ATTACHMENT A

THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Reinstatement from Disability Retirement of:

JOY D. JORDAN, Respondent,

and

DEPARTMENT OF STATE HOSPITALS, NAPA, Respondent.

Agency Case No. 2022-0415

OAH No. 2023020701

PROPOSED DECISION

Jessica Wall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on October 4, 2023, in Sacramento, California.

Mehron Assadi, Attorney, represented the California Public Employees' Retirement System (complainant or CalPERS).

Joy D. Jordan (respondent) represented herself.

There was no appearance by or on behalf of the Department of State Hospitals, Napa (DSH). CalPERS established that DSH was properly served with the Notice of

Hearing. Consequently, this matter proceeded as a default hearing against DSH under Government Code section 11520.

Evidence and testimony were received at the hearing. The record was left open for parties to submit additional exhibits and objections. CalPERS submitted its Exhibit 23, an Ergonomic Report by Shawn Moss, on October 5, 2023, which was admitted as administrative hearsay. Respondent did not file an opposition or additional exhibits. On October 17, 2023, the record closed, and the matter submitted for decision.

BACKGROUND AND ISSUE

Respondent was employed by DSH at its Napa facility as a Pharmacy Technician. By reason of her employment, respondent is a state miscellaneous member of CalPERS. On February 18, 2020, respondent applied for disability retirement based on her orthopedic conditions. On June 30, 2020, CalPERS approved respondent's application.

Because respondent was under the minimum age for voluntary service retirement, pursuant to Government Code section 21192, CalPERS sent respondent to an Independent Medical Evaluation (IME). CalPERS reviewed medical reports concerning respondent's orthopedic conditions and determined that respondent was no longer substantially incapacitated from performing the duties of a Pharmacy Technician at the DSH. Respondent appealed from CalPERS's determination.

The issue for Board determination is whether CalPERS established that respondent is no longer disabled or substantially incapacitated from performing the usual duties of a Pharmacy Technician based on her orthopedic conditions.

FACTUAL FINDINGS

1. On February 18, 2020, respondent signed and subsequently applied for disability retirement based on her orthopedic (left upper extremity and right upper extremity) conditions. Respondent identified the date of injury as August 1, 2017.

2. On June 30, 2020, CalPERS approved the application. Following the approval, respondent retired for disability effective December 4, 2019. Respondent was under the minimum age for voluntary service retirement at the time. CalPERS advised respondent that she may be reexamined periodically to determine her qualification for reinstatement if she was under the minimum age for service retirement. Respondent was under the minimum age for service retirement.

3. On September 27, 2021, CalPERS notified respondent that her disability retirement benefits were under review pursuant to Government Code section 21192. CalPERS also obtained medical reports and records about respondent's orthopedic conditions and treatment history. On February 2, 2022, Harry A. Khasigian, M.D., performed an IME of respondent on behalf of CalPERS. Dr. Khasigian concluded respondent no longer qualified for disability retirement.

4. By a letter dated March 3, 2022, CalPERS notified respondent and DSH of this determination and advised the parties of their right to appeal. Respondent filed a notice of appeal dated April 5, 2022, which CalPERS received on April 11, 2022. Although respondent's notice of appeal was untimely (Cal. Code Regs., tit. 2, § 555.1), CalPERS did not argue the appeal should be rejected. Therefore, the issue was waived.

5. On February 9, 2023, Keith Riddle, Chief of CalPERS's Disability and Survivor Benefits Division, filed the Accusation in this matter. This hearing followed.

Job Duties of a Pharmacy Technician

6. According to the Duty Statement from DSH, Napa State Hospital, a Pharmacy Technician performs basic pharmacy tasks. A licensed pharmacist supervises these tasks. The duties include accurately preparing unit dose cassettes, checking the automated medication machine, filling medication drawers with prescribed doses, preparing medication labels, and assisting the pharmacist with prescription preparation. A Pharmacy Technician must also order medications and supplies, verify orders, maintain records, review stock for expired drugs, maintain patient profiles, and deliver medications to nursing units. Other duties include operating packaging machinery, cleaning equipment, reviewing physician orders, processing fax orders, and coordinating Medicare drug benefits.

