ATTACHMENT E

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:

TAMARA S. DUNN and

CALIFORNIA STATE UNIVERSITY, SACRAMENTO,

Respondents.

Agency Case No. 2022-0115

OAH No. 2022060319

PROPOSED DECISION

Jessica Wall, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on October 5, 2022, from Sacramento, California.

Cristina Andrade, Senior Counsel, represented the California Public Employees' Retirement System (CalPERS).

Tamara S. Dunn (respondent) represented herself.

There was no appearance by or on behalf of the California State University, Sacramento (Sacramento State). A Notice of Hearing was properly served on

Sacramento State. Consequently, this matter proceeded as a default against Sacramento State under Government Code section 11520, subdivision (a).

Oral and documentary evidence was received, the record closed, and the matter submitted for decision on October 5, 2022.

ISSUE

The issue on appeal is whether at the time respondent filed her application for disability retirement, based on orthopedic (bilateral wrists, fingers, bilateral hands, left arm) conditions, respondent was substantially incapacitated from the performance of her duties as an Administrative Analyst/Specialist for Sacramento State.

FACTUAL FINDINGS

Procedural History

1. On July 14, 2021, respondent signed and thereafter submitted an application for disability retirement (application) with CalPERS. At the time, respondent was employed as an Administrative Analyst/Specialist with Sacramento State. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150.

2. In filing the application, respondent claimed that her specific disabilities were:

> 1. CUMULATIVE TRAUMA INJURY TO BILATERAL WRISTS FINGERS AND HANDS DUE TO REPETITIVE MOTION

WHILE PERFORMING JOB DUTIES DATA ENTRY, TYPING, WRITING, HOLDING PHONES, MOUSE USE, FILING, LIFTING PULLING, GRABBING

2. WHILE PERFORMING ESSENTIAL JOB FUNCTIONS MY HANDS CONTINUE TO TINGLE CRAMP AND MY LEFT ARM RANDOMLY GETS NUMB

Respondent wrote that her disability occurred on May 3, 2019. She stated the injury occurred "WHILE PERFORMING HIGHLYY [*sic*] REPETITIVE JOB DUTIES DATA ENTRY, TYPING, WRITING HOLDING PHONES, MOUSE USE, LIFTING, PULLING AND, FILING." Her restrictions included:

1. INABILITY TO USE HANDS TO WORK A FULL DAY[,] NO REPETITIVE TYPING OR USE OF HANDS WITHOUT TINGLING AND CRAMPING IN MY FINGER AND HANDS, OR RANDOM NUMBNESS IN MY LEFT FOREARM

2. EXPERIENCE DIFFICULTY IN PERFORMING DAILY WORK TASKS, REPETITIVE TYPING MOUSE USE WRITING, GRIPPING PULLING AND LIFTING ANYTHING OVER EIGHT POUNDS WITH DIFFICULTY

3. I AM RIGHT HAND DOMINATE [*sic*] AND HAVE NOT YET REGAINED THE FULL USE AND STRENGTH OF MY RIGHT HAND

3. CalPERS obtained medical records and reports prepared by Harry Khasigian, M.D., Natalya Shtutman, M.D., Robert Allen, M.D., Patrick Michelier, M.D., Chris Shin, M.D., and Ronald Wolfson, M.D., including an Independent Medical Evaluation (IME) of respondent's orthopedic conditions conducted by Dr. Khasigian.

After reviewing the reports, CalPERS determined that respondent's orthopedic (bilateral wrists, fingers, bilateral hands, left arm) conditions were not disabling. As a result, she was not substantially incapacitated from the performance of her job duties as an Administrative Analyst/Specialist for Sacramento State. By letter dated October 6, 2021, CalPERS notified respondent that her application for disability retirement was denied and advised her of her appeal rights.

4. Respondent filed an appeal and request for hearing with CalPERS by letter dated November 3, 2021. On May 19, 2022, Keith Riddle, in his official capacity as Chief of the Disability and Survivor Benefits Division at CalPERS, signed and thereafter filed the Statement of Issues. This hearing followed.

Duties of an Administrative Analyst/Specialist for Sacramento State

5. Respondent's University Staff Position Description Form, provides a detailed assessment of the tasks performed by an Administrative Analyst/Specialist, as follows:

- 25 percent of the position's time is spent performing budget, finance, and purchasing tasks, such as compiling and analyzing data, writing, and presenting reports, evaluating and reconciling fund accounts, and maintaining working relationships with vendors and university personnel.

