

**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:**

**GABRIELA MITCHELL, Respondent**

**and**

**DESERT SANDS UNIFIED SCHOOL DISTRICT, RIVERSIDE  
COUNTY SCHOOLS, Respondent**

**Agency Case No. 2023-0711**

**OAH No. 2024010325**

**PROPOSED DECISION**

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on April 10, 2024.

Bryan Delgado, Attorney, represented complainant, Sharon Hobbs, Chief, Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS), State of California.

Gabriela Mitchell, respondent, represented herself.

No one appeared on behalf of respondent Desert Sands Unified School District, Riverside County Schools.<sup>1</sup>

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on April 10, 2024.

## **ISSUE**

Was respondent permanently disabled or substantially incapacitated from performing the regular and customary duties of an Elementary Classroom Teacher due to an orthopedic (left hand) condition at the time she filed her application for a disability retirement?<sup>2</sup>

## **FACTUAL FINDINGS**

### **Procedural Background**

1. Respondent was employed as an Elementary Classroom Teacher by Desert Sands Unified School District, Riverside County Schools. By virtue of her employment, respondent is a local miscellaneous member of CalPERS subject to

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<sup>1</sup> The term respondent is used throughout this proposed decision to refer to Gabriela Mitchell only.

<sup>2</sup> Respondent is currently receiving disability benefits for another medical condition, and she will continue to receive those disability benefits regardless of this decision.

Government Code section 21150. Respondent also has the minimum service credit necessary to qualify for retirement.

2. On August 18, 2022, respondent signed and filed an application for disability retirement based on "limited use of my right and left arm, which impacts my neck and back." Respondent further wrote in the application, "I have weight and mobility restrictions in both arms, neck, back," and "I was placed on sick leave due to my work limitations regarding my right arm nerve pain and left hand trigger finger."

3. On August 18, 2022, respondent signed an application for service retirement. Respondent retired for service effective December 15, 2021.

4. By letter dated November 28, 2023, CalPERS notified respondent:

Based upon additional information received after our determination, your application for disability retirement has been approved. We find you are substantially incapacitated from the performance of your usual duties as an Elementary School Teacher with Desert Sands Unified School District, based upon your Orthopedic (neck and back) condition.

Please note that this finding does not alter our prior review and denial of your application for disability retirement based on a separate Orthopedic (left hand) condition. Based on reports from Richard Hannah, M.D., Stephen O'Connell, M.D., and Emily Perez, M.D., we have determined your Orthopedic (left hand) condition is not disabling.

5. On January 9, 2024, complainant filed the Statement of Issues in this matter in her official capacity noting that the issue on appeal is limited to whether at the time of her disability application, respondent was substantially incapacitated from the performance of her duties as an Elementary Classroom Teacher on the basis of an orthopedic (left hand) condition.

6. Respondent timely appealed CalPERS's decision to deny her disability retirement based upon her left hand. This hearing followed.

### **The Usual Duties of an Elementary Classroom Teacher**

7. Two documents describing the usual duties of an Elementary Classroom Teacher were received in evidence. Both of those documents, one entitled "Job Description" for the job title of "Elementary Classroom Teacher" and the other entitled "Physical Requirements of Position/Occupation Title," described the physical requirements of the position.

8. An Elementary Classroom Teacher must be able to perform all the critical physical and mental tasks listed in the two documents. As set forth in the "Basic Functions" section of the Position Description, the job candidate "[p]rovides an educational program for students in the specifically assigned duties and conducts herself/himself as a professional person, exhibiting the qualities of ability, personality and integrity that will make him/her respected by all those with who [*sic*] he/she associates." The physical requirements of the position include: sitting occasionally from 31 minutes up to two and one-half hours; standing frequently from two and one-half hours up to five hours; walking occasionally for up to two and one-half hours; running and kneeling infrequently from five minutes up to 30 minutes; occasionally bending, twisting, reaching below the shoulder, pulling, pushing, and power grasping from 31

minutes up to two and one-half hours; frequently handling (holding, light grasping) from two and one-half hours up to five hours; occasionally fine fingering (pinching, picking), computer use (keyboard, mouse), walking on uneven ground, and exposure to excessive noise from two and one-half hours up to five hours; and infrequently reaching above the shoulder and exposure to extreme temperature from five minutes up to 30 minutes.

