

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

In the Matter of the Reinstatement from Disability

Retirement of:

KENNETH C. GRAVES,

Respondent,

and

**KERN COUNTY SCHOOLS, and FRUITVALE ELEMENTARY
SCHOOL DISTRICT,**

Respondents.

Agency Case No. 2023-0072

OAH No. 2023050300

PROPOSED DECISION

Harden Sooper, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on November 13, 2023.

Attorney Bryan R. Delgado represented complainant Keith Riddle, Chief, Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS).

Michael A. Conger, Attorney at Law, represented respondent Kenneth C. Graves (respondent), who was present.

Kelly A. Lazerson, Attorney at Law, represented respondent Kern County Schools.

Kim Carlson, Assistant Superintendent, was present on behalf of respondent Fruitvale Elementary School District (District).

The ALJ received testimony and documentary evidence. The record closed and the matter was submitted for decision on November 13, 2023.

On December 1, 2023, on his own motion, the ALJ issued a protective order sealing Exhibits F, G, W, and X because they contained medical records.

During a review of the evidence, the ALJ redacted dates of birth, social security numbers, and CalPERS identification numbers from Exhibits C, D, E, H, I, J, L, R, and Q for confidentiality purposes.

SUMMARY

In May 2021, CalPERS approved respondent's application for disability retirement from his position as a Lead Custodian for the District based on an orthopedic condition in respondent's left hand. Complainant contends respondent is no longer substantially incapacitated from performing his usual job duties and

therefore seeks to reinstate respondent in the Lead Custodian position. The evidence established respondent's condition has not improved and respondent still suffers from degenerative osteoarthritis in his left hand, along with psoriatic arthritis. Respondent's condition renders him substantially incapacitated from performing key duties of a Lead Custodian, such as mopping, sweeping, moving furniture, lifting up to 50 pounds, and ascending and descending a ladder. Complainant did not prove otherwise, and respondent remains eligible to receive a disability retirement allowance. His appeal is granted.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent was employed by the District from 1994 to 2021. By virtue of his employment, respondent was a local miscellaneous member of CalPERS.
2. In an application dated February 4, 2021, respondent applied for disability retirement from his position as a Lead Custodian with the District.
3. On May 21, 2021, CalPERS approved respondent's application for disability retirement, based on an orthopedic condition in respondent's left hand.
4. In a letter dated November 4, 2022, CalPERS informed respondent it completed a re-evaluation of his qualifications for disability retirement and determined he is no longer substantially incapacitated from the performance of his job duties and would be reinstated as a Lead Custodian.
5. In a letter dated November 26, 2022, respondent timely filed an appeal.

Background

6. Respondent worked for the District for 27 years. As Lead Custodian, his job duties included various tasks related to cleaning, minor repairs, maintaining school security by locking doors and windows, moving furniture, and replenishing supplies. To perform his duties, respondent was required to be able to bend, twist, stoop, kneel, crawl, push, and pull very frequently; to lift and carry 50 pounds often; to reach in all directions very frequently; to work at heights often; and to ascend and descend a ladder often. (Ex. 13.)

7. As the basis for his February 2021 disability retirement application, respondent cited psoriatic arthritis and osteoarthritis in his left hand, which had worsened over the previous four years. He stated he experienced chronic pain and tightening of his tendons, rendering him unable to grip and hold objects in his left hand. Specifically, respondent stated he could not perform his job duties, including opening and locking gates to the school campus, holding a screw to drill, and raising and lowering desks. (Ex. 3, p. A15.)

8. In support of his application, respondent submitted a Physician's Report on Disability form, dated February 1, 2021, signed by Emmanuel Strategus, M.D., respondent's internal medicine doctor. Dr. Strategus stated respondent suffered from psoriatic arthritis and osteoarthritis of the hands and found him to be permanently substantially incapacitated from performing his usual job duties. Specifically, Dr. Strategus stated respondent could not do any pushing, pulling, or lifting. (Ex. F, p. B43.)

