation. Respondent also explained she is in pain and feels that going back to work as an OT for the Department would not be beneficial to her or the Department.

## **Discussion**

32. CalPERS established that respondent is no longer substantially incapacitated from performing the usual duties of an OT for the Department. Dr. Khasigian persuasively testified that there is no objective medical evidence that respondent is unable to perform the duties of an OT, including the duties described by respondent for her position in the Property Unit at the Training Facility. Respondent had carpal tunnel surgeries that successfully treated her bilateral upper extremity condition. While her lower back has degenerative changes, the evidence established that her low back condition does not prevent her from performing her job duties.

33. Although respondent contends that pain prevents her from returning to work, she did not produce any competent medical evidence to rebut Dr. Khasigian's opinions. None of the medical records respondent submitted noted that respondent is substantially incapacitated from the performance of her duties as an OT because of her orthopedic conditions. Additionally, because the authors of these records were not available at hearing for cross-examination, their opinions were admitted only as

administrative hearsay and cannot be relied upon, standing alone, to support any findings as to respondent's orthopedic conditions. (Gov. Code, § 11513, subd. (d).)

34. When all the evidence is considered, CalPERS submitted sufficient evidence to meet its burden. As a result, CalPERS's request that respondent be reinstated from disability retirement is granted.

## **LEGAL CONCLUSIONS**

### **Standard of Proof**

1. CalPERS had the burden of proving by a preponderance of the evidence that respondent is no longer substantially incapacitated for the performance of her usual job duties as a OT with the Department and should be reinstated to her former position. (*In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Willie Starnes* (January 22, 2000, Precedential Decision 99-03). Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) To be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.

### **Applicable Law**

2. Respondent is a state industrial member of CalPERS by virtue of her former employment as an OT for the Department. She was granted disability retirement based on her orthopedic conditions pursuant to Government Code section 21150, subdivision (a), which provides the following:

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.

3. "Disability" and "incapacity for performance of duty" are defined in Government Code section 20026, which provides:

"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, 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.

4. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the substantial inability of the applicant to perform his usual duties." In *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862, the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. Furthermore, in *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff's subjective complaints alone, without competent medical evidence to substantiate the complaints, were insufficient to support a finding that he was permanently incapacitated for the performance of his duties.

5. In accordance with Government Code section 21192, CalPERS reevaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination. . . . The examination shall be made by a physician or surgeon, appointed by the board. . . . Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency . . . where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

6. The minimum age for service retirement for a state industrial member of CalPERS is 50 years old. (Gov. Code, § 21060, subd. (a).) Respondent had not yet reached age 50 when CalPERS notified her on April 9, 2018, that her disability retirement benefits were under review to determine if she continued to meet the qualifications to receive disability retirement benefits pursuant to Government Code section 21192.

7. Government Code section 21193 governs the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty and, in relevant part, provides:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

8. When all the evidence is considered, CalPERS established that respondent is no longer substantially incapacitated for the performance of her usual duties as an OT for the Department. Consequently, CalPERS's request that respondent be reinstated from disability retirement is granted.

## ORDER

Respondent's appeal is DENIED. The request of California Public Employees' Retirement System to reinstate respondent Sarah Zuniga from disability retirement is GRANTED.

DATE: November 18, 2019

DocuSigned by:  
*Marcie Larson*  
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MARCIE LARSON

Administrative Law Judge

Office of Administrative Hearings