7. In October 2019, respondent completed a "Physical Requirements of Position/Occupational Title" form for CalPERS. On that form, she listed the Pharmacy Technician's physical activities and their corresponding frequencies as follows:

- Constantly (over six hours): sitting, standing, walking, climbing, squatting, bending and twisting at the neck and waist, reaching above and below the shoulder, pushing and pulling, fine manipulation, power and simple grasping, repetitive hand use, keyboard and mouse use, lifting up to 25 pounds, walking on uneven ground, working with heavy equipment, exposure to excessive noise, and operation of foot controls or repetitive movement;

- Frequently (three to six hours): kneeling, lifting 26 to 50 pounds, driving, exposure to dust, gas, fumes, or chemicals, and working with biological hazards;

- Occasionally (up to three hours): crawling, lifting 51 to 75 pounds, exposure to extreme temperature, humidity, or wetness, and use of special protective equipment;

- Never: running, lifting over 75 pounds, and working at heights.

8. The job documents also included a January 2012 report from Shawn Moss Ergonomic Consulting for respondent's role as Pharmacy Technician at DSH. In this report, the lifting descriptions differ from what respondent described on the October 2019 form. The report states that a Pharmacy Technician lifts or carries up to five pounds constantly (67 to 100 percent of shift); six to 10 pounds frequently (34 to 66 percent of shift); 11 to 50 pounds occasionally (one to 33 percent of shift); and never more than 50 pounds. He further found that a Pharmacy Technician pushes up to 20 pounds frequently; 21 to 30 pounds occasionally, and 31 to 50 pounds rarely (less than one percent of shift). As for the other activities, he listed their frequency as follows:

- Constantly: walking, balancing, and eye-hand coordination;

- Frequently: dynamic standing, bending, twisting, spinal rotation, fine motor activity, using a computer, driving, and pinching;

- Occasionally: sitting, climbing, squatting, kneeling, reaching above shoulder, grasping, and writing;

- Rarely: static standing; and

- Never: crawling.

CalPERS Investigation

9. CalPERS Investigator Pravneel Sharma testified about his investigation in this case. CalPERS assigned Investigator Sharma to investigate respondent's case after the State Compensation Insurance Fund (SCIF) reported a tip about its own investigation into respondent's injuries. SCIF provided CalPERS with footage from surveilling respondent on two days in February 2021. Based on the tip and footage, Investigator Sharma and his team surveilled respondent for seven days in August and September 2021, for a total of 44 hours. He recorded video footage, edited to the 36 minutes and 21 seconds that showed respondent, and drafted an investigation report. Investigator Sharma testified consistently with his report.

10. On the afternoon of August 16, 2021, respondent drove herself and a female passenger to two businesses in Napa. The videos depict her using both hands to put on a face mask. Four days later, on the morning of August 20, 2021, respondent drove herself and a female passenger to about seven businesses in Napa and Yountville. The videos show respondent flexing and extending her left arm and using her left hand to grip different objects. She held her backpack with her left arm and, at multiple times, rotated her left arm and hand around in a fluid motion to pull the strap of her backpack over her arm. At one point, she gripped her car door with her left hand and pulled it closed as she tossed litter under the car with her right hand. During much of the footage, respondent held her cell phone, keychain, or face mask in her left hand.

11. On the afternoon of August 23, 2021, the videos show respondent shopping at Target. She gripped a packet of papers with her left hand and pushed a shopping cart with both hands. Inside the store, respondent used both arms and hands to pick up and inspect items. At one point, she reached up with both hands to

pick up a 12-pack of canned soft drinks located on a shelf above her shoulders. After lifting it, she bent down and placed it on the lower tray of her shopping cart. Back at her vehicle, respondent used both hands to put a bag into her trunk and closed the driver's side door with her left arm. She then went shopping at a grocery store, again using both arms to push her shopping cart.

12. On the morning of August 25, 2021, respondent pulled multiple trash bins up to her house with her right arm while holding a keychain with her left hand. She then retrieved her mail, switching the items from her right to left hand as she walked back to the house.

13. On or about September 20, 2021, Investigator Sharma provided his Investigation Report and surveillance videos to CalPERS's Disability and Survivor Benefits Division for their review and determination. He testified that, during his investigation, he did not see respondent struggling with any physical tasks. He also did not edit out any footage that showed her struggling to complete an activity.

14. The February 2021 videos from SCIF similarly show respondent engaging in errands and socializing. The February 10, 2021, video depicted respondent driving her car with both hands, loading laundry into the vehicle, and pulling a wheeled laundry basket with her right hand while holding her keychain in her left hand. She stopped at a fast-food drive-thru, eating French fries with her right hand and steering with her left. She later held the bag of food with her left arm before she used both arms to remove a female toddler from the car and place her on the ground. While respondent ate with the children, she used both hands to open the packaging on a toy and take out pieces. She also picked up the female toddler with both arms, and then held her on her right side.

