

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
(Statement of Issues) of:**

CECILIA L. MACAYAON, Respondent,

and

**CALIFORNIA INSTITUTION FOR MEN, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent.**

Agency Case No. 2021-0105

OAH No. 2021050887

PROPOSED DECISION

Marion J. Vomhof, Administrative Law Judge, Office of Administrative Hearings, heard this matter via telephone and videoconference on September 9, 2021, due to the ongoing COVID-19 pandemic.

Charles H. Glauberman, Senior Staff Attorney, represented petitioner, Keith Riddle, Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Cecelia Macayaon, respondent, represented herself.

There was no appearance by California Institution for Men, California Department of Corrections and Rehabilitation (CIMCDCR), respondent.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on September 9, 2021.

ISSUE

At the time of her application, was Ms. Macayaon permanently disabled or incapacitated from performing the regular and customary duties of a registered nurse with CIMCDCR due to a pulmonary condition (COPD¹, asthmatic bronchitis, shortness of breath, severe cough)?

SUMMARY OF DECISION

Ms. Macayaon had the burden to prove that she was permanently disabled or incapacitated from performing her regular and customary job duties due to a pulmonary condition (COPD, asthmatic bronchitis, shortness of breath, severe cough). The evidence did not support her claim that she was permanently disabled or

¹ COPD is chronic obstructive pulmonary disease.

incapacitated from performing the regular and customary duties of a registered nurse due to this condition. Ms. Macayaon's claim for disability retirement is denied.

FACTUAL FINDINGS

Preliminary Matters and Application for Disability

1. Ms. Macayaon was employed by CIMCDCR as a registered nurse. By virtue of her employment, Ms. Macayaon is a state safety member of CalPERS subject to Government Code section 21151.

2. On August 7, 2020, Ms. Macayaon filed a Disability Retirement Election Application with CalPERS. At the time, she was on leave due to the governor's executive orders in connection with the COVID-19 pandemic. Ms. Macayaon claimed a disability based on pulmonary conditions (COPD, asthmatic bronchitis, shortness of breath, and severe coughs).

3. The following is a summary of pertinent questions on Ms. Macayaon's application and her written responses (cited as written):

- When did the disability occur?

3-22-2020 SRN Payne² ordered me to stay home because [sic] am old 81 years high risk to COVID 19, to follow executive order of Gov Newsom, till further order.

² SRN refers to Supervising Registered Nurse.

- How did the disability occur?

Since I stayed home order, I suffered severe asthma attacks, short of breath, coughs, mental torture due to fear of COVID 19, since many old people are dying.

- What are your limitations/preclusions due to your injury or illness?

Using a facial mask and chemical sanitizer, and exposed to other allergens make me have severe coughs and short of breath – wheezing consistently limit my function.

- How has your injury or illness affected your ability to perform your job?

When short of breath, coughs, rales, and wheezing, as well as having fear of COVID 19, mental torture, gets confuse [sic] cannot sleep, affect my ability to perform my job. 81 years old.

4. Ms. Macayaon identified her treating physician as Charles Ho, M.D.

5. Ms. Macayaon included a written narrative with her application, and the following is a summary of pertinent information contained in that narrative:

The stay-at-home order made her "immobile," the use of the mask and sanitizer caused severe asthma attacks, severe coughs, and consistent shortness of breath with rales and wheezing. "[Dr. Ho] took care of me, [sic] was suffering from asthmatic bronchitis, COPD " She is "scared to die from COVID 19," which "stressed me with mental torture and confusion." Many inmate patients and co-workers were infected with Covid-19. At her age and with her "underlying diagnosis [sic] COPD" she is at high

risk and should follow the executive order to stay home. During the months at home, she “contracted asthmatic bronchitis, COPD.” In addition to the executive order,”[Dr. Ho] recommended permanent disability because of my medical condition at 81 years of age, thus I am applying for disability retirement.”

6. CalPERS obtained medical records and reports related to Ms. Macayaon’s condition and selected Syed Omar Tirmizi, M.D., a physician who is board certified in both internal medicine and pulmonary disease, to perform an independent medical evaluation (IME). Dr. Tirmizi provided CalPERS with narrative reports of his findings and conclusions. After reviewing all these documents, CalPERS determined that when Ms. Macayaon filed her application for a disability retirement, she was not permanently disabled or incapacitated from performing the usual and customary duties of a registered nurse.