## **Testimony of Linda Ha**

9. Linda Ha is employed by CalPERS as an Associate Governmental Program Analyst in the Disability Retirement Division, a position she has held for the past four years. Her duties include the review of disability retirement applications, as well as preparation of appeals for CalPERS's decisions on disability retirement applications. Ms. Ha was assigned to review respondent's disability retirement application.

10. Ms. Ha testified that on November 28, 2023, she wrote a letter to respondent informing her that, based on an independent medical examination (IME) conducted to evaluate respondent's neck and back, that CalPERS determined that respondent's application for disability retirement based upon orthopedic neck and back issues was approved. The letter dated November 28, 2023, also informed respondent that her disability retirement application based on orthopedic left hand condition continued to be denied based on reports from various physicians, and that her left hand condition was not disabling. The letter further informed respondent that her disability retirement would be effective immediately. Ms. Ha testified that respondent's neck and back condition would not be subject to reevaluation in the future because respondent is already at the service retirement age and CalPERS does not reevaluate disability retirement eligibility after a member is past the service retirement age. Ms. Ha stated that respondent will continue to receive disability

retirement benefits and cannot be removed from those benefits unless respondent elects to be taken off of disability retirement.

### **Testimony of Emily Nicole Perez, M.D.**

11. Emily Nicole Perez, M.D. is a physician, licensed in California, specializing in hand surgery. Dr. Perez is employed by Healthpointe Medical Group, Inc., a large medical group of about 20 physicians providing orthopedic care, general medicine, and surgical care. She has held that position since November 2020. Since 2018, Dr. Perez has been board certified in general surgery from the American Board of Surgery. Dr. Perez practices as a hand surgeon, a specialty she has worked in since 2017. Dr. Perez completed medical school in 2011 from Howard University. She completed her internship and residency in general surgery in 2016 at Wellstar Atlanta Medical Center. Dr. Perez also completed a fellowship in hand surgery in 2017 at the University of Miami, Jackson Health Systems.

Dr. Perez's specialty requires her to provide medical care for the skin, soft tissue, and bone for all ailments involving the hand, such as acute fractures, chronic conditions, traumatic injuries, and repetitive or degenerative issues. Dr. Perez treats hand patients every day and sees approximately 40 to 50 patients per day in her practice. In addition to her private practice, Dr. Perez also serves as an independent medical examiner for CalPERS for disability determinations. She has done so since 2020. Her work as an independent medical examiner involves the review of medical records and examination of patients for the purpose of determining if those patients meet the requirements to qualify for disability retirement for CalPERS. About 75 to 85 percent of the IMEs she conducts for CalPERS on patients result in a determination that those patients are substantially incapacitated from the performance of their usual

and customary job duties, with the remaining 15 to 25 percent resulting in a finding of no substantial incapacity.

12. By letter dated March 7, 2023, CalPERS requested that Dr. Perez conduct an IME on respondent regarding her left hand condition to determine whether she is substantially incapacitated to perform the usual and customary duties of her position as an Elementary Classroom Teacher based on her left hand condition and provided Dr. Perez with respondent's medical records and the two job descriptions received in evidence related to respondent's job for her review. Dr. Perez examined respondent on April 11, 2023, and completed an IME report regarding her evaluation of respondent and review of relevant documents, which was received in evidence. Dr. Perez testified that she was only asked to evaluate respondent's hands, even though respondent had other complaints. With regard to her hands, respondent's chief complaints were triggering and locking of her left ring finger. Dr. Perez noted that respondent received treatment for the left trigger finger of splinting, and it was recommended that she have steroid injections to treat the left trigger finger, but respondent declined those injections. Surgery was also recommended for the left hand trigger finger, but respondent declined the surgery.