Independent Medical Evaluation by Harry A. Khasigian, M.D.

15. On February 2, 2022, Dr. Khasigian evaluated respondent at CalPERS's request. Dr. Khasigian obtained his medical degree from the University of Southern California in 1974. He completed his orthopedics residency at the University of California, Irvine Medical Center in 1979. He received board certification from the American Board of Orthopedic Surgery in September 1980, with a subspecialty certification in orthopedic sports medicine in November 2011. Since 1979, Dr. Khasigian has maintained an orthopedic surgery private practice in Sacramento, California. He still sees patients and performs orthopedic surgeries on a full-time basis. He has been a Qualified Medical Evaluator (QME) for the State of California since December 1992. Dr. Khasigian has performed many IMEs for CalPERS.

16. Dr. Khasigian reviewed respondent's duty statement, the physical requirements of her position, and the ergonomics report. He then interviewed respondent and performed a physical examination. Following the examination, Dr. Khasigian reviewed the surveillance footage and respondent's medical records. He prepared a February 2, 2022, IME report in which he applied the CalPERS standards for disability retirement. He later submitted a supplemental report dated October 19, 2022, after reviewing additional medical records. Dr. Khasigian testified at the hearing consistent with his reports.

RESPONDENT'S COMPLAINTS AND HISTORY OF TREATMENT

17. Respondent was 49 years old when she presented for the IME. She reported injuring her left extremity in 2005 when she pulled on a large cart and experienced pain. She stopped working on August 1, 2017, and has not been employed since. According to respondent, her left arm was "a dead weight," and she

could not use it at all. She reported she was unable to perform any job duties that involved using her left arm.

18. Respondent reported pain in performing most of the physical activities of a Pharmacy Technician. She said she could not perform other household tasks, such as lifting grocery bags, doing yard work, and vacuuming because she was unable to lift any weight with her left arm. She had treated the injury through therapy, cortisone, and rest. Her medications included oxycodone, clonazepam, and ibuprofen. She also received injections of Botulinum toxin (Botox) in her left arm every three months. Her treating doctor was Jacqueline Weisbein, D.O., a pain management specialist.

19. According to respondent, her daily activities were "do[ing] nothing." She reported staying in her home in her pajamas all day. She said she did no outside activities and drove barely once a week. She limited those trips to within four blocks of her home.

PHYSICAL EXAMINATION

20. Dr. Khasigian performed a physical examination, in which he found respondent was "a well-developed, well-nourished, thin female with obvious lean body mass atrophy." He noted respondent lost weight because of an intestinal condition. Respondent sat and stood without help and did not wear any orthopedic devices. Her left arm was at her side, flexed at the wrist. She had a "swan neck deformity," which is a bending, in the left little and ring fingers. She did not display muscle spasms, twitches, or jerking. Dr. Khasigian noted respondent had decreased muscle tone based on weight loss.

21. Dr. Khasigian evaluated respondent's extremity tissues and found them to be soft and of equal warmth. Neither arm was swollen with fluid or discolored. They

did not show signs of complex regional pain syndrome. Neither extremity had fixed tightening of muscles, tendons, or ligaments.

22. Respondent reported a deformity in her left elbow, but Dr. Khasigian found both elbows to be normal. He found no swelling or masses near the elbow joints. He noted that her right upper arm was normal, while her left upper arm had mild thinning. She had a full range of motion when he assisted in moving her left arm. Her joints flexed equally and symmetrically, and she could fully extend.

23. During the neurological examination, respondent did not perform any motor function with her left arm. She could, however, push it against gravity. Her motor examination results were Grade 5 (normal strength) in her right arm and Grade 0 in her left. Respondent's left upper arm circumference was 1.5 centimeters smaller than her right, which Dr. Khasigian attributed to respondent being right-hand dominant.

REVIEW OF SURVEILLANCE FOOTAGE

24. Dr. Khasigian watched the CalPERS and SCIF surveillance footage twice. Based on what he observed, Dr. Khasigian opined that the footage showed respondent "using her left hand completely in a normal fashion" and having "essentially normal function of the right upper extremity." He did not observe any restrictions or limitations, though she occasionally had "a mild postural deformity." He noted respondent's left arm was functional because she was able to close a car door, hold her bag, manipulate her bag's shoulder strap, and hold a cell phone, keychain, cup, and mail in her left hand. In the SCIF videos, he observed respondent was able to lift and carry a small child with her arms. Dr. Khasigian also noted she was able to drive to many stops, repeatedly entering and exiting her car. He questioned whether this

conflicted with her statement that she could only drive four blocks, but he did not know the distances driven in the videos.