7. On December 8, 2020, CalPERS notified Ms. Macayaon that her application for disability retirement was denied. CalPERS advised Ms. Macayaon of her right to appeal that adverse determination.

8. On December 29, 2020, Ms. Macayaon timely filed her appeal.

9. On May 10, 2021, Keith Riddle filed the statement of issues in his official capacity. The statement of issues and other jurisdictional documents were served on all respondents. Ms. Macayaon requested a hearing.

Job Description Documents

10. The Essential Functions of a registered nurse and the Physical Requirements of that position outlined the tasks and physical requirements of that position. Dr. Tirmizi relied upon those records in formulating his opinions.

CalPERS's Medical Evaluation Conducted by Dr. Tirmizi and His Report

11. CalPERS obtained Ms. Macayaon's medical records and sent those to Dr. Tirmizi to review. Dr. Tirmizi authored a report on November 18, 2020, discussing the pulmonary disability evaluation he performed on Ms. Macayaon. Dr. Tirmizi reviewed Ms. Macayaon's medical history, and she provided the following information: She has worked for CIMCDCR for 20 years. On March 26, 2020, because of the COVID-19 pandemic and the governor's mandate with respect to quarantine, she was advised by her SRN to go home. She has no history of asthma or respiratory illnesses. After March 22, 2020,³ she was diagnosed as having asthmatic bronchitis and asthma. She has had long-standing issues with degenerative arthritis and low back pain.

12. Dr. Tirmizi wrote: "I have reviewed the medical records that she presented with, which are basically prescriptions from Dr. Charles Ho, which indicate that she had been given Phenergan with codeine, Lasix, Cipro, and she herself has indicated that she has asthmatic bronchitis. This has been corroborated by Dr. Charles Ho, and that she is substantially incapacitated." The medical records revealed that during the period from May 11, 2020, through October 20, 2020, Ms. Macayaon had six telehealth visits and one in-person visit with Dr. Ho. During these visits she presented with a cough, at times severe, and Dr. Ho diagnosed her with asthma. At one of her telehealth visits, Dr. Ho prescribed Phenergan with codeine and Cipro. Regarding Ms. Macayaon's final visit on October 20, 2020, via telehealth, Dr. Tirmizi wrote: "Based on Dr. Ho's medical records, she presented on 10/20/20, reporting

³ Ms. Macayaon originally stated she was asked to go home on March 26, 2020, and later stated that the date was March 22, 2020.

productive cough and shortness of breath.....He diagnoses her as having bronchitis on the basis of a telehealth visit and prescribed Cipro, Phenergan, albuterol, and Lasix.”

13. Dr. Tirmizi reviewed the physical requirements of Ms. Macayaon’s position as a registered nurse, and wrote that “there is rarely any lifting requirements, and most of the time, it is walking or walking briskly.”

14. Dr. Tirmizi’s diagnostic impression was: “No definite diagnosis of permanent respiratory disorder, such as COPD/asthma; volitional wheezing on expiration.” When Ms. Macayaon presented to Dr. Tirmizi’s office, she appeared to be short of breath and he could hear her wheezing from a distance. However, on close inspection, he noted that she “was voluntarily closing her glottis and vocal cords and performing exhalation against a closed glottis, making the typical sound of wheezing. When I asked her to discontinue from this, the wheezing stopped completely, and she was able to breathe normally.” Dr. Tirmizi opined that Ms. Macayaon does not have a respiratory disorder, consistent with asthmatic bronchitis, COPD, shortness of breath or severe cough. He later testified that “I do not disagree with asthmatic bronchitis.” He reported that “she either intentionally or unintentionally was breathingin a way that resulted in audible wheezing.”