9. In a letter dated April 13, 2021, CalPERS referred respondent to attend an orthopedic Independent Medical Examination (IME) by Frank Guellich, M.D.

10. On May 4, 2021, Dr. Guellich conducted an IME and diagnosed respondent with moderate osteoarthritis of the metacarpophalangeal joint in his left hand. Dr. Guellich opined respondent's left hand was permanently incapacitated, rendering him substantially incapacitated from performing his usual job duties. Specifically, Dr. Guellich stated respondent could not reach and climb, lift things, lift and carry 50 pounds, and go up and down ladders. Dr. Guellich did not testify at the hearing. (Ex. H, p. B187.)

11. Respondent was born in January 1973. When CalPERS approved his application for disability retirement in May 2021, respondent was 48 years old.

Re-Evaluation of Respondent's Eligibility for Disability Retirement

12. In a letter dated June 2, 2022, CalPERS notified respondent his disability benefits were under review to determine if he remained eligible to receive them. CalPERS referred respondent for a re-evaluation IME conducted by Don T. Williams, M.D.

13. Dr. Williams is Board-certified in orthopedic surgery and has practiced medicine for 40 years. For the past 30 years, he has operated a private practice where he treats patients for orthopedic problems. He currently sees about 10 patients a day, four days a week.

14. Dr. Williams has conducted IMEs for CalPERS for the past seven or eight years. He has not performed surgery for three or four years. Pursuant to a January 3, 2022 agreement with CalPERS, Dr. Williams receives a \$2,000 examination fee in most cases; \$400 per hour spent preparing a supplemental report; \$300 per hour spent preparing for an administrative hearing; \$2,000 for half day hearing attendance; and

\$4,000 for full day hearing attendance. (Ex. 7, p. A39.) Dr. Williams testified he finds about 85 percent of his IME patients to be substantially incapacitated.

15. On August 26, 2022, Dr. Williams conducted an IME and diagnosed respondent with the following conditions: (1) psoriatic arthritis, controlled by injections; (2) degenerative osteoarthritis, base of the left thumb at the carpometacarpal joint; and (3) very mild dorsal joint skin psoriasis. (Ex. 9.)

16. Psoriatic arthritis is an autoimmune disease that attacks the distal joints of a person's hands, feet, and knees, causing pain and a rash. The condition can be treated with anti-inflammatory pills and injections. Dr. Williams noted minor psoriatic redness on respondent's hands. Dr. Williams testified psoriatic arthritis does not affect muscles, grip strength, or a person's ability to push or pull.

17. Degenerative osteoarthritis is the narrowing and deterioration of cartilage caused by wear and tear on joints, causing pain. Dr. Williams noted palpable arthritic changes in the base of respondent's left thumb, meaning he could feel a bump, and noted a cyst at the base of respondent's thumb, consistent with arthritis. Dr. Williams testified degenerative osteoarthritis is treatable with a splint, anti-inflammatory medications, injections, and rest. He assessed respondent's condition as relatively minor and treatable. On cross-examination, Dr. Williams conceded that too many injections can increase damage to joints.

18. Dr. Williams opined respondent did not have a substantial incapacity to perform his usual job duties, stating respondent maintained full motion of his hands and fingers. He noted a slight loss of motion in respondent's left thumb. Although respondent had weak grip strength in his left hand, Dr. Williams opined the weakness was inconsistent with and not supported by the rest of his examination. Dr. Williams

noted he felt respondent exaggerated his complaints and exhibited poor effort during the grip strength test on his left hand. He testified there is no reason for arthritis in respondent's thumb to affect grip strength because the test involves the palm and other fingers, not the thumb.

19. In a supplemental report dated December 14, 2022, Dr. Williams reiterated his conclusion respondent is not substantially incapacitated from performing his job duties as Lead Custodian. Dr. Williams reviewed Dr. Guellich's May 2021 report and additional medical records from Dr. Strategus. Dr. Williams stated respondent's psoriatic arthritis is well controlled with injectable medications, he has no swelling of the joints on his hands, and all his fingers and joints have full motion. Dr. Williams noted respondent's osteoarthritis at the base of his left thumb does not block finger or hand motions and respondent's left thumb has almost full motion. He characterized respondent's impairments as minor. (Ex. 11.)