Dr. Perez testified that if respondent underwent the steroid injections or the surgery, then those measures would treat the symptoms and essentially alleviate the problems. According to Dr. Perez, there is a treatment algorithm for the treatment of trigger finger that begins with splinting the finger, then injections of steroids, and then surgery. Dr. Perez stated that these treatments tend to be curative of the trigger finger issue and are safe treatment options. However, respondent refused any of those treatments, other than splinting, because she was only interested in naturopathic treatments.



13. Dr. Perez performed a systemic review and evaluation of respondent, including her head, eyes, ears, neck, and throat, as well as respondent's extremities. Dr. Perez stated that she was looking for obvious deformities, cyanosis, edema, or clubbing and found none. Dr. Perez examined respondent's hands and wrists looking for swelling, pain, or nodules, difficulty moving the fingers or locking, and range of motion. Dr. Perez found no gross deformities in the left hand and no atrophy. Dr. Perez performed a number of tests on respondent's hands and all tests given were negative. She found respondent had normal strength in both hands. The only significant finding Dr. Perez found was that respondent had a mass nodule over the left ring finger, as well as catching and locking of her left ring finger. She explained that typically the nodule is formed because the tendon is swollen and does not pass through the tendon sheath well, causing friction, irritation, and swelling, thereby causing a nodule under the skin. Dr. Perez noted that respondent had trigger finger on her left ring finger, which was of moderate severity. Dr. Perez compared respondent's left hand and fingers to her right hand and found that the right hand and fingers were normal and healthy with no conditions or significant problems. Dr. Perez looked at x-rays of respondent's left hand, which showed no evidence of fracture or malalignment.

Dr. Perez testified that respondent's left trigger finger is an entirely treatable condition. Extensive medical literature supports the treatment options Dr. Perez recommends for this condition, which would depend on the duration of symptoms and the severity of symptoms. She explained that patients who just started having trigger finger symptoms and have no fixed flexion deformity can be treated with a splint to reduce repetitive friction, which allows the finger to heal on its own. For patients who have had the symptoms for a longer period of time and/or if the finger does not heal on its own with the use of a splint, then steroid injections are recommended as a next step. She explained that the steroid injections are safe and

effective and 75 percent of patients who receive the steroid injections have full resolution of the condition. A second steroid injection is recommended if there is not full resolution of the condition after the first injection. Thereafter, surgery is the recommended treatment to treat the trigger finger condition. The surgery opens the tendon sheath to remove any impedence or glide of the tendon. Dr. Perez explained that surgery is the definitive treatment if all other treatment options fail. Dr. Perez noted that respondent refused to have either steroid injections or surgery for her trigger finger condition.

14. Dr. Perez also testified that while respondent does have the trigger finger condition and was not exaggerating her symptoms, there was no activity listed in her job description as an Elementary Classroom Teacher that respondent could not perform with the trigger finger. Accordingly, her condition, even without treatment, would not prevent respondent from performing her usual and customary job duties. Furthermore, there are treatment options available to respondent to treat the trigger finger condition, but respondent declined those treatments. Dr. Perez is aware that respondent has had acupuncture treatments and other treatments for the trigger finger condition, but those treatments are not the treatments recommended by Dr. Perez or are the standard of care for the treatment of the condition. Dr. Perez opined that respondent is not substantially incapacitated from performing the usual duties of her job as an Elementary Classroom Teacher as a result of the trigger finger condition. Dr. Perez's testimony, IME report, and letter to CalPERS were consistent.

### **Testimony of Respondent**

15. Respondent is 54 years old and not currently employed. She officially entered service retirement from her position as a school teacher on December 15, 2021.

16. Respondent disagrees with CalPERS's determination that she is not eligible for disability retirement based on her left hand condition. She understands she is already receiving disability retirement benefits based on her neck and back conditions. She believes that her neck, back, and left hand conditions are all related and her conditions prevent her from returning to the classroom as an Elementary Classroom Teacher. Respondent believes that CalPERS did an insufficient evaluation of her left hand condition and is frustrated because her worker's compensation claims have been denied. She believes her left hand condition impacts her ability to teach.