- 25 percent of the position's time is spent engaging in general office administration, such as assisting callers and visitors, hiring and training student assistants and volunteers, tracking and reporting student assistant work hours, and reviewing timekeeping documents.

- 35 percent of the position's time is spent on event and project planning tasks, such as administering programs and events, independently planning and executing events and projects, and maintaining working relationships.

- 10 percent of the position's time is spent on research and statistical analysis, which entails collecting, evaluating, and interpreting data; researching and developing policies and programs; creating and collaborating on strategic plans, proposals, and grants, and assisting in the implementation of programs and procedures.

- Five percent of the position's time is spent on "[o]ther duties as assigned."

6. On July 22, 2021, respondent signed a "Physical Requirements of Position/Occupational Title" form (Physical Requirements Form). According to this form, when working as an Administrative Analyst/Specialist, respondent: (1) frequently (two and one-half to five hours) interacted and communicated with others, supervised staff, sat, stood, walked, bent and twisted at the neck and waist, reached above and below the shoulders, and used a computer (keyboard and mouse); (2) occasionally (31 minutes to two and one-half hours) lifted up to 25 pounds, knelt, climbed, squatted, pushed and pulled, handled, engaged in fine fingering; and (3) never lifted more than 26 pounds, ran, crawled, power grasped, walked on uneven ground, drove, operated hazardous machinery, was exposed to excessive noise, extreme temperature, dust, gas, fumes or chemicals, or worked at heights.

Independent Medical Evaluation by Harry Khasigian, M.D.

7. On September 10, 2021, at CalPERS's request, Dr. Khasigian conducted an IME of respondent and issued a report. Dr. Khasigian testified at hearing consistent with his report. Dr. Khasigian obtained his medical degree from the University of

Southern California in 1974 and completed an orthopedics residency at the University of California, Irvine Medical Center in 1979. He has been certified by the American Board of Orthopedic Surgery since 1980, with a subspecialty certification in orthopedic sports medicine since November 2011. He has performed numerous IMEs for CalPERS and is also a Qualified Medical Evaluator (QME) for the State of California.

8. As part of respondent's IME, Dr. Khasigian asked respondent to complete a questionnaire, interviewed respondent, obtained a personal and medical history, conducted a physical examination, and reviewed respondent's medical records and reports related to her orthopedic conditions. Dr. Khasigian also reviewed respondent's University Staff Position Description Form and her Physical Requirements Form.

RESPONDENT'S HISTORY OF INJURY AND COMPLAINTS

9. Respondent was 52 years old when Dr. Khasigian conducted the IME. She informed Dr. Khasigian about her numerous prior surgeries, including trigger finger releases on seven fingers and carpal tunnel releases in both arms. Three of those surgeries took place in 2020: a left carpel tunnel release and left index and small finger trigger releases on May 21, 2020; a right carpel tunnel release and right index trigger finger release on September 16, 2020; and a left thumb trigger finger release on December 23, 2020.

10. Respondent explained to Dr. Khasigian that her hands cramped when she typed, and she could not open jars or play tennis. She also reported a "prickly feeling," and that her hands fell asleep. Respondent complained of pain in the base of the palm of her right hand and pain in her right carpometacarpal (CMC) if she moved 10-pound objects. She could, however, lift 10 pounds, carry a single grocery bag at a time, do lawn work, and vacuum. She reported pain with grasping and that her joints and hands

hurt. To ease the pain, she took acetaminophen and wrapped her hands in warm towels. Overall, respondent's chief complaints were hand cramping, numbness in her forearm, and numbness, tingling, and prickling in her hands, wrists, and fingers. Respondent also said that she had arthritis in her hands and thumb.

11. Respondent explained that her treating doctor was Dr. Shtutman at the Spine and Nerve Center. She completed physical therapy in June 2021 and continued to do therapy exercises on her own for 30 minutes twice per day. Respondent told Dr. Khasigian that her right hand had minimal improvement after the carpal tunnel release surgery and her left hand was not back to 100 percent. Her surgery scars were sore and tender, and she used silicone patches to reduce sensitivity.