REVIEW OF DIAGNOSTIC TESTS AND MEDICAL RECORDS

25. Dr. Khasigian also reviewed respondent's diagnostic tests. She had a July 2019 magnetic resonance imaging (MRI) test of her cervical spine that showed degenerative changes. She also had an April 2018 MRI of her right wrist with findings of swelling but no bone anomalies. A record he found particularly important was the April 2021 exam by neurologist Albert Mitchell, D.O. Dr. Mitchell performed an electromyography (EMG) test on respondent's right arm, which yielded normal results. He wrote several statements in his report about examining both her arms. His notes were that "she appeared to have full strength of the arms (plural) proximally and distally at 5/5 strength," her muscle tone was normal, and she had no atrophy. He found intact sensation in respondent's fingertips and bilateral deep tendon reflexes of 1/4.

26. Dr. Khasigian reviewed respondent's medical records from Napa Valley Orthopedic and Kaiser Permanente. A November 18, 2021, record found that respondent exhibited involuntary muscle contracture and gave an impression of dystonia. Dystonia is a neurological disorder, composed of involuntary muscle contractions that cause repetitive movements or abnormal postures. This contrasted with Dr. Khasigian's examination, where respondent had no symptoms of dystonia. The dystonia diagnosis was also present in a February 12, 2019, record. This record reported that respondent saw a neurologist "a long time ago" and her dystonia had been caused by an acute injury.

27. Respondent's Kaiser records reported her complaints of pain in both arms and weakness in her left arm since December 2020. She reported the pain level was 9/10 without medication, and desired to stay on her opioid pain medicine.

DIAGNOSIS AND OPINION

28. Dr. Khasigian's diagnoses for respondent included:

> 1. Normal right upper extremity.
> 2. Left arm, no diagnosable clinical abnormality.
> 3. Intermittent and voluntary swan neck deformities, ring and small finger left hand.
> 4. No clinical evidence of dystonia at this time.
> [¶] … [¶]
> 6. Two normal EMGs of the right upper extremity.
> [¶] … [¶]
> 10. Chronic pain syndrome, on Oxycodone 40mg, Klonopin, Motrin and Prozac.

He found that she did not present with symptoms of dystonia. Furthermore, the surveillance footage showed her engaging in activities that "supersede[d] her subjective complaints quite significantly." He concluded that respondent's Botox injections did not contribute to the absence of any tremors because she was at the end of that treatment at the time of his examination.

29. In conclusion, Dr. Khasigian opined that respondent had the capacity to perform her usual job duties. He found that her clinical examination did not show dystonia. There were no conclusive diagnostic tests that showed a neurological deficit in her upper extremity. His findings were based, in part, on the substantial

inconsistencies between her subjective complaints and the activities performed in the surveillance footage. He noted she took a great deal of medication, significantly more than was customary for her physical presentation. He also mentioned the April 2021 findings from Dr. Mitchell regarding his normal examination of respondent's extremities. Since there was no objective medical evidence of an abnormality, Dr. Khasigian concluded that respondent had no restrictions on her usual and customary job duties.

SUPPLEMENTAL REPORTS

30. On October 19, 2022, Dr. Khasigian authored a Supplemental Report to the IME. He reviewed an additional three inches of medical reports and charts. The new information dated back to 2008 and included reports from multiple examiners. Those records included the 2009 records from Robert Bruckman, M.D., mentioning dystonia. Nevertheless, no medical provider confirmed the dystonia diagnosis by objective testing. Dr. Khasigian's conclusions remained the same. He also added wording to the diagnosis section to reflect that respondent had "chronic opioid habituation" based on her long-term use of oxycodone.

Respondent's Evidence

31. Respondent testified that she began working as a Pharmacy Technician in 1989. It was her only job, other than being a mother. She stopped working in 2017 because she was unable to perform the usual duties of a Pharmacy Technician without experiencing pain. She argued it would be unfair to expect her to work and be in pain all the time. She does things that cause her pain on her own time, like lifting her grandchildren, but that is her choice. She also maintained her grandchildren are petite and lightweight.

32. Respondent explained that she sometimes has control over her left arm. Other times, she does not. The Botox injections sometimes relieve the pain. Other times, they cause her to lose control of her wrist. Her sporadic inability to use her arm limits her daily activities. Her husband assists her with some grooming tasks, and she improvises by using her mouth to open some items. She has also purchased assistive devices, like a cell phone grip, to perform normal daily tasks.

33. Respondent asserted that she had nothing to hide, but she also objected to having been surveilled. She argued the videos were an invasion of privacy and compared being filmed to being robbed. She thought the 36 minutes of footage did not accurately convey her daily limitations and challenges. She occasionally uses her left arm because her physician told her she had to "use it or lose it." Her physician also suggested that she start physical therapy, which she has yet to begin.

34. Respondent believed that Dr. Khasigian was "mad from the start" of her appointment and "treated [her] mean." She thought his tone was arrogant and perceived that he was calling her a liar. She found his conclusions to be "rude" because he assumed her bag was heavy and repeatedly referenced her luxury car brand. She thought the surveillance footage biased Dr. Khasigian's opinion.

35. Respondent also disagreed with the April 2021 report from Dr. Mitchell. She expressed that he never examined her left arm and could not have made findings about it functioning normally. Respondent did not think she was more intelligent than the doctors who diagnosed her with dystonia. She would not have been able to fool them into thinking she has dystonia unless she did.

Analysis

36. In reevaluating respondent's disabling conditions, CalPERS sought to determine whether she was still disabled. Dr. Khasigian's IME process, report, and testimony was competent and thorough. His opinion that respondent is no longer substantially incapacitated from her usual job duties was supported by the evidence upon which he relied. Although respondent presented as a sincere witness who has experienced pain for many years, she presented no medical evidence or medical-expert testimony to challenge Dr. Khasigian's opinion or refute CalPERS's evidence. In sum, based on the evidence presented at hearing, CalPERS's contention that respondent is no longer disabled was persuasive.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The burden of proof flows from the type of process initiated and lies with the party making the charges. (*Martin v. State Personnel Bd.* (1972) 26 Cal.App.3d 573, 582.) CalPERS approved respondent's disability retirement on June 30, 2020, with a retirement date effective December 4, 2019. CalPERS filed this Accusation to force her involuntary reinstatement from disability retirement. As such, the burden rests with CalPERS to prove its contentions based on competent medical evidence.

2. CalPERS must carry this burden by a preponderance of the evidence. (Evid. Code, § 115.) Evidence that preponderates must amount to "substantial evidence." (*Weiser v. Bd. 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 Statutes and Precedent

3. 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, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient who is at least six months less than the age of compulsory retirement for service applicable to members of the class or category in which it is proposed to employ him or her." (Gov. Code, § 21192.)

4. "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. If the recipient was an employee of the state or of the university and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated, at his or her option, to that position ....." (Gov. Code, § 21193.)

5. The role of disability retirement is to address the needs of employees who are unable to work because of a medical disability. (Gov. Code, § 21150, subd. (a).) "[W]hile termination of an unwilling employee for cause completely severs the employer-employee relationship, disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled." (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1296.) "Until an employee on disability retirement reaches the age of voluntary retirement, an

employer may require the employee to undergo a medical examination to determine whether the disability continues." (*Id.* at p. 1305 [citing Gov. Code, § 21192].)

6. An applicant must demonstrate her substantial inability to perform her usual duties based on competent medical evidence, and not just the applicant's subjective complaints of pain. (*Harmon v. Bd. of Retirement* (1976) 62 Cal.App.3d 689, 697.) Mere difficulty or discomfort in performing certain tasks is not enough to support a finding of disability. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

Conclusion

7. CalPERS met its burden of proving by competent medical evidence that respondent is no longer substantially disabled for performance of her duties as a Pharmacy Technician at DSH. For the reasons set forth in the Factual Findings, Dr. Khasigian's professional opinion was that respondent is not substantially incapacitated from performing her usual job duties as a Pharmacy Technician at DSH. His opinion was comprehensive and persuasive. Despite respondent's credible complaints of ongoing pain, she did not submit competent medical evidence of impairment to contravene CalPERS's evidence.

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ORDER

Respondent Joy D. Jordan's appeal is DENIED. California Public Employees' Retirement System's request to involuntarily reinstate respondent Joy D. Jordan from industrial disability retirement is GRANTED.

DATE: October 19, 2023

Jessica Wall
Jessica Wall (Oct 19, 2023 12:21 PDT)

JESSICA WALL
Administrative Law Judge
Office of Administrative Hearings