20. Dr. Williams testified his examination did not reveal objective findings to support respondent's subjective complaints of pain in his left hand. However, he conceded during cross-examination the ability to feel a bump at the base of respondent's left thumb is objective. He also conceded he reviewed respondent's November 2020 medical records from a hand specialist who X-rayed respondent's left hand and noted degenerative changes, which is also an objective finding. Dr. Williams did not personally review the hand specialist's 2020 X-rays or generate new X-rays as part of his examination. Dr. Williams testified respondent might have "some pain" on occasions but he did not think it amounted to a substantial incapacity to perform his job duties. He reiterated pain is subjective; he did not ask respondent to carry 50 pounds during his examination to observe whether it caused respondent pain. He

agreed an inability to grip or hold items without substantial pain would “probably” cause substantial impairment.

Dr. Strategus’s Testimony

21. Dr. Strategus has treated respondent for various conditions since 2011. He has been practicing medicine for approximately 28 years. He currently practices internal medicine in a group setting in Bakersfield. He has been Board-certified in internal medicine since 1997.

22. Beginning in 2011, respondent complained of pain related to psoriatic arthritis. Dr. Strategus referred respondent to a rheumatologist for treatment because previous efforts by dermatologists to treat respondent’s condition were unsuccessful. Dr. Strategus testified psoriatic arthritis is a permanent disability, causing respondent consistent and persistent pain, particularly in his left hand. Dr. Strategus has treated hundreds of patients with psoriatic arthritis. Control for psoriatic arthritis tends to wax and wane, decreasing over time while using one medication, causing patients to switch to a new medication.

23. Beginning in 2017 or 2018, respondent reported increased pain in his left hand. Since then, respondent has consistently reported left hand pain, affecting his ability to do his job. Dr. Strategus referred respondent to the Southern California Orthopedic Institute (SCOI) for treatment. Dr. Strategus treats patients for orthopedic conditions, including osteoarthritis, sometimes in conjunction with specialists. Dr. Strategus’s medical records from 2020 and 2021 document respondent’s complaints of severe thumb and hand pain.

24. Dr. Strategus most recently saw respondent on October 30, 2023. Respondent reported continued pain in his left hand and thumb. Dr. Strategus

observed respondent's left thumb was swollen, especially at the base of the thumb. He testified respondent "has been totally disabled due to pain." Injections directly into respondent's joint relieve pain temporarily but are not a long-term treatment because repeated injections can cause joint damage. Surgery is an option to relieve pain, but it could result in a loss of function in respondent's thumb.

25. On November 15, 2022, Dr. Strategus signed a CalPERS Physician's Re-evaluation of Current Disability form, stating respondent is currently substantially incapacitated from performing his usual job duties due to psoriatic arthritis. Dr. Strategus indicated the incapacity is permanent. He noted respondent is unable to lift up to 50 pounds, as required by his job duties, due to chronic hand and wrist pain. (Ex. R, p. B226.) Dr. Strategus testified his opinion about respondent's incapacity remains the same; he noted respondent's pain limits his ability to use his hand, which is corroborated by objective findings of swelling and X-rays showing degeneration in respondent's left thumb. Dr. Strategus described respondent's left thumb joint as having an "obvious deformity." He noted any task requiring respondent to use two hands repetitively, such as sweeping and mopping, would be difficult and cause pain. Increasing pain eventually causes a person to lose their grip and become weak.

Kim Carlson's Testimony

26. For approximately six years, Ms. Carlson has served as the Assistant Superintendent overseeing all human resources matters for the District. She became familiar with respondent through her human resources role.

27. For several years, respondent attempted to perform his job duties as Lead Custodian but struggled due to pain. During conversations with Ms. Carlson, respondent noted he had difficulty opening and closing campus gates, cleaning

bathrooms with mops, and vacuuming. Ms. Carlson personally observed respondent physically struggling while handling and signing paperwork related to his application for disability retirement.