12. Regarding her position, respondent detailed that 90 percent of her time was spent on the computer and 10 percent was spent face-to-face with people. Her computer work included completing budgets and modeling. She felt that typing and clicking with the mouse produced all her problems. At the time of the IME, respondent was on modified duty for four hours per day with the restriction of "no use of the hands." Sacramento State accommodated her by providing Dragon, a speech recognition software. Previously, respondent was on temporary total disability from May 2020 through June 2021.

PHYSICAL EXAMINATION AND REVIEW OF MEDICAL RECORDS

13. Dr. Khasigian conducted a physical examination of respondent, including her cervical spine, shoulders, and upper extremities. Dr. Khasigian noted that respondent had a normal gait and no restrictions of her arm motion. She appeared coordinated. She exhibited a full range of motion in her cervical spine without any

difficulty or limitations. Similarly, her shoulders showed a full range of motion without any impairments.

14. Dr. Khasigian spent much of his examination focusing on respondent's upper extremities. He determined that her pulses, hair distribution, temperature, and skin elasticity were normal, which indicated the absence of a nerve problem.[1] Respondent's upper extremities were not bruised, swollen, warm, red, or showing any other deformity or abnormality. She lacked Heberden's nodes and contractures, signs of arthritis. She had a very small mucus cyst at the base of the CMC joint on her right hand, which Dr. Khasigian explained should not cause pain. Respondent was able to grasp and make a full fist without limitation.

15. Dr. Khasigian reviewed the appearance of respondent's surgical scars from her carpal tunnel and trigger finger release surgeries. The scars were well-healed and small, without elevation or stitch irritation. No nodules remained. Her trigger finger areas were fully healed and did not trigger, lock, or catch. Respondent's forearm muscles functioned normally. Respondent had no pain in the arcade of Frohse, a common site for radial nerve compression. There were no abnormalities or motor deficiencies in the left arm area where respondent said she experienced numbness. Respondent's muscles were nearly the same size, indicating that she had not experienced muscle atrophy.

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[1] If the nerves in respondent's hands and arms were damaged or she had complex regional pain syndrome, Dr. Khasigian explained, respondent would have objective symptoms like cold hands or a loss of hair in the area.

16. Additionally, Dr. Khasigian performed several tests to determine if there was objective evidence of respondent's complaints. She tested negative on the Tinel's test for nerve problems, the Grind test for arthritis in the bilateral CMC joints, and the Phalen's test for carpal tunnel syndrome. Dr. Khasigian saw no evidence of De Quervain's tenosynovitis. During the neurological examination, Dr. Khasigian used a pinwheel to test respondent's ability to feel sensation, taking extra care and performing the hand portion multiple times. Respondent had normal results. Similarly, her motor examination was normal (Grade 5/5) in both her right and left upper extremities. Dr. Khasigian measured her grip strength using a Jamar dynamometer. Respondent's results (left hand: 20, 18, and 19 pounds; right hand: 10, 8, and 9 pounds) were so modest that Dr. Khasigian believed that respondent was not putting forth a full effort.

17. Dr. Khasigian reviewed medical records and reports related to respondent's orthopedic conditions, including an electromyography (EMG) report by Chris Shin, M.D.; post-operative reports from Robert H. Allen, M.D., and Natalya Shtutman, M.D.; physical therapy reports; and reports from Ronald Wolfson, M.D., who performed QME examinations related to respondent's 2019 workers' compensation claim. Respondent's May 2019 EMG found objective evidence of a nerve condition consistent with bilateral carpal tunnel syndrome. However, none of her physicians had ordered a subsequent EMG after her two carpal tunnel release surgeries in 2020, which would verify whether respondent still had nerve problems that her surgeries did not correct.

18. Dr. Khasigian also reviewed documents respondent prepared about her complaints and pain level at the time of the IME. Respondent listed 14 problems she was experiencing and described her pain as an 8 out of 10. Specifically, her "tingling

pain" was an 8-to-9 out of 10,[2] and her "hand cramping pain" was a 5 out of 10. She medicated her pain with acetaminophen and used ice packs, warm compresses, and wax dips for swelling and pain. Respondent also provided Dr. Khasigian with information about her orthopedic surgeries, 2019 EMG, job descriptions, medications, and medical conditions.

