

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:

AMERICA I. NICHOLS, Respondent,

and

OCEANSIDE UNIFIED SCHOOL DISTRICT, Respondent.

Agency Case No. 2022-0106

OAH No. 2022030355

PROPOSED DECISION

Jami A. Teagle-Burgos, Administrative Law Judge, Office of Administrative Hearings, heard this matter via telephone and videoconference on July 7, 2022.

Cristina Maria Andrade, Senior Staff Attorney, represented complainant, Keith Riddle, Chief, Disability and Survivor Benefits Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

There was no appearance by America I. Nichols, respondent. Upon proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default against Ms. Nichols pursuant to Government Code section 11520.

Jolie Napier-Vea, Director of Classified Human Resources, represented Oceanside Unified School District (OUSD), respondent.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on July 7, 2022.

ISSUE

At the time of her application, was Ms. Nichols permanently disabled or incapacitated from performing the regular and customary duties of a school bus attendant for OUSD due to orthopedic conditions (bilateral shoulders, bilateral hips, neck, and coccyx)?

SUMMARY OF DECISION

Ms. Nichols had the burden to prove that she was permanently disabled or incapacitated from performing her regular and customary job duties due to orthopedic conditions (bilateral shoulders, bilateral hips, neck, and coccyx). The evidence did not support her claim that she was permanently disabled or incapacitated from performing the regular and customary duties of a school bus attendant due to these conditions. Ms. Nichols's claim for disability retirement is denied.

FACTUAL FINDINGS

Preliminary Matters and Application for Disability

1. Ms. Nichols was employed by OUSD as a school bus attendant. By virtue of her employment, Ms. Nichols is a local miscellaneous member of CalPERS subject to Government Code section 21150.

2. On May 21, 2021, Ms. Nichols filed a Disability Retirement Election Application with CalPERS. Ms. Nichols claimed a disability based on orthopedic conditions (bilateral shoulders, bilateral hips, neck, and coccyx).

3. The following is a summary of pertinent questions on Ms. Nichols's application and her written responses: (Errors in original.)

What is your specific disability? R shoulder R wing L shoulder L wing lower R hip lower L hip B neck area L neck area coccyx area, can't sit to use toilet, can't lay flat, can't turn right or left fingers spasms hands & fingers numb R leg gets numb tingly.

How did the disability occur? Student dead dropped my upper area twisted dropped/pulled shoulder I felt neck pull shoulder tear hips twisted, coccyx snapped wing felt tear inner both shoulders.

4. CalPERS obtained medical records and reports related to Ms. Nichols's conditions and selected Darren D. Thomas, M.D., to perform an independent medical evaluation (IME). Dr. Thomas provided CalPERS with a narrative report of his findings

and conclusions. After reviewing all these documents, CalPERS determined that when Ms. Nichols filed her application for disability retirement, she was not substantially incapacitated from performing the usual and customary duties of a school bus attendant.

5. On December 3, 2021, CalPERS notified Ms. Nichols that her application for disability retirement was denied. CalPERS advised Ms. Nichols of her right to appeal that adverse determination.

6. On December 14, 2021, Ms. Nichols timely filed her appeal in a written narrative that stated, in pertinent part: (Errors in original.)

There is no reason why I should have been denied disability. I have never had a full IME examine be able to be completed by the examiners that PERS has had EXAMINE ME. And because they can't finish examine due to my permanent pain they just close the report . . .

I had a friend to come over and help me with walking, bathing, trying to figure how to use the toilet among other daily necessities . . . I was inhumanly forced to go through pain, traumatic force of being tied down to try and do MRI and or Xray I suffer from high mental/emotional/physical condition of major claustrophobia due to being a surviving domestic violence rape victim from my early 20's . . . Again there is no way why I should be denied, . . .

7. On March 7, 2022, 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. Nichols requested a hearing.

Job Description Documents

8. The Job Description of a school bus attendant and the Physical Requirements of that position outlined the tasks and physical requirements of that position. Dr. Thomas relied upon those records in formulating his opinions.

Dr. Thomas's Medical Evaluation, Report, and Testimony

9. The following is a summary of the medical evaluation and report prepared by Dr. Thomas. His testimony was consistent with his report.

10. Dr. Thomas obtained his medical degree from the Uniformed Services University of Health Sciences in 2007. He is board certified in orthopedic medicine. He is employed by the United States Navy as an orthopedic surgeon treating acute-traumatic and urgent conditions, performing surgeries, and conducting post-surgical evaluations. He also conducts IMEs for CalPERS by providing an opinion of medical-legal issues of applicants for disability retirement.

11. CalPERS obtained Ms. Nichols's medical records and sent those to Dr. Thomas to review. Dr. Thomas authored a report on October 27, 2021, discussing the orthopedic disability evaluation he performed on Ms. Nichols. Dr. Thomas reviewed her medical history, and she reported that on May 19, 2016, she was on the bus and a special needs student was trying to get to the bus driver, so she attempted to hold the student but the student became dead weight and she fell trying to hold the student. She reported symptoms of neck pain at the right posterior side of her neck. She also

reported to be mostly unable to perform activities such as bathing, opening a carton of milk and jars, doing any outside activities, carrying groceries, driving, and riding a bike. She reported having difficulty sleeping.

