

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:

LETICIA M. MORANDO-HERNANDEZ, Respondent

and

CASTRO VALLEY UNIFIED SCHOOL DISTRICT, Respondent

and

ALAMEDA COUNTY SCHOOLS, Respondent

Agency Case No. 2022-0361

OAH No. 2022060866

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter by videoconference on October 20, 2022, from Sacramento, California.

Nhung Dao, Attorney, represented California Public Employees' Retirement System.

Respondent Leticia M. Morando-Hernandez represented herself.

Dustin Gacherieu, Director of Human Resources, represented respondent Castro Valley Unified School District (District).

No one appeared for or on behalf of respondent Alameda County Schools (County). The County's default was entered, and this matter proceeded as a default hearing as to the County only, pursuant to Government Code section 11520.

Evidence was received, the record closed, and the matter submitted for decision on October 20, 2022.

FACTUAL FINDINGS

Jurisdictional Matters

1. Ms. Morando-Hernandez began working for the District in 2000. She became a local miscellaneous member of CalPERS by virtue of her employment. Her most recent position was Secondary School Secretary. She meets the minimum service requirement to qualify for disability retirement.

2. On September 29, 2021, Ms. Morando-Hernandez signed an application for disability retirement. She identified her disability as functional neurologic disorder, which she described as "a medical condition in which there is a problem with the functioning of the nervous system."

3. Ms. Morando-Hernandez indicated that her disability began on August 3, 2020, and initially presented as "burning pain in [her] right hand and forearm" which made it "very difficult to concentrate with constant pain and burning sensation." She

explained she has constant pain, burning, and numbness in both hands and feet, as well as tingling and electric sensations throughout both hands, legs, and feet.

4. Ms. Morando-Hernandez specified that her disability prevents her from using a computer, mouse, and keyboard. She stated she cannot use her hands to hold a telephone handset or her fingers to dial a telephone and is unable to lift, pull, or push items, and she has great difficulty writing or holding items in her hands.

5. CalPERS notified Ms. Morando-Hernandez that it had reviewed medical reports from Judy Chang-Witt, M.D., Christine Lu, M.D., and A.K. Bhattacharyya, M.D., regarding her condition and determined she is not substantially incapacitated for the performance of her usual duties as a Secondary School Secretary with the District. Therefore, it denied her application for disability retirement.

6. The following week, Ms. Morando-Hernandez applied for service retirement. Her application was approved, and she has been receiving a service retirement allowance since May 23, 2022.

7. Ms. Morando-Hernandez appealed CalPERS's denial of her application for disability retirement. On June 22, 2022, Keith Riddle, CalPERS's Chief of Disability and Survivor Benefits Division, signed the Statement of Issues solely in his official capacity. The sole issue on appeal is whether Ms. Morando-Hernandez was substantially incapacitated for the performance of her usual duties as a Secondary School Secretary with the District due to a neurological (functional neurologic disorder) condition when she applied for disability retirement.

Usual Duties and Physical Requirements of a Secondary School Secretary

8. The District's job description describes the following as some of the essential duties performed by a Secondary School Secretary:

- Evaluates situations involving staff, students, parents, the public, etc. [*s/c*] including emergency/disaster for the purpose of taking action and/or directing to other personnel for resolution
- Orients new site personnel regarding appropriate school and district practices for the purpose of effectively assimilating new personnel into site operations
- Oversees student workers, volunteers, office staff, etc. [*s/c*] for the purpose of ensuring appropriate class credit and/or meeting work requirements
- Supports assigned administrative personnel for the purpose of providing assistance with their administrative functions

9. Mr. Gacherieu completed CalPERS's form "Physical Requirements of Position/Occupational Title" for Ms. Morando-Hernandez's position. Ms. Morando-Hernandez reviewed the completed form and signed her name indicating her agreement with the information provided. Mr. Gacherieu identified the following physical activities as being performed by a Secondary School Secretary with the following frequencies during an eight-hour shift:

Constantly: interacting/communicating face-to-face with public and co-workers, lifting/carrying up to 10 pounds, and using a computer keyboard and mouse;¹

Frequently: sitting and interacting/communicating with public by telephone;

Occasionally: interacting/communicating with co-workers,² supervising staff, lifting/carrying between 11 and 25 pounds, standing, walking, bending at neck and waist, twisting at neck and waist, reaching below shoulder, pushing and pulling, power grasping, holding and light grasping, pinching and picking, and exposure to excessive noise;

Infrequently: lifting/carrying between 26 and 50 pounds, kneeling, climbing, squatting, reaching above shoulder, and working at heights; and

¹ "Constantly" is more than 5 hours, "frequently" is between 2.5 and 5 hours, "occasionally" is between 31 minutes and 2.5 hours, "infrequently" is between 5 and 30 minutes, and "never/rarely" is less than 5 minutes.