Respondent's Testimony

28. Respondent testified he had difficulty using his left hand to perform his job duties for about four years before he applied for disability retirement. He used braces, splints, injections, anti-inflammatory pills, and topical medications to control his symptoms. He estimated he used at least nine different medications, none of which permanently controlled his symptoms. He declined surgery because the hand specialist at SCOI advised him he would lose almost all function in his thumb, affecting his ability to grip and hold objects. He described his current condition as worse than in 2021, causing constant pain and significantly limiting his ability to use his hand. He struggles with everyday tasks such as buttoning his pants.

29. Respondent explained he experienced severe pain while performing several job duties, including sweeping, mopping, vacuuming, holding a screw in place while using a drill, moving furniture, changing lightbulbs, and using heavy equipment. The more respondent used his hand, the worse his pain and swelling became.

30. Respondent testified credibly that he applied for disability retirement because he was in pain and believed he could no longer do his job. He explained he would rather continue to work and he was not prepared to retire, but he was "at the end of [his] rope" and could not continue working any longer. He stated he could not do his job even if he wanted to because "[his] hand would be swollen up like a balloon."

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Analysis

31. The evidence established respondent suffers from two conditions affecting his left hand: psoriatic arthritis and degenerative osteoarthritis. Both Dr. Williams and Dr. Strategus testified X-ray findings and a palpable bump at the base of respondent's thumb corroborated the existence of degenerative changes in respondent's left hand. Both conditions cause pain, as reported by respondent, and are permanent. There is no dispute respondent suffers from the two conditions; the only dispute is whether the conditions render respondent substantially incapacitated from performing his usual job duties as Lead Custodian.

32. Dr. Williams and Dr. Strategus disagreed about whether the conditions rendered respondent substantially incapacitated. Dr. Strategus noted respondent has consistently reported pain related to psoriatic arthritis since 2011; respondent's pain became severe in 2017 or 2018, leading to an additional diagnosis of degenerative osteoarthritis. Dr. Strategus considers respondent totally disabled by the pain and therefore unable to perform his usual job duties. Dr. Williams considers respondent's conditions relatively minor and treatable, causing "some pain," and does not believe respondent is substantially incapacitated from performing his usual job duties. He also felt respondent did not put forth his best effort during the grip test administered during his August 2022 IME.

33. The totality of the evidence supported respondent's complaints of severe pain in his left hand. At least five years of medical records documented consistent complaints. Before applying for disability retirement, respondent used at least nine different medications attempting to control his symptoms. He continued working for at least three years after developing severe pain in his left hand, as corroborated by the testimony of both Dr. Strategus and Ms. Carlson. When he retired, respondent had

worked for the District for 27 years. He testified credibly that he would rather continue working if he were able.

34. Dr. Strategus's opinion that respondent was substantially incapacitated from performing his usual job duties was more persuasive than Dr. Williams's opinion to the contrary. Dr. Strategus relied on a 12-year relationship with respondent when evaluating respondent's condition and his credibility when reporting pain. Although Dr. Strategus is not an orthopedic specialist, he has treated numerous patients with both psoriatic arthritis and degenerative osteoarthritis during his 28-year medical career. Dr. Williams's opinion that respondent exaggerated his complaints of pain was unsupported by the evidence. Dr. Williams is compensated an additional \$2,000 or \$4,000 for cases proceeding to an administrative hearing, creating a financial benefit for Dr. Williams in those cases, which further detracts from the weight of his opinion about respondent exaggerating his pain.

35. Given respondent's severe pain associated with his left hand conditions, he is unable to mop or sweep repeatedly, lift up to 50 pounds, move furniture, or ascend and descend a ladder. All these tasks occur either often or very frequently as part of a Lead Custodian's job. Even Dr. Williams conceded during his testimony an inability to grip or hold items without substantial pain would "probably" cause substantial impairment. Dr. Strategus explained that pain, while subjective, eventually becomes unbearable and causes a person to lose their grip and become weak.