DIAGNOSIS AND OPINIONS

19. Dr. Khasigian's diagnoses for respondent included multiple trigger finger releases; bilateral carpal tunnel releases with alleged continued complaints; and left proximal forearm "numbness" of unknown origin. Throughout his career, Dr. Khasigian has performed hundreds of trigger finger surgeries, which he described as a minor surgery that completely resolves the underlying issue. Similarly, he has performed carpal tunnel surgeries, in which a surgeon relieves nerve compression by cutting through the ligament pressing down on the nerve and creating more room. Dr. Khasigian found respondent's orthopedic conditions were resolved by the treatment and surgery she received in 2020.

20. Respondent's clinical examination presented as normal, without any inflamed joints, restricted motion, neurological deficits, joint creaking, or fixed deformities. Dr. Khasigian explained that if a patient continues to show symptoms after surgery, a physician will repeat the diagnostic tests. Here, there were no repeat diagnostic studies in the medical records to substantiate respondent's ongoing

[2] Dr. Khasigian testified that pain of 8-to-9 out of 10 is equivalent to the amount of pain a person would feel when breaking a femur bone.

complaints. Dr. Khasigian found that respondent's "extremely high reported pain" did not correlate with her physical presentation and the examination's findings.

21. In response to the question posed by CalPERS to Dr. Khasigian concerning whether respondent had an actual, present impairment that rose to the level of substantial incapacity to perform her usual job duties, Dr. Khasigian answered "No." Dr. Khasigian opined that respondent "has an essentially normal presentation on a clinical basis," and she did "not have any updated diagnostic tests to correlate with her subjective complaints." She had full range of motion in her hands, wrists, fingers, elbows, and shoulders, and no restrictions in her joint function. He found no evidence of complex regional pain syndrome (CRPS) or secondary changes following her surgeries. Accordingly, Dr. Khasigian determined that there were no job duties respondent was unable to perform.

22. In the question related to respondent's cooperation with the examination and whether she put forth her best effort, Dr. Khasigian explained:

> The member was cooperative in the examination; however, her statements of level 8-to-9 out of 10 pain after what appears to be clinically successful surgeries which have decompressed and resolved the problems, based on the nature of the diagnosed conditions and customary resolution of the problems by the treatment provided, do not correlate with the level of subjective pain presently described as 8-to-9 out of 10 when there is no visible impairment on clinical examination.

DECEMBER 2021 SUPPLEMENTAL REPORT

23. Dr. Khasigian issued a supplemental report on December 10, 2021, after he reviewed Dr. Wolfson's September 2021 QME reevaluation and notes from respondent's September 2021 appointment at the Spine and Nerve Diagnostic Center. Based on review of the additional records, Dr. Khasigian summarized, in relevant part:

> The subjective presentation of her conditions, which in regard to carpal tunnel syndrome are primarily due to her diabetes, indicates a prolongation of symptoms for relatively modest upper extremity diagnoses and for which all the diagnoses have been resolved surgically. There have been no repeat EMGs, despite complaints in her hands, which would indicate that there is not an actual indication of impairment or postsurgical recurrence.
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> [¶] . . . [¶]
>
> At present time, the basis for disability appears to be a high level of subjective complaints without correlative impairment for conditions that are modest in reference to upper extremity diagnoses . . . .

24. None of the information reviewed by Dr. Khasigian changed his opinions set forth in his September 2021 report. He concluded that respondent was not substantially incapacitated from performing her usual and customary duties as an Administrative Analyst/Specialist at Sacramento State based on the orthopedic conditions listed in her application.

HEARING TESTIMONY REGARDING NEW MEDICAL RECORDS

25. Before hearing, respondent submitted a number of new medical documents that she had not supplied to CalPERS earlier in the application process. Those documents included a September 2022 QME reevaluation by Dr. Wolfson, a May 2022 bone scan and x-ray, and September 2022 letters from her primary care doctor and chiropractor. Dr. Khasigian had an opportunity to review the new records in the days before hearing and during the lunch break on the day of hearing. After reviewing all the new records, Dr. Khasigian found nothing in the documents that changed his prior opinion.

26. Regarding respondent's 2022 QME reevaluation report, Dr. Khasigian explained that the QME examination focused on what caused respondent's medical condition, rather than whether her medical condition was so severe that it incapacitated her from performing her job's essential functions. Dr. Khasigian also reviewed the May 2022 bone scan and x-rays performed on respondent. He found the bone scan and x-rays showed mild degenerative changes, consistent with aging. Dr. Khasigian concluded the images did not show evidence of CRPS or support a finding of substantial incapacity.

27. Dr. Khasigian described why he disagreed with the determinations of respondent's treating physicians and QME physician. He explained that they relied on respondent's subjective statements rather than objective medical evidence, like CalPERS requires. He further noted that treating physicians often serve as advocates for their patients, while his role is one of a non-treating evaluator. He did not review the letter from respondent's chiropractor. Dr. Khasigian stated that her chiropractor's findings were not relevant because chiropractors do not get the same advanced training and education as medical doctors.

Respondent's Evidence

28. Respondent began working as an Administrative Analyst/Specialist for the Martin Luther King Jr. Center at Sacramento State in September 2018. She has suffered from hand, wrist, and forearm conditions since about 2007, when she had her first trigger finger release surgery, and her conditions have worsened over time. She listed May 3, 2019, as her date of injury because this was the date the EMG confirmed she had bilateral carpal tunnel syndrome. In May 2020, she went on temporary total disability leave to undergo a series of trigger finger and carpal tunnel release surgeries, then recover. She returned to work on modified duty in June 2021. While on modified duty, her work accommodated her through reduced, four-hour workdays and no typing or repetitive hand activities. She was provided speech recognition software; however, the software did not always recognize her voice commands, which caused her to use her hands anyway. Respondent went on medical leave again on March 30, 2022. She is no longer working.

29. Respondent asserted that she suffers from "numbing pain" in her left forearm and "constant, agonizing, and incapacitating" pain in her right wrist and hand. She argued that her lack of grip strength in her right, dominant hand limits her ability to type reports, research, access computer applications, use a computer mouse and telephone, enter data, and pull and file documents. The swelling and "constant and persistent pain" made it difficult for her to concentrate. She is able to type, but it causes her pain and cramping.

30. The majority of respondent's arguments focus on matters addressed in workers' compensation proceedings, such as her belief that her employer caused her orthopedic conditions. She asserted that CalPERS's determination "fail[ed] to consider the totality of events and circumstances leading up to [her] injuries and disability,"

such as her current and past work-related responsibilities that she believes caused repetitive stress injuries to her hands and wrists. She relied on Government Code section 31720[3] to argue she is permanently incapacitated and cited to Evidence Code sections 1250 and 1251[4] in support of her argument that her "state of mind, emotional, or physical sensation, mental and physical impact, feeling, pain or bodily health" are objective evidence in this case.

MEDICAL RECORDS

31. Respondent provided hundreds of pages of medical records in support of her position. In his 2019 QME examination, Dr. Wolfson wrote that respondent's objective factors of disability were "grade 4 sensory and grade 4 motor changes" and weakness. In September 2021, following respondent's 2020 surgeries, Dr. Wolfson performed another QME examination where he took respondent's grip strength measurements with a Jamar dynamometer. She measured 20, 22, and 20 pounds with her left hand and 20, 18, and 20 pounds with her right hand. He found respondent had full range of motion in her neck, shoulders, elbows, wrists, and fingers. Dr. Wolfson amended the objective factors of disability to "significant motor weakness not only in opponens weakness but her entire grip strength related to multiple trigger finger

[3] Government Code section 31720 governs certain county employees' eligibility for service-connected disability retirement and does not apply in this proceeding.

[4] Those sections of the Evidence Code provide exceptions to the hearsay rule. They do not change respondent's state of mind and perception of pain from subjective evidence into objective evidence.

surgeries that she has had over the years."[5] Dr. Wolfson did not alter his objective findings in his September 2022 QME report.

32. Respondent's medical records from UC Davis Health System document her multiple hand and wrist surgeries and her successful recoveries from these surgeries. In June 2020, her physicians reported she was "doing well" and her "[n]umbness has resolved" after her left carpal tunnel release. In January 2021, the notes document she was "doing well," her left thumb "incision [was] healing nicely," and she had some pain at the incision site of her right carpal tunnel release surgery. The UC Davis medical records do not mention any complications or unsuccessful surgery results. Additionally, these records document that respondent's grip strength in January 2012 measured 50 pounds in her left hand and 26 pounds in her right hand.

33. From January 2020 through September 2022, respondent sought treatment of her orthopedic conditions with Dr. Shtutman. She submitted those treatment records for consideration. Dr. Shtutman recorded respondent's complaints of grip weakness, tingling in the left hand and forearm, and left shoulder pain. In May 2021, respondent told Dr. Shtutman that she felt all of her 2020 surgeries were successful; however, she continued to complain of pain. Respondent described her pain levels on a 1-to-10 scale each visit, which ranged from 5–6 unmedicated, or 0 with acetaminophen (September 2021 through February 2022), to 7–8 unmedicated, or 1–2 with acetaminophen (September 2022). Dr. Shtutman determined in March 2022 that respondent's "symptoms do not meet all the criteria for CRPS," but decided not to rule it out. Similarly, in May 2022, Dr. Shtutman documented her call with a radiologist,

[5] The opponens pollicis is a hand muscle.

which detailed that respondent's bone scan and x-ray findings were more likely arthritic than CRPS.

34. Respondent attended Select Physical Therapy from September 2020 through June 2021. Her physical therapy reports document respondent's complaints of wrist and hand pain, aggravated by hard gripping, writing, typing, and mousing, and relieved by rest, shaking, and stretching. Her physical therapists had respondent take grip strength measurements at five appointments. Her grip strength in her left hand ranged from a low of 22 pounds to a high of 40 pounds. In her right hand, her grip strength ranged from a low of 21 pounds to a high of 31 pounds. Respondent's pain had improved by 60 percent by the time of her discharge in June 2021, and her physical therapist found respondent's prognosis was good. Respondent received additional physical therapy from Rehab Without Walls from May 2022 through September 2022. In May 2022, her right-hand grip strength measured slightly under 25 pounds. In August 2022, she reported her pain level was a 5 out of 10 and she was "moderately limited" in her work or regular daily activities as a result of her arm, shoulder, or hand problem.

REPORT BY EDMOND PROVDER

35. Edmond Provder, Certified Rehabilitation Counselor, drafted a report after evaluating respondent via videoconference and reviewing her records. Based on his evaluation, Mr. Provder felt that respondent was unable to perform her past work as an Administrative Analyst/Specialist at Sacramento State. Mr. Provder is not a physician and did not perform a physical examination of respondent to determine if there was objective medical evidence of impairment. Accordingly, Mr. Provder's report and testimony do not constitute competent medical evidence.

LETTERS OF SUPPORT

36. In addition to her testimony, written argument, and medical records, respondent submitted several letters written by treating physicians. Katerina Christiansen, M.D., is respondent's primary treating physician. She provided an overview of respondent's numerous medical conditions, most of which are not at issue here. Benjamin Jones, D.C., has been respondent's chiropractor since March 2021. He wrote about respondent's history of back and sciatic pain, her joint flexibility, and his disagreement with Dr. Khasigian's IME report.[6] Neither Dr. Christiansen nor Dr. Jones made a finding regarding respondent's substantial incapacity under the applicable standards.

37. Respondent also submitted an affidavit from a coworker to corroborate her testimony that her coworkers needed to assist her with completing her work assignments based on her orthopedic condition. The affidavit did not describe any specific functions respondent was unable to perform and included medical conditions not at issue in this application, such as vision and back problems.

Analysis

38. When all the evidence is considered, respondent failed to establish that, at the time she filed her application, she was permanently disabled or substantially

[6] Part of this disagreement appears to stem from Dr. Jones misunderstanding Dr. Khasigian's report to assert that no corroborating studies, such as EMGs, were ever performed. Dr. Khasigian's report correctly noted that respondent had a 2019 EMG, but no post-surgery studies were performed between her 2020 surgeries and the date of his report.

incapacitated from performing the usual duties of an Administrative Analyst/Specialist at Sacramento State due to her orthopedic (bilateral wrists, fingers, bilateral hands, left arm) conditions. Between 2007 and 2020, respondent had numerous surgeries on her fingers and wrists to address issues of triggering and pain. After her 2020 carpal tunnel release surgeries, no subsequent EMGs were performed to impugn the surgeries' success.

39. Although respondent presented evidence of subjective complaints including pain, tingling, and numbness, Dr. Khasigian's opinion that the objective evidence does not support a substantial incapacity finding is most persuasive. Dr. Khasigian conducted a physical examination and reviewed respondent's medical records. The medical records provided support Dr. Khasigian's opinion that the conditions listed on respondent's application were resolved by her numerous surgeries. They further corroborate his finding that her grip strength measurement at the 2021 IME was so anomalous that it was not an objective measure of her abilities. After reviewing the 2022 bone scan and x-ray, he found this study did not provide any objective evidence that respondent is incapacitated from performing her usual job duties due to her orthopedic conditions.

40. Additionally, neither Dr. Shtutman nor Dr. Wolfson provided any opinions supported by objective findings to demonstrate respondent is substantially incapacitated from the performance of her usual job duties. Dr. Shtutman recorded respondent's subjective complaints of tingling and pain, the latter of which respondent stated was resolved by taking acetaminophen. Dr. Wolfson performed a QME examination after respondent's 2020 surgeries that found she had full range of motion but a loss of grip strength. He did not find her job entailed duties that require a strong grip, such as power grasping or heavy lifting. Moreover, Drs. Shtutman and Wolfson

did not testify at hearing and were not available for cross-examination. As a result, their opinions were admitted only as administrative hearsay and cannot be relied upon, standing alone, to support any findings as to respondent's condition. (Gov. Code, § 11513, subd. (d).)

41. In sum, respondent did not present competent medical evidence to support the assertion that at the time she filed her application she was substantially incapacitated from the performance of her usual and customary duties as an Administrative Analyst/Specialist based upon the legal criteria applicable in this matter. Consequently, respondent failed to establish that her application should be granted based upon her orthopedic conditions.

LEGAL CONCLUSIONS

1. Government Code section 21150, subdivision (a), provides, in pertinent part, that "[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….. "

2. 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 duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

3. Government Code section 21152, subdivision (d) provides that an application for disability retirement may be made by the member. Government Code section 21154 provides the relevant conditions and timelines for submission of an application.

4. Government Code section 21156, subdivision (a)(1), provides in relevant part that:

> If the medical examination and other available information show to the satisfaction of the board [. . .] that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

This determination must be made "on the basis of competent medical opinion." (Gov. Code, § 21156, subd. (a)(2).)

5. Incapacity for the performance of duty "means the substantial inability of the applicant to perform [her] usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Substantial inability to perform usual duties must be measured by considering applicant's abilities. Discomfort, which makes it difficult to perform one's duties, is insufficient to establish incapacity from

performance of one's position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854, 862.) A condition or injury that may increase the likelihood of further injury, as well as a fear of future injury, do not establish a present "substantial inability" for the purpose of receiving disability retirement. (*Hosford v. Bd. of Administration*, *supra*, 77 Cal. App. 3d at pp. 863–864.)

6. Findings issued for the purposes of Workers' Compensation proceedings are not evidence that respondent's injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa*, *supra*, 120 Cal.App.4th at p. 207.) While a workers' compensation proceeding "decides whether the employee suffered *any* job-related injury," disability retirement proceedings "focus on a different issue: whether an employee has suffered an injury or disease of such magnitude and nature that [she] is incapacitated from substantially performing [her] job responsibilities." (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567 [emphasis original].)

7. The burden of proof is on respondent to demonstrate that she is unable to perform her usual duties such that she is substantially incapacitated. (*Harmon v. Bd. of Retirement of San Mateo County* (1976) 62 Cal. App. 3d 689; *Glover v. Bd. of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) To meet this burden, respondent must submit competent, objective medical evidence to establish that, at the time of her application she was substantially incapacitated from performing the usual duties of her position. (*Harmon v. Board of Retirement*, *supra*, 62 Cal. App. 3d at p. 697.)

8. Respondent did not present competent, objective medical evidence to establish that she was substantially incapacitated from performance of her duties as an Administrative Analyst/Specialist for California State University, Sacramento at the time

she filed her disability retirement application. Therefore, based on the Factual Findings and Legal Conclusions, respondent is not entitled to retire for disability pursuant to Government Code section 21150.

ORDER

Respondent Tamara S. Dunn's application for disability retirement is DENIED.

DATE: November 1, 2022

Jessica Wall
Jessica Wall (Nov 1, 2022 14:50 PDT)

JESSICA WALL
Administrative Law Judge
Office of Administrative Hearings