² Mr. Gacherieu indicated this duty is performed constantly and occasionally. The persuasive evidence established that the duty is performed constantly rather than occasionally.

Never/Rarely: lifting/carrying greater than 50 pounds, running, crawling, walking on uneven ground, driving, operating hazardous machinery, exposure to extreme temperature, and exposure to dust, gas, fumes, or chemicals.

Medical Evidence

A.K. BHATTACHARYYA, M.D.

Assignment

10. Dr. Bhattacharyya is a board-certified neurologist. CalPERS asked him to perform an Independent Medical Evaluation (IME) of Ms. Morando-Hernandez to determine if she was substantially incapacitated for the performance of her duties as a Secondary School Secretary with the District. Dr. Bhattacharyya performed his IME on January 28, 2022, and prepared a written report documenting his findings and conclusions. His report was admitted into evidence, and he testified consistently with his report.

Medical Record Review

11. CalPERS provided Dr. Bhattacharyya with Ms. Morando-Hernandez's medical records to review as part of his IME. Those records indicated she received conservative treatment for her disability through workers' compensation from September 16 through October 23, 2020. She initially treated with Rose Quintos-Melgar, M.D., who conducted a limited examination by videoconference, diagnosed Ms. Morando-Hernandez with right ulnar nerve entrapment, requested authorization

for a nerve conduction study of the right arm, and prescribed 12 weekly physical therapy sessions and ibuprofen as-needed.

12. Charlene Niizawa, M.D., a physician board-certified in physical medicine and rehabilitation, performed a nerve conduction study due to Ms. Morando-Hernandez having pain and numbness in her right forearm and thumb for several months. The study was normal and showed no evidence of a right axon loss, cervical radiculopathy, brachial plexopathy, mononeuropathy, or peripheral neuropathy.

13. Dr. Quintos-Melgar referred Ms. Morando-Hernandez to a neurologist. Christine Lu, M.D., a board-certified neurologist, examined Ms. Morando-Hernandez, who complained of constant migrating numbness and tingling in her right arm. She was experiencing a new symptom of numbness in her right lower lip, a weakened grip in her right hand, and an electric sensation in her left arm and leg. Dr. Lu diagnosed Ms. Morando-Hernandez with numbness and tingling of skin and functional neurologic disorder. She recommended Ms. Morando-Hernandez reduce stress, improve the quality of her sleep, and increase her level of exercise. Dr. Lu prescribed gabapentin for symptom management.

14. On October 23, 2020, Dr. Quintos-Melgar had a telephone appointment with Ms. Morando-Hernandez. Ms. Morando-Hernandez had sent a message earlier that day explaining she was experiencing the same symptoms in her left arm she had been experiencing in her right. Additionally, she developed a tremor in her right wrist at night. Dr. Quintos-Melgar explained that based on Dr. Lu's diagnosis of functional neurologic disorder, Ms. Morando-Hernandez's disability was not work-related, her treatment was no longer covered by workers' compensation, and she was being referred to her primary care physician for further treatment under her health insurance plan.

15. According to Ms. Morando-Hernandez's medical records, she continued to receive conservative treatment for her disability through her health plan from September 16, 2020, through September 8, 2021. Judy Chang-Witt, M.D., a board-certified internist, managed her treatment. Dr. Lu and Rajesh Kalra, M.D., a physician board-certified in physical medicine and rehabilitation, also provided treatment.

16. Ms. Morando-Hernandez continued to complain of migrating burning, pain, and tingling in her bilateral upper and lower extremities. She also complained of chronic neck pain. Treatment included the pain medications gabapentin, cyclobenzaprine, and duloxetine. She was taken off work temporarily and then returned to work with restrictions. Additionally, she was referred to the chronic pain clinic for counseling, physical therapy, and medication management. She was encouraged to maintain an active lifestyle and exercise to the extent tolerable.

17. An MRI of the cervical spine showed discogenic and degenerative disc disease, most prominently at the C6-C7. However, there was only mild narrowing of the foramen. A repeat nerve conduction study of the right upper extremity was "normal," which Dr. Lu explained supported her prior diagnosis of functional neurologic disorder.

Examination

18. When Ms. Morando-Hernandez arrived for her IME in January 2022, she completed a medical questionnaire about her disability prior to meeting with Dr. Bhattacharyya. She was then taken to an examination room, and Dr. Bhattacharyya discussed her answers with her prior to physically examining her.