15. Dr. Tirmizi noted that most of Ms. Macayaon’s evaluations with Dr. Ho were telemedicine, and Dr. Tirmizi did not see documentation in her medical records of actual wheezing during a physical examination. Her medical records contained no pulmonary function tests (PFTs) to support a diagnosis of a respiratory condition, such as COPD or asthma. At hearing, Dr. Tirmizi stated: “A diagnosis of COPD or asthma must include PFTs.” Dr. Tirmizi opined that Ms. Macayaon “initially was exaggerating her complaints.” However, “when she was asked to desist, her breathing normalized, . . . without any audible wheezing or difficulty with breathing throughout the

remainder of the examination.” It was Dr. Tirmizi’s opinion that Ms. Macayaon did not have an actual and present pulmonary impairment that rose to the level of substantial incapacity to perform her usual duties; she was not substantially incapacitated due to a respiratory condition; and she could perform the specific job duties and physical requirements as listed in the job description.

Dr. Tirmizi’s Testimony

16. Dr. Tirmizi obtained his medical degree in 1988 from the Aga Khan University Hospital in Karachi, Pakistan. He is board certified in both internal medicine and pulmonary medicine. Dr. Tirmizi maintains a private practice, Los Angeles Pulmonary Medical Group. He is Assistant Clinical Professor of Medicine at the David Geffen School of Medicine at UCLA.

Dr. Tirmizi testified consistent with his report. He reiterated that it is possible to produce a wheezing sound, which he referred to as “volitional wheezing.” The sound appears to be coming from the lungs, but it actually comes from the vocal cords. He observed Ms. Macayaon’s neck and the sound came from her vocal cord area and there was no sound or wheezing from her lungs. When he coached her not to close the glottis⁴, there was no wheezing sound.

Ms. Macayaon’s Testimony

17. Ms. Macayaon asserted that Dr. Ho’s opinion that she is permanently disabled should be relied upon, and she should be granted disability retirement. She said “it’s not 24 hours”: she has asthma and difficulty breathing when exposed to

⁴The glottis is the opening between the vocal cords.

allergens. "I cannot work doing my duties and responsibilities with my asthma. It is not like before when I could do it." "I would be jeopardizing my patients." This has affected her body, and at her age her joints and back hurt. She said, "I am weaker, not like when I was younger."

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement*(1989) 214 Cal.App.3d 1327, 1332.)

Applicable Code Sections

2. Government Code section 20026 provides:

"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 21150, subdivision (a), provides:

A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she

is credited with five years of state service regardless of age unless the person has elected to become subject to Section 21076, 21076.5, or 21077.

4. Government Code section 21152 provides in part:

Application to the board for retirement of a member for disability may be made by:

(a) The head of the office or department in which the member is or was last employed, if the member is a state member other than a university member.

[¶] . . . [¶]

(d) The member or any person in his or her behalf.

5. Government Code section 21153 provides:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

6. Government Code section 21154 provides in part:

The application shall be made only (a) while the member is in state service, . . . On receipt of an application for disability retirement of a member, . . . the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty . . .

7. Government Code section 21156, subdivision (a), provides that if the medical evaluation or other evidence demonstrates that an eligible member is incapacitated physically or mentally, then CalPERS shall immediately retire the member for disability. The determination of incapacitation shall be based on competent medical opinion.

Appellate Authority

8. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the public employee is not "incapacitated" and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873; *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1057.)

Evaluation

9. In order to qualify for a disability retirement, Ms. Macayaon must demonstrate that she was permanently disabled or incapacitated from performing the regular and customary duties of a registered nurse when she filed her application.

Dr. Ho did not testify or provide a written report. Contrary to Ms. Macayaon's testimony that she had been diagnosed with COPD, Dr. Tirmizi found no evidence of this diagnosis in her medical records. Dr. Ho diagnosed her as having asthma. Dr. Tirmizi credibly testified that he found no evidence that PFTs were completed, and PFTs must be done to make a diagnosis of COPD or asthma. Dr. Tirmizi was well qualified to testify regarding pulmonary conditions. His testimony was credible and persuasive. Ms. Macayaon did not meet her burden to establish that she was permanently disabled or incapacitated from performing her regular and customary job duties. As such, her application must be denied.

ORDER

The application for a disability retirement filed by Cecelia Macayaon with CalPERS is denied. CalPERS's denial of Ms. Macayaon's application is affirmed.

DATE: October 11, 2021

Marion J. Vomhof

MARION J. VOMHOF

Administrative Law Judge

Office of Administrative Hearings