36. There was no evidence respondent's condition improved between when CalPERS granted his application for disability retirement in 2021 and when he was re-evaluated in 2022. Respondent testified his condition has only worsened since 2021. Dr. Strategus confirmed respondent continued to report pain during his most recent office visit in October 2023. Respondent's years-long effort to mitigate the pain using

multiple medications and treatments demonstrates the difficulty in controlling his symptoms. Respondent's decision to decline surgery because of the risk he would lose functionality of his thumb was reasonable and does not indicate he is exaggerating his pain or is not substantially incapacitated.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Complainant has the burden of proving by a preponderance of the evidence that respondent is no longer substantially incapacitated from the performance of his usual job duties as Lead Custodian and should therefore be reinstated in his former position at the District. (Evid. Code, § 115; *Martin v. State Personnel Bd.* (1972) 26 Cal.App.3d 573, 582.) "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Applicable Law

2. "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 CalPERS Board of Administration based on competent medical opinion. (Gov. Code, § 20026.)

3. "Incapacitated for the performance of duty" means "the substantial inability of the applicant to perform [their] usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) The person does not

need to be able to perform all duties. (*Schrier v. San Mateo County Employees' Retirement Assn.* (1983) 142 Cal.App.3d 957, 961.) Mere discomfort, which may make it difficult for one to perform his duties, is insufficient to establish incapacity. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

4. CalPERS may require any recipient of a disability retirement allowance to undergo medical evaluation at any time before their reaching the minimum age for voluntary retirement from service (Section 21192 medical evaluation). (Gov. Code, § 21192.) If a Section 21192 medical evaluation determines a recipient is "not so incapacitated for duty in the position held when retired for disability," and their "employer offers to reinstate that employee," their disability retirement allowance is canceled immediately. (Gov. Code, § 21193.) The minimum age for voluntary retirement from service is 50 years of age for those with at least five years of state service. (Gov. Code, § 21060, subd. (a).)

5. The analysis of whether a disability retirement recipient is "still incapacitated" from the performance of their usual job duties under Government Code section 21192 "is limited to determining whether the conditions for which disability retirement was granted continue to exist." (*Cal. Dept. of Justice v. Board of Administration etc.* (2015) 242 Cal.App.4th 133, 141.)

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Eligibility for Re-Evaluation

6. The evidence established CalPERS had the authority to require respondent to undergo a re-evaluation medical examination. At the time of the August 2022 IME conducted by Dr. Williams, respondent was 49 years old, about four months short of reaching the minimum age for voluntary retirement from service for those with at least five years of state service.

Respondent's Substantial Incapacity

7. Complainant did not establish by a preponderance of evidence respondent is no longer substantially incapacitated from performing his usual job duties as Lead Custodian. Dr. Strategus's competent medical opinion that respondent was substantially incapacitated from performing his usual job duties was more persuasive than Dr. Williams's opinion to the contrary. Both doctors agreed respondent suffers from psoriatic arthritis and degenerative osteoarthritis and that both conditions cause respondent pain. Respondent's complaints of severe pain were credible and supported by the evidence. Dr. Williams's opinion respondent exaggerated his pain was inconsistent with the totality of the evidence. As Dr. Strategus opined, respondent's pain due to an orthopedic left hand condition renders him unable to perform key duties of a Lead Custodian, such as mopping, sweeping, moving furniture, lifting up to 50 pounds, and ascending and descending a ladder. There was no evidence respondent's condition improved since CalPERS approved his disability retirement in 2021. Respondent therefore remains substantially incapacitated from performing his usual job duties and is eligible to continue receiving a disability retirement allowance.

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ORDER

Respondent Kenneth C. Graves's appeal is granted. He is eligible to continue receiving a disability retirement allowance.

DATE: **12/05/2023**

Harden Sooper

HARDEN SOOPER

Administrative Law Judge

Office of Administrative Hearings