19. Ms. Morando-Hernandez described her current symptoms as numbness in her face, lips, mouth, and eyelids. She had chronic pain in her neck and sharp pain in

her shoulder which reduced mobility. She felt burning, tingling, and numbness in both forearms and numbness and sharp pain with burning and tingling in both hands, particularly the fingers and palms. She sometimes had a tremor in her right wrist. She had an electric "shock-like" pain in both upper and lower extremities. Her knee buckled when walking, and she experienced bilateral leg weakness.

20. Ms. Morando-Hernandez reported that her symptoms began August 30, 2020, while she was working as a school secretary for the District. Her duties included computer database management, front office work, troubleshooting problems, answering phones, and managing the school's website. She regularly worked more than eight hours a day, five days a week. She lifted 10 pounds or less, usually computers and laptops. She regularly engaged in repetitive hand use and was constantly lifting, pushing, pulling, standing, twisting, bending, squatting, walking, kneeling, sitting, stooping, and reaching with her arms. She was off work due to her disability from October 2020 until April 2021, when she returned on modified duty. She was retired for service at the time of the IME.

21. Ms. Morando-Hernandez attributed her initial symptoms to poor ergonomics while working from home during COVID and then later working at school. She received medical treatment from the Kaiser Permanente Group, initially through workers' compensation. Workers' compensation denied coverage after Dr. Lu's diagnosis of functional neurologic disorder, and Ms. Morando-Hernandez continued treatment through her health plan.

22. At the time of the IME, Ms. Morando-Hernandez was taking pain medication and wearing a brace on her hand and wrist. Dr. Chang-Witt was still managing her treatment, which included chiropractic care and acupuncture.

23. Relevant medical history included a history of psychological counseling for stress-related anxiety since age 15. Ms. Morando-Hernandez had been receiving treatment for anxiety for the last one and a half years prior to the IME, including counseling, medication, and tai chi.

24. Dr. Bhattacharyya performed a physical examination of Ms. Morando-Hernandez, which was unremarkable. She was awake, alert, and oriented as to who she was, where she was, and what time it was. She followed instructions, and her speech and hearing were normal. She was not confused or agitated, but was anxious.

25. Ms. Morando-Hernandez's skull and face were normal in size, and her eyes were clear. Her neck muscles were not tender to palpation, and she had a normal range of motion. None of the joints in her upper or lower extremities were swollen, and she had no tenderness in her shoulders. She had full range of motion, without restriction, throughout her upper and lower extremities. She had no thoracolumbar tenderness, and she had full range of motion in her thoracic and lumbar spine.

26. Dr. Bhattacharyya's examination of cranial nerves 2 through 10 was normal, and all muscle groups were normal in tone, bulk, and strength. Deep tendon reflexes were normal in the triceps, biceps, brachioradialis, knees, and ankles. Coordination was normal when tested by finger-to-nose, rapid alternating movements, and heel-shin tests. There was no sensory impairment during light touch or pain sensation, and gait was normal during heel-to-toe and tandem walk.

Conclusion

27. Dr. Bhattacharyya concluded that Ms. Morando-Hernandez is not substantially incapacitated. He explained in his report:

The functional impairment means that when neurological examination was normal and her subjective complaints and objective findings cannot be correlated, and functional neurological disorder is most probably related to anxiety and depression. She has a previous history of psychiatric evaluation when she was young and, at the present time, she is also under psychiatric evaluation and treatment including practicing yoga and tai chi.

28. Dr. Bhattacharyya further explained:

Any subjective complaint or psychiatric disorder with multiple complaints cannot be correlated with the neurological point of view and has been significantly evaluated in the past by the treating doctor including multiple treatments, multiple investigation including electrodiagnostic studies which were normal show this condition definitely is related to functional impairment related to psychiatric condition and not for any neurological condition. She has a history of repetitive hand use, but her neurological examination did not reveal any evidence of neurological dysfunction including any evidence of nerve entrapment pathology, neuropathy, or cervical radiculopathy. She has [had] all the electrodiagnostic studies and MRI done which [were] within normal limits.

29. At hearing, Dr. Bhattacharyya reiterated his opinion that Ms. Morando-Hernandez is not substantially incapacitated. He explained that a diagnosis of

functional neurologic disorder is justified when a patient's subjective complaints cannot be objectively verified, such as by MRI, nerve conduction study, or physical examination. He concluded Ms. Morando-Hernandez was a good historian, cooperated during physical examination, and did not engage in symptom magnification or exaggeration. He opined that his findings and conclusions during Ms. Morando-Hernandez's IME were consistent with Dr. Lu's diagnosis of functional neurologic disorder.