17. Respondent testified that she goes to yoga, has undergone physical therapy for her left hand, and has received acupuncture treatments of her trigger finger condition. Respondent provided a list of her acupuncture visits for treatment of her trigger finger condition. Respondent testified that she manages her disabilities with good nutrition and yoga.

## **LEGAL CONCLUSIONS**

### **Burden and Standard of Proof**

1. Respondent has the burden of proof to establish that CalPERS's determination that she is not eligible for disability retirement based on her left hand condition is incorrect, and that she is substantially incapacitated from performance of her duties as an Elementary Classroom Teacher as a result of her left hand condition. (Evid. Code, § 500.) She must meet her burden by a preponderance of the evidence. (Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"].) Evidence that is deemed to preponderate 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.)

2. The Public Employees’ Retirement Law (Retirement Law) governs disability retirement and reinstatements and grants sole jurisdiction to CalPERS to make such determinations. (See Gov. Code, §§ 20026, 20125, 21154, 21156, 21190, 21192 and 21193.)

### **Applicable Statutes**

3. 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.

4. Government Code section 20383 provides:

“Local miscellaneous member” includes all employees of a county office of education, school district, or community college district who are included in a risk pool and all employees of a contracting agency who have by contract been included within this system, except local safety members.

5. 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.

6. Government Code section 21152 provides:

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.
- (b) The university if the member is an employee of the university.
- (c) The governing body, or an official designated by the governing body, of the contracting agency, if the member is an employee of a contracting agency.
- (d) The member or any person in his or her behalf.

7. 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.

8. Government Code section 21154 provides:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety 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. On receipt of the application with respect to a local safety member other than a school.

9. Government Code section 21156 provides, in part:

(a) (1) If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, 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.

(2) In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process. . . .

## **Case Law Defining Disability Retirement**

10. "Incapacitated 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.) When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the employee is not incapacitated and does not qualify for a disability retirement.

(*Mansperger, supra*, 6 Cal.App.3d, at pp. 886-887.) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854.) Further, respondent must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Id.* at p. 863.)

## **Evaluation**

11. Respondent failed to prove by a preponderance of the evidence that she is substantially incapacitated to perform her usual and customary duties of an Elementary Classroom Teacher based upon her orthopedic left hand condition. This conclusion is based upon Dr. Perez's opinion after performing an independent examination of respondent and reviewing medical records provided to her. Dr. Perez's testimony was credible and forthright. She provided objective observations to substantiate her conclusions that respondent has a trigger finger condition of her left ring finger and no other hand impairments. Dr. Perez also credibly testified that the trigger finger condition, even without treatment, does not impair respondent's ability to perform the usual duties of an Elementary Classroom Teacher. Furthermore, respondent has refused to have the steroid injection or surgery to treat the trigger finger condition, which Dr. Perez testified is generally curative of the condition. In *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, the court upheld the denial of an employee's disability application on the basis that the employee refused reasonable medical treatment for the disabling condition. (*Id.* at 218.) In this case, respondent is also refusing the reasonable medical treatment of the steroid injection and/or surgery. Based on the holding in *Reynolds*, respondent cannot now claim she is disabled by a condition for which she refused reasonable medical treatment.



12. Respondent provided no competent medical evidence to refute the credible testimony of Dr. Perez in this matter.

### **Cause Exists to Deny Respondent's Application**

13. Cause exists to conclude that respondent is not permanently disabled or substantially incapacitated from the performance of her usual and customary duties as an Elementary Classroom Teacher based on her orthopedic (left hand) condition. As such, she does not qualify for a disability retirement on the basis of her orthopedic (left hand) condition, and her application for disability retirement on the basis of the orthopedic (left hand) condition is denied.

### **ORDER**

CalPERS's determination that Gabriela Mitchell was not permanently disabled or substantially incapacitated from the performance of her usual and customary duties as an Elementary Classroom Teacher as of the date of her application for disability based upon her orthopedic (left hand) condition is affirmed.

DATE: May 3, 2024

*Debra D. Nye-Perkins*

DEBRA D. NYE-PERKINS

Administrative Law Judge

Office of Administrative Hearings