# 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:

## CONNIE L. DOMINGOS,

## and

## TULARE CITY SCHOOL DISTRICT,

## Respondents

## Agency Case No. 2019-0308

## OAH No. 2019080272

## PROPOSED DECISION

John E. DeCure, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on February 11, 2020, in Fresno, California.

Helen L. Louie, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Connie L. Domingos (respondent) was not present. The ALJ made telephone contact on the record with respondent, who represented herself. Respondent stated

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she chose not to attend the hearing because she needed more time to prepare. Respondent requested a continuance but did not state any specific reasons for her lack of preparation or need for additional time. The ALJ found that CalPERS provided adequate notice of hearing to respondent by certified mail on August 21, 2019.

No good cause appearing, respondent's motion for a continuance was denied. Respondent ended the phone call and did not participate further in the hearing. As such, this matter proceeded as a default hearing against respondent under Government Code section 11520.

There was no appearance by or on behalf of respondent Tulare City School District (District). CalPERS established that the District was properly served with the Notice of Hearing. Consequently, this matter proceeded as a default hearing against the District under Government Code section 11520.

CalPERS elected to present evidence in support of the Statement of Issues. Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on February 11, 2020.

## ISSUE

Is respondent permanently and substantially incapacitated from the performance of her usual duties as a Cook for the District on the basis of an orthopedic (back and neck), psychiatric (depression and anxiety) and rheumatic (fibromyalgia and chronic pain) conditions?

## FACTUAL FINDINGS

### Disability Application and Jurisdiction

1. On April 8, 2014, respondent submitted a Disability Retirement Election Application (Application) to CalPERS. The Application identified the Application type as "Service Pending Industrial Disability Retirement." Respondent, a Cook employed by the District, stated her last date on the payroll was April 10, 2014. By virtue of her employment, she is a local miscellaneous member. Respondent retired for service on May 1, 2014, and has been receiving her service retirement since that date.

2. In the Application, respondent described her disability as:

> cervical disc disease, generalized anxiety disorder, depressive disorder, mixed hypertension and lipedema, essential hypertension, chronic pain syndrome, essential [and] other specified . . . tremors, constipation, edema, insomnia, lesion of the femoral nerve, fibromyalgia and migraines, neck, lower [and] upper back bilateral knees [and] wrists.

Respondent reported the disability occurred on February 6, 2013, when she "fell at work" and broke [her] foot," which "intensified all" the disabilities she described above "by 98 [percent]." She further stated the fall "forced" her to retire.

3. CalPERS received respondent's Application on May 9, 2014. CalPERS requested from respondent medical reports concerning the conditions alleged in her Application. Respondent submitted medical reports as requested. CalPERS reviewed the medical reports and found they indicated a possible disability based on her

orthopedic (back and neck) conditions. CalPERS then obtained an independent medical evaluation (IME) from an orthopedic surgeon regarding respondent's orthopedic conditions. CalPERS further determined that the medical reports respondent supplied did not support any other alleged conditions included in her Application as a basis for disability. As a result, CalPERS did not pursue further IMEs regarding those other conditions.

4. CalPERS concluded its review of all medical reports received, and determined that respondent was not substantially incapacitated from the performance of her duties as a Cook based on her orthopedic conditions at the time her Application was filed. CalPERS notified respondent of its decision and advised her of her appeal rights by a letter dated October 9, 2014. Respondent timely appealed CalPERS' determination by a letter dated October 31, 2014.

5. Following her appeal, respondent submitted additional medical reports in support of her Application. CalPERS reviewed the additional reports and found they indicated a possible disability concerning her psychiatric (depression and anxiety) conditions. CalPERS obtained an IME of respondent by a psychiatrist. CalPERS also found the additional reports indicated a possible disability concerning respondent's rheumatic (fibromyalgia and chronic pain) conditions, and obtained an IME of respondent by a rheumatologist. CalPERS also sent respondent's medical reports to an orthopedic surgeon for review regarding her orthopedic (back and neck) conditions. After reviewing the reports, CalPERS made an amended determination, finding that respondent was not substantially incapacitated from the performance of her duties as a Cook at the time her Application was filed due to her orthopedic (back and neck), psychiatric (depression and anxiety) and rheumatic (fibromyalgia and chronic pain)

conditions. CalPERS notified respondent of its amended decision and advised her of her appeal rights by a letter dated April 19, 2019.[1]

## CalPERS' Evidence and Expert Opinions

### JOB DESCRIPTIONS

6. The District's job duty description for the Cook position generally describes the cook as preparing and cooking a variety of foods in large quantities, assisting in maintaining the school kitchen, and performing other work as required. Essential functions include preparing and cooking entrees, sandwiches, salads, and other foods, checking recipes and estimating supply quantities, setting up food production equipment, cleaning and storing equipment and supplies, and performing other related kitchen duties. The cook must meet all food, sanitation and equipment safety standards, understand food operations and services, apply proper food preparation and serving procedures and methods, and apply basic principles and techniques for proper inventory maintenance, storage, recordkeeping, and reporting. Physical requirements include continuously (67 to 100 percent of the time) standing, walking, grasping (including power grasping heavier items), and handling. The cook frequently (34 to 66 percent of the time) bends, lifts and carries items weighing up to 25 pounds and "team lift" items up to 50 pounds, lightly pushes and pulls items and utensils, and reaches above and below. The cook occasionally (1 to 33 percent of the

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[1] The evidence did not establish whether, or how, respondent appealed CalPERS' amended determination, why CalPERS' amended determination occurred nearly five years after respondent's October 2014 appeal, or whether any relevant intervening events regarding the Application occurred during that time period.

time) sits, squats or kneels, climbs using a step stool, reach from ground level to knee height, and reach while rotating the torso up to 90 degrees. In addition, the cook is exposed to gust, gas, or fumes from the oven and char-broiler, equipment noise, extreme summer heat, extreme cold from a walk-in freezer, and adverse weather conditions.

7. The District provided CalPERS with a completed "Physical Requirements of Position/Occupation Title" form describing specific physical movements and requirements for the cook position. The cook occasionally (up to three hours) sits, walks, kneels, climbs, squats, bends and twists at the neck and waist, reaches above and below the shoulder, pushes and pulls, performs fine manipulation, simple-and-power grasps, makes repetitive use of the hands, operates foot controls, and walks on uneven ground. The cook is occasionally exposed to excessive noise, extreme temperatures, humidity, wetness, dust, gas, fumes or chemicals. The cook occasionally lifts up to 50 pounds, but never more than 50 pounds.

**ORTHOPEDIC CONDITIONS**

8. CalPERS relied upon Donald C. Pompan, M.D. to evaluate respondent's orthopedic conditions. Dr. Pompan is board-certified in orthopedic surgery and has been in private practice in Salinas, California, since 1994. He has performed a variety of orthopedic surgeries for many years. He also specializes in treating patients with a broad scope of orthopedic problems involving the shoulders, elbows, knees, hands, fingers, bones, muscles, tendons, joints, and spine. His emphasis in treating patients emphasizes the exploration of non-surgical approaches to orthopedic issues utilizing education, therapy, and non-invasive interventions. He has performed independent evaluations in both personal injury and workers' compensation cases, and has performed IMEs for CalPERS for approximately five years. Dr. Pompan reviewed

respondent's medical records and job duties, and considered an IME report written by a previous CalPERS orthopedic expert, Ghol B. Ha'Eri, M.D., who had performed an IME on respondent on August 24, 2014. Dr. Pompan issued an IME report and testified regarding his observations and findings.

9. Dr. Pompan noted that several of respondent's complaints were not orthopedic in nature. She was being treated for pain in early 2013, and was taking OxyContin for pain due to a chronic neck and back pain history. This pain treatment history preceded the on-the-job fall which was the basis of respondent's disability claim. Two MRI images were taken, the first in October 2012, and the second on May 15, 2013, after respondent's fall. Dr. Pompan noted that neither MRI showed any differences, indicating that the minimal bulges and mild to moderate stenosis, which were normal findings, were present before the fall and were not caused by the fall itself.

10. Dr. Pompan referenced an April 7, 2014 note from Steven Schopler, M.D., describing a spinal fusion surgery in 2008 from which respondent "made a full recovery." Dr. Schopler reviewed MRIs of the lumbar and cervical spine and noted they were "essentially normal." Dr. Schopler also found "no radiographic evidence of objective findings consistent with a significant spinal injury." Dr. Schopler raised a concern that respondent appeared to be "moderately intoxicated" from "the extraordinary amount of medications" she was taking for a relatively insignificant injury.

11. Dr. Pompan reviewed Dr. Ha'Eri's IME, and found it notable that Dr. Ha'Eri's examination of the bilateral upper and lower extremities was "normal." Dr. Pompan opined that Dr. Ha'Eri's physical examination was thorough and carefully performed, and his conclusion that respondent's symptoms were "not supported by

objective findings" was consistent with all available medical evidence as well as Dr. Schopler's findings.

12. Dr. Pompan further noted that in respondent's October 31, 2014 letter appealing CalPERS' denial of her Application, she complained of "a lot more things" being "wrong" with her, including her "legs, arms, hands, knees, hips, entire back, shoulders, anxiety, depression, migraines, chronic pain, tremors, [and] fibromyalgia." Dr. Pompan opined that the orthopedic neck and back problems respondent alleged were due to her fall do not lead to the many additional problems of which she complained.

13. Dr. Pompan concluded that respondent's medical records and history contained no objective medical findings, particularly in the radiological studies, to support her claim of substantial incapacity. While respondent may have experienced severe pain and other medical issues from an orthopedic standpoint, Dr. Pompan found no objective evidence that she sustained an actual orthopedic impairment as a result of her at-work fall in February 2013. Instead, her alleged incapacity appeared to be based only on subjective complaints. As a result, Dr. Pompan found no evidence that she would be unable to perform any specific job duties due to an orthopedic condition.

**PSYCHIATRIC CONDITIONS**

14. CalPERS relied upon Robindra Paul, M.D., to evaluate respondent's psychiatric conditions. Dr. Paul is board certified in psychiatry and forensic psychiatry and has been in private practice in San Diego, California, since 2008. He specializes in adult and forensic psychiatry, has performed civil and criminal evaluations as an independent medical evaluator, and has performed evaluations as a qualified/agreed

medical evaluator certified by the Division of Workers' Compensation. Dr. Paul evaluated respondent on February 15, 2015, took a history, reviewed her medical records and job duties, administered a mental status examination and psychological testing, and issued an IME report. Dr. Paul testified regarding the results of his IME.

15. Dr. Paul's diagnoses included: unspecified depressive disorder, unspecified anxiety disorder, and post-traumatic stress disorder (PTSD). These three diagnoses were all based on respondent's reporting that she suffered from depression, excessive anxiety occurring four to five times per week, and PTSD due to intrusive memories and nightmares due to her history of being abused by her father as a child. Dr. Paul opined that these three conditions were not caused by respondent's work injury, but rather preceded it. He noted that respondent had a history of fibromyalgia, which can make it difficult to be physically active and may lead a person to report that she cannot perform her job duties. Dr. Paul opined in his February 2015 IME report that if the fall aggravated her fibromyalgia, it likely aggravated her depression and anxiety. These aggravated conditions would make her unable to perform all of her duties as a cook, which would render her substantially incapacitated for the performance of her job duties.

16. Thereafter, in June 2019, CalPERS provided Dr. Paul with an IME report dated June 30, 2019, by CalPERS' medical rheumatology expert, Dan La, M.D. In that report, which is discussed further below, Dr. La opined that respondent did not aggravate her fibromyalgia when she had a work-related fall in February 2013. Dr. La went on to conclude that respondent was not substantially incapacitated for the performance of her usual job duties as a cook due to fibromyalgia and chronic pain. Dr. Paul considered Dr. La's findings, and thereafter revised his previous opinion as follows in a supplemental report:

> Given that my opinions in my original report were contingent on [respondent's] fibromyalgia being aggravated [by the work-related fall], I cannot opine Ms. Domingos's (*sic*) was psychiatrically incapacitated at the time of my original report.

**RHEUMATOLOGIC CONDITIONS**

17. CalPERS retained Dan La, M.D., to evaluate respondent's rheumatologic conditions and perform an IME. Dr. La has been a licensed physician since 2004 and is Board certified in rheumatology. He has a private practice specializing in rheumatology and commonly treats patients with fibromyalgia, arthritis, lupus, rheumatoid arthritis, and chronic pain. Dr. La evaluated respondent on January 30, 2019, took a history, reviewed her medical records and job duties, performed a physical examination, and issued an IME report. Dr. La testified regarding the results of his IME.

18. Dr. La's review of systems revealed that respondent suffered from headaches, aches and pains, and fatigue, which is typical for fibromyalgia patients. Otherwise, he found "not much else" than normal results. Respondent's physical examination revealed tremors in her fingers not typically related to fibromyalgia, but no abnormal neurological findings, and no objective findings of joint pain. Respondent had no swelling in her waist, fingers, or knees, and demonstrated full range of motion. Dr. La reviewed all available medical records and noted that December 2014 laboratory studies conducted by Daniel Watrous, M.D., were negative for rheumatoid factor. Dr. La opined that respondent was substantially incapacitated for the performance of her job duties based on findings of degenerative arthritis involving the cervical and lumbar spine associated with previous fusion of the cervical spine. He also considered

respondent's subjective reports of chronic pain from fibromyalgia to limit her ability to work as a cook.

19. Thereafter, CalPERS contacted Dr. La and asked him to clarify his opinions in a supplementary report. CalPERS asked Dr. La to "leave any cervical and lumbar spine issues" to be determined by an orthopedic expert, and informed Dr. La that CalPERS' orthopedic expert opined that respondent was not substantially incapacitated for the performance of her job duties due to any orthopedic condition. Dr. La reconsidered the basis of his prior conclusions and recognized he had assumed a combination of orthopedic issues existed which were not substantiated by the evidence. Dr. La drafted a supplementary report, revising his earlier opinion, finding that respondent was not substantially incapacitated for the performance of her job duties due to fibromyalgia or chronic pain syndrome. Dr. La also noted that respondent's fibromyalgia complaints were subjective only and not supported my any objective medical findings. Although her February 2013 fall may have aggravated her fibromyalgia, it would have been short term and would not lead to worsening of her fibromyalgia conditions.

## Analysis

20. Respondent did not participate at hearing. Thus, she failed to offer sufficient, competent medical evidence to establish that, at the time she applied for industrial disability retirement, she was substantially and permanently incapacitated from performing the usual duties of a cook for the District.

21. The medical evidence CalPERS presented established that respondent's orthopedic, rheumatologic, and psychiatric conditions did not render her incapable of performing her usual job functions and duties. CalPERS' three medical experts carefully

reviewed the available evidence and were persuasive in reaching their respective opinions that respondent was not substantially and permanently incapacitated from performing the usual duties of a cook.

## LEGAL CONCLUSIONS

1. By virtue of her employment, respondent is a local miscellaneous member of CalPERS, pursuant to Government Code section 21150.

2. To qualify for disability retirement, respondent had to prove that, at the time she applied, she was "incapacitated physically or mentally for the performance of [her] duties in the state service." (Gov. Code, § 21156.) As defined in Government Code section 20026:

> "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.

3. Evidence Code section 500 provides:

> Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

4. Evidence Code section 115 provides in relevant part, that "burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The party assuming

the affirmative at an administrative hearing has the burden of proof, including the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) Respondent did not meet her burden.

5. The determination of whether respondent is substantially incapacitated must be based on an evaluation of whether, at the time she applied for disability retirement, she was able to perform the usual duties of a cook. (*California Department of Justice v. Board of Administration of California Public Employees' Retirement System* (*Resendez*) (2015) 242 Cal.App.4th 133, 139.)

6. 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." (Italics in original.)

7. The court in *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855 (*Hosford*), reached a similar conclusion with respect to a state traffic sergeant employed by the CHP. In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that "this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing." (*Hosford*, *supra*, 77 Cal.App.3d at p. 863.) As the court explained, prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Ibid.*)

8. When all the evidence in this matter is considered in light of the courts' holdings in *Resendez, Mansperger,* and *Hosford*, respondent did not establish that her disability retirement Application should be granted. Respondent failed to participate in the hearing and, thus, provided no evidence in support of her Application. In addition, CalPERS established that there was insufficient objective evidence based upon competent medical opinion that respondent is permanently and substantially incapacitated from performing the usual duties of a cook due to an orthopedic, rheumatologic, and/ or psychiatric condition. Consequently, her disability retirement Application must be denied.

## ORDER

The Application of respondent Connie L. Domingos for Service Pending Industrial Disability Retirement is DENIED.

DATE: March 12, 2020

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John DeCure
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JOHN E. DeCURE
Administrative Law Judge
Office of Administrative Hearings