30. Dr. Bhattacharyya estimated that he has treated 250 patients with functional neurologic disorder. They presented to him with subjective complaints of pain, numbness, tingling, and other subjective symptoms, and he evaluated them to determine if there was a neurological basis for their symptoms. When all objective tests were "normal," he diagnosed functional neurologic disorder. "None" of his patients with functional neurologic disorder has made a complete recovery, and he opined that none will improve unless and until the psychiatric component of the disease is treated.

31. Dr. Bhattacharyya described Ms. Morando-Hernandez as such a patient. He could not conclude she is substantially incapacitated because her disability is not due to a neurological condition and he is unable to assess her psychiatric state because he not a psychiatrist.

DR. CHANG-WITT

32. Dr. Chang-Witt did not testify at hearing. However, she wrote a letter summarizing Ms. Morando-Hernandez's treatment and completed a Physician's Report on Disability. Dr. Bhattacharyya discussed both documents at length in his IME report, and both were admitted as administrative hearsay.

33. Dr. Chang-Witt has been Ms. Morando-Hernandez's primary care physician since 2019. She explained in her October 7, 2021 letter that Ms. Morando-Hernandez treated with the Kaiser Permanente Group's chronic pain clinic and tried multiple medications in an effort to alleviate or reduce her symptoms. In that letter, she noted that "[u]nfortunately she has not had significant improvement in her symptoms and they continue to limit her ability to use her hands and work in a meaningful way."

34. The following day, Dr. Chang-Witt completed a Physician's Report on Disability. She opined that Ms. Morando-Hernandez is substantially incapacitated for the performance of her usual duties as a Secondary School Secretary with the District. Dr. Chang-Witt further opined that Ms. Morando-Hernandez's incapacity is permanent and prevents her from typing, writing, using a telephone and a mouse, and performing repetitive activities and movements "due to significant pain + discomfort."

35. Dr. Chang-Witt's opinions were based on Ms. Morando-Hernandez's "normal" neurological examination, nerve conduction studies, and MRI of her cervical spine, as well as her understanding of the physical requirements for the position. Dr. Chang-Witt's findings after examination were numbness, tingling, and pain in both upper and lower extremities since August 2020. Her diagnosis was functional neurologic disorder.

DR. LU

36. Dr. Lu did not testify at hearing. However, she completed a Physician's Report on Disability, which Dr. Bhattacharyya discussed at length in his IME report. The Physician's Report on Disability was admitted as administrative hearsay.

37. Dr. Lu opined that Ms. Morando-Hernandez is substantially incapacitated for the performance of her usual duties as a Secondary School Secretary with the District. She further opined that Ms. Morando-Hernandez's incapacity will last longer than 12 months and prevents her from using either hand extensively "including typing" due to "bilateral hand pain."

38. Dr. Lu's opinions were based on Ms. Morando-Hernandez's "normal" examination, nerve conduction studies, and MRI of her cervical spine, as well as her understanding of the physical requirements for the position. Dr. Lu's findings after examination were "altered sensation" and "pain, numbness, and tingling in various body parts." Her diagnosis was functional neurologic disorder.

Ms. Morando-Hernandez's Testimony

39. Ms. Morando-Hernandez enjoyed working for the District. She spent her entire career working at Castro Valley Adult & Career Education, having started as an Office/Program Technician in 2000. She later taught Microsoft Office courses before becoming a Secondary School Secretary.

40. Ms. Morando-Hernandez initially thought her symptoms were due to poor ergonomics while working. The District made multiple attempts to accommodate her disability, including providing an ergonomically correct workstation, a telephone headset, and dictation software. Ms. Morando-Hernandez even tried using her left hand instead of her right. The accommodations provided only temporary, if any, relief.

41. Ms. Morando-Hernandez produced a diagram at hearing on which she documented her current symptoms and the areas of her body in which she experiences them. She has severe headaches, migraines, and anxiety, an electric shock-like feeling, and has trouble thinking, concentrating, and coming up with words. She

feels numbness in her face, lips, and eyelids. She has chronic stiffness and pain in her neck and in her shoulders which limits mobility, mostly on her right side.

42. Ms. Morando-Hernandez has throbbing/burning pain, tingling, numbness, weakness, electric shock-like pain, tremors, and a sensitivity to heat and cold in both upper extremities, although her right elbow and forearm are affected more than her left. Both legs are shaky and weak, her knees buckle (mostly the right), and she has trouble balancing when walking. She has throbbing pain, tightness, and swelling in both ankles. She feels tingling, numbness, burning pain, weakness, and cramping in both feet and all her toes.