12. Upon Dr. Thomas's review of Ms. Nichols's medical records, he noted that she was initially diagnosed with a thoracic strain, which he described as a very minor injury on the spectrum of injuries in that body region. A strain is when tissues have tension over a load and muscle becomes inflamed, or a tendon is torn. This is a treatable injury according to Dr. Thomas. She had been given activity modifications, and prescribed anti-inflammatory medications, muscle relaxants, and physical therapy. An x-ray of Ms. Nichols's lumbar spine showed spondylosis, which is known as arthritis of the spine, and is not a severe diagnosis. The x-ray also showed scoliosis, which is a chronic, congenital or degenerative finding. At that time, it was recommended that she undergo an open magnetic resonance image (MRI) due to claustrophobia, or undergo a regular MRI with sedatives. She informed Dr. Thomas that she had an MRI, but she was unable to report for which body part, and she could not get the MRI results because the clinic had since closed. Dr. Thomas concluded that, to the best of his knowledge, Ms. Nichols never had an MRI. Dr. Thomas also reviewed a report by Allen Fonseca, M.D., who conducted an initial orthopedic qualified medical examination (QME). Dr. Fonseca concluded that Ms. Nichols had no organic diagnosis and he was unable to make any conclusions.

13. Dr. Thomas performed a physical examination of Ms. Nichols, and his diagnostic impression was as follows: She had normal vital signs and slightly high blood pressure. She had a slow gait, but it was not antalgic or ataxic. She was able to perform tandem heel-to-toe walk, although she complained of pain in her back. She had negative Romberg and Spurling tests, which indicated she had no cord

compression or reproduction of axial-based neck and/or back pain. She was not able to perform a straight-leg raise test because she was unable to sit or lie down secondary to reported back pain. She had normal skin/muscle tone and texture bilaterally. She had no edema or swelling. She had no gross atrophy of any muscle groups bilaterally of the upper or lower extremities. She had hypersensitivity and hyperalgesia to light touch, which were not present in pinprick testing of the right and left buttocks, sacroiliac joints, or paraspinal musculature in the lumbar and cervical regions and midline spine and left and right periscapular regions. She was not able to perform strength testing – “out of respect for her tolerances due to her subjective pain” that was “excessive to her objective findings.” This was shown by her having “almost zero” shoulder motion, which is not normal and “did not make any sense” because that would be the case for a person who had both shoulders fused. Moreover, she exhibited “pain behaviors” that were not consistent with her “significant non-organic findings,” such as when she winced frequently, squinted her eyes, and made “some kind of small noises when attempting to do focused motion testing.”

14. Dr. Thomas opined that Ms. Nichols did not have any orthopedic musculoskeletal diagnosis, and her only diagnosis was pain. He conceded that at the time of her injury on May 19, 2016, it would have been consistent that she had a thoracic or cervical strain. However, at the time of his exam, she had no diagnosis. Her original injury likely resolved without sequela, as would have been typical of a strain injury resolving within three months. He opined that Ms. Nichols had an “exaggeration of her subjective complaints” and “overall she was cooperative during the exam but she did not put forth an appropriate effort because the pain behaviors during her exam” were not consistent with the exam findings. In particular, she had hypersensitivity and hyperplasia to light touch but none with pinprick testing; she reported sensory issues in her arms and hands, yet when tested she could not

discriminate between one to two points at 15+ millimeters or more and this would have been indicative of severe nerve problems; and she complained of having no shoulder motion but she moved her shoulder later in the exam.

15. Based on these findings, Dr. Thomas assessed that Ms. Nichols did not have an actual and present orthopedic impairment that rose to the level of substantial incapacity to perform her usual duties; she was not substantially incapacitated due to an orthopedic condition; and she could perform the specific job duties and physical requirements as listed in the job description.

Ms. Napier-Vea's Testimony

16. Jolie Napier-Vea testified on behalf of OUSD. The following is a summary of her testimony. She is the Director of Classified Human Resources for OUSD. She does not believe that Ms. Nichols is not able to return to work because of a medical condition. Ms. Nichols relocated and decided not to come back. The burden is on Ms. Nichols, and the evidence weighs in favor of CalPERS. Ms. Nichols application should be denied.

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. Nichols must demonstrate that she was permanently disabled or incapacitated from performing the regular and customary duties of a school bus attendant when she filed her application.

10. Contrary to Ms. Nichols's written narrative that she was permanently disabled and not able to return to her job due to orthopedic conditions, Dr. Thomas found no evidence to support her claim in his review of her medical records or in the physical examination that he conducted. Dr. Thomas credibly testified that Ms. Nichols did not have any orthopedic musculoskeletal diagnosis, her only diagnosis was pain, and her original strain injury likely resolved within three months. He opined that Ms. Nichols had an "exaggeration of her subjective complaints," as she complained of hypersensitivity and hyperplasia to light touch but she had none with pinprick testing; she complained of sensory issues in her arms and hands so extensive that this would have been for a person with severe nerve problems; and she complained of having no shoulder motion yet she was able to move her shoulder later in the exam.

11. Dr. Thomas was well qualified to testify regarding orthopedic conditions. His testimony was credible and persuasive. Ms. Nichols 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 America I. Nichols with CalPERS is denied. CalPERS's denial of America I. Nichols's application is affirmed.

DATE: August 4, 2022



JAMI A. TEAGLE-BURGOS

Administrative Law Judge

Office of Administrative Hearings