43. Ms. Morando-Hernandez identified the following tasks as being more difficult to perform due to her disability: writing, typing, using a mouse, lifting and holding objects, opening items such as packages, using scissors, pushing or pulling, texting, washing dishes, doing laundry, fixing her hair, showering, drying off with a towel, and manipulating zippers, buttons, and snaps. She does the following for relief from her symptoms: paces herself, no multitasking, prioritizes tasks, asks for help, receives acupuncture and chiropractic care, listens to autogenic recording, engages in meditation and restorative yoga, stretches, wears gloves, braces, and cold and heat packs, and walks.

Analysis

44. Ms. Morando-Hernandez has the burden of producing competent medical opinion that she was substantially incapacitated for the performance of her duties as a Secondary School Secretary for the District when she applied for disability retirement. The only medical opinions were those of Drs. Bhattacharyya, Chang-Witt,

and Lu. Dr. Bhattacharyya opined that Ms. Morando-Hernandez is not substantially incapacitated, and Drs. Chang-Witt and Lu opined that she is.

45. Dr. Bhattacharyya's opinion was more persuasive than Drs. Chang-Witt's and Lu's because he testified at hearing, explained the factual basis for his opinion, and was subject to cross-examination. Neither Dr. Chang-Witt nor Dr. Lu testified at hearing, explained the factual basis for her opinion, or was subject to cross-examination. Additionally, Drs. Chang-Witt and Lu, respectively, indicated Ms. Morando-Hernandez is unable to perform some of her duties "due to significant pain + discomfort" or because of "bilateral hand pain." But neither pain nor discomfort alone constitutes a substantial incapacity. And because Ms. Morando-Hernandez's physicians did not testify, they did not clarify whether their opinions are that her pain renders her unable to perform her duties or only makes performing them more difficult or increases the likelihood of further injury. Ms. Morando-Hernandez testified that her disability makes performing tasks more difficult, not impossible. In sum, there was insufficient evidence that she was substantially incapacitated due to a neurological condition when she applied for disability retirement.

LEGAL CONCLUSIONS

Applicable Standard/Burden of Proof

1. Ms. Morando-Hernandez has the burden of proving she qualifies for disability retirement by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5 ["As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion

by a preponderance of evidence”].) This evidentiary standard requires Ms. Morando-Hernandez to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, she must prove it is more likely than not that she was substantially incapacitated for the performance of her usual duties as a Secondary School Secretary with Castro Valley Unified School District when she applied for disability retirement. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

Applicable Law

2. “A member incapacitated for the performance of duty” is entitled to disability retirement if she has at least five years of service credit, “regardless of [her] age.” (Gov. Code, § 21150, subd. (a).) She must be immediately retired for disability “if the medical examination and other available information show” she “is incapacitated physically or mentally for the performance of . . . her duties and is eligible to retire for disability.” (Gov. Code, § 21156, subd. (a)(1).) Eligibility for disability retirement shall be made “on the basis of competent medical opinion.” (*Id.*, subd. (a)(2).)

3. “Incapacity for performance of duty” refers to a “disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board [of administration], . . . on the basis of competent medical opinion.” (Gov. Code, § 20026.) An appellate court interpreted the phrase “incapacitated for the performance of duty” as meaning “the [s]ubstantial inability of the applicant to perform [her] usual duties.” (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 876 [interpreting former Gov. Code, § 21022, which was repealed by Stats.1995, c. 379 (S.B. 541), § 1 and reenacted as Gov. Code, § 21151, subd. (a), by Stats.1995, c. 379 (S.B. 541), § 2].)

4. Pain or discomfort which merely makes it more difficult for one to perform her duties does not constitute a substantial incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.) Neither does the risk of further injury. (*Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 863.)

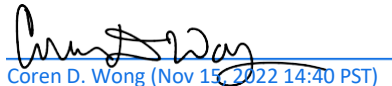
Conclusion

5. The competent medical opinion established that Ms. Morando-Hernandez was not substantially incapacitated for the performance of her usual duties as a Secondary School Secretary for the District due to a neurological (functional neurologic disorder) condition when she applied for disability retirement for the reasons explained in Factual Findings 44 and 45. Therefore, she did not meet her burden of demonstrating that she qualifies for disability retirement, and her application for disability retirement is denied.

ORDER

Respondent Leticia M. Morando-Hernandez's Disability Retirement Election Application dated September 29, 2021, is DENIED.

DATE: November 15, 2022


Coren D. Wong (Nov 15, 2022 14:40 PST)

COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings