

ATTACHMENT C

RESPONDENT(S) ARGUMENT

CalPERS Board

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Via facsimile and email

Case No. 2021-0565

Re: Appeal Regarding the Application for Industrial Disability Retirement of EUSEBIO M. MONTEJO, Respondent and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, CALIFORNIA MEDICAL FACILITY, Respondent; OAH No. 2021110530

Respondent's Argument against adopting the proposed decision

A. The bifurcation of my case confused me

On October 7, 2022, ALJ Ed Washing granted the motion to bifurcate my case based on judicial economy. The focus changed from whether or not I was substantially incapacitated at the time of my application for IDR to whether I am,

“Barred for the application and eligibility for industrial disability retirement pursuant to the courts’ rulings in Haywood v. American River Fire Protection District (1998) 67 Cal.App.4th 1292 (Haywood), and its progeny.”

On October 7, 2022, ALJ Ed Washington confirmed with me my understanding that the hearing will not be about my disability but whether or not I am barred from applying for disability Retirement.

The above guidance confused me to unwittingly dismiss my expert witnesses. This becomes relevant shortly.

B. Administrative Law Judge (ALJ) Ed Washington did not accept evidence that would have resulted in a decision in my favor

On November 1, 2022, I disputed the validity of Dr. Gennady Kolodenker DPM PQME report citing deficiencies. In response, ALJ Ed Washington said,

“We have no experts testifying about this. I am not going to conclude on whether it does or does not rise to substantial medical evidence. I am going to look at what is written and essentially take it at is word, unless you call in an expert to say it is not accurate or we call the doctor in to say why certain things were stated and certain things weren't.

I was able to secure my expert witness Jose Hernandez MD. I informed ALJ Ed Washington that my expert Dr. Hernandez was ready to testify.

Judge Ed Washington replied by indicating that I could not provide any more evidence and could only reply to CalPERS' rebuttal.

On October 31, 2022, when considering my Exhibit Q, ALJ Ed Washington said,

“I don't need the medical records...you testified about your restrictions. I have some documents from your email communications that talk about your restrictions. I don't need your medical records to understand you have restrictions.”

Exhibit Q contained my medical records that refute Dr. Kolodenker's PQME report. In addition,

Exhibit Q contained authenticated medical records that would meet the exception of the hearsay rule.

In effect, by denying my witness to testify, denying direct evidence of medical records, and hearsay medical records, ALJ Ed Washington, prevented me from submitting evidence that would result in a ruling in my Favor.

C. I was substantially incapacitated at the time of my application for IDR on the bases of my orthopedic Injuries

Dr. Henrichsen, IME orthopedic surgeon, CalPERS's expert witness, wrote in his IME report dated April 6, 2021, to CalPERS's question 5, as of what date did I become substantially incapacitated answered,

"The condition became substantially incapacitating on October 20, 2020, as determined by Kevin Kirby, D.P.M."

Dr. Kirby DPM, my primary treating provider for my right ankle injury, on October 20, 2020, in his physician's report on disability, indicated that I was substantially incapacitated but that it would not last more than 12 months. On December 29, 2021, Dr. Kirby updated his physician's report on disability and indicated that my substantial incapacity started on May 12, 2020, and that it would last longer than 12 months.

Dr. Kou, orthopedic surgeon, my primary treating physician, indicated on January 27, 2021, that I was substantially incapacitated due to a tear of my right ankle peroneal tendon.

Dr. McHenry, IME cardiologist CalPERS's expert, on June 13, 2022, indicated that my right ankle injury substantially incapacitated me as of May 12, 2020.

D. I was substantially incapacitated at the time of my application for my psych and internal conditions

I have claimed a heart condition, a presumptive condition in worker's compensation. This means my heart condition is industrial until successfully rebutted by worker's compensation which has not occurred.

Dr. Perez PCP, on October 14, 2020, in her physician's report on disability, indicated that due to my psych condition and internal conditions, I was substantially incapacitated as of October 7, 2020, in physician's report on disability.

Dr. McHenry, IME cardiologist, on June 13, answered CalPERS question 5, as to what date my substantial incapacity started,

"Dr. Montejo became incapacitated after his ankle injury in April 2020. Specific dates for incapacitation due to sleep apnea, diabetes, and persistent sinus tachycardia were probably in the same year."

Dr. McCormick, Ph.D. psychologist, on November 3, 2020, in his physician's report on disability, indicated that I was substantially incapacitated and that it would last longer than 12 months.

On November 29, 2021, CalPERS filed a statement of the issue.

"The issue on appeal is limited to whether, at the time of the application, on the basis of an orthopedic (right/left ankle) condition."

On July 6, 2022, at CalPERS's request to exclude obstructive sleep apnea analysis by Dr. McHenry, IME submitted a supplemental report. In the report, he indicated that the inclusion of sleep apnea was in error and was due to my adamant request that it be included because I

“did not feel any other expert would be commenting on a condition [I] felt was important to the resolution of my [my] case.”

Then on September 14, 2022, CalPERS filed an amended statement of issue that now included my multiple orthopedic conditions, psych conditions, and internal conditions, including obstructive sleep apnea.

“Whether at the time of the application, on the basis of orthopedic (right/left ankle, hip), psychological, internal and cardiovascular (diabetes mellitus II, tachycardia, obstructive sleep apnea) conditions, respondent Montejo is substantially incapacitated from the performance of his usual and customary duties as a Physician and Surgeon.”

Including the sleep apnea diagnosis in the statement of issue validates the original report by Dr. McHenry. Based on the above, I have met the criteria that I was substantially incapacitated at the time of my application for IDR. This includes CalPERS’s expert witness versed in the standards that CalPERS uses to determine IDR.

E. Judge Ed Washington’s analysis of the Haywood and Smith and the exceptions as it applies to me is incorrect

1. On the issue of reinstatement and my contesting the AWOL separation

ALJ Ed Washington is incorrect because I did not dispute the AWOL dismissal. In my opposition to the motion to bifurcate on October 1, 2022, I noted that I am currently litigating the AWOL separation in State Superior Court as an ADA violation.

As spelled out in the Haywood court on the theory of potential reinstatement. In the same vein, theoretically, should I win my ADA violation claim in the state superior court, I would then be able to reinstate into state service. Thereby nullifying ALJ Ed Washington’s conclusion that my AWOL separation is similar to those illustrated by Haywood and its progeny.

2. Haywood exception applies in that my AWOL separation was the ultimate result of my disabling condition

Of my orthopedic injuries, I was substantially incapacitated at the time of my application for IDR on October 14, 2020, as noted above in section C., Dr. McHenry, IME cardiologist, indicated that I was substantially incapacitated as of May 12, 2020, and remained substantially incapacitated at the time of his June 13, 2022, report.

A worker’s compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different. (Bianchi v. City of San Diego (1989) 214 Cal.App.3d 563, 567, 262 Cal.Rptr. 566; Summerford v. Board of Retirement (1977) 72 Cal.App.3d 128, 132, 139 Cal.Rptr. 814.

ALJ Ed Washington does not clarify why he accepts worker’s compensation Dr. Kolodenker’s report at its word, but not the IME expert Dr. McHenry reported. Especially since Dr. McHenry’s report and response to CalPERS questions meet the standard for disability retirement, it is conceivable that CalPERS own experts, having an understanding of the requirements and verbiage of disability retirement, would carry more weight than that of the worker’s compensation expert.

Also, ALJ Ed Washington did not allow for expert testimony to refute Dr. Kolodenker’s PQME report. Nor did he allow for direct evidence from Dr. Cantu to be admitted into evidence that would refute Dr. Kolodenker’s PQME report. Nor was my hearsay medical record admitted that would

support my claim that I have a recurrence of a peroneal tendon tear in my right ankle requiring surgery again.

The medical evidence demonstrates my ongoing substantial incapacity; therefore, I could not return to work without appropriate restrictions. I was not at work because of my orthopedic disabilities. I was made AWOL because I was not at work. Therefore, my separation resulted from my disabling condition, meeting an exception spelled in the Haywood court.

3. On the matured right to disability and principles of equity

1. All competent medical opinions demonstrate that I was substantially incapacitated by sleep apnea, tachycardia, and type 2 diabetes at the time of my application for IDR and preceded my separation by AWOL by 13 months. This is unequivocal evidence that my right to disability retirement matured before my separation by AWOL. Therefore, for my internal conditions, my right to disability retirement matured before my AWOL separation
2. All competent medical opinion demonstrates that I was substantially incapacitated at my application for IDR for my orthopedic conditions. Therefore, my right to disability retirement matured before my AWOL separation.
3. Through no fault of my own, CalPERS excluded my internal conditions from my application. Had they been included, a favorable decision would have been rendered in my favor.

F. Testimony by Ms. Mack about the physical requirement of my job is factually inaccurate

Ms. Mack testified under oath that due to the Covid Pandemic, physicians were walking to the patient's cells for clinical encounters. This is not correct for two reasons. First, due to the Covid pandemic, movement in prison was restricted to prevent the spread of Covid. Second, when I was directed to return to work on November 23, 2021, the Covid pandemic was still in full force.

Mack did not supply any evidence to corroborate her statement that physicians were required to provide medical services at patient/inmate cells during the Covid pandemic.

Before the pandemic, walking from the parking lot to the ambulatory clinics was about half a mile. Navigating this distance requires prolonged standing in lines through gate checkpoints. Before the pandemic, walking to the patient's cell side was required for many reasons. Witnesses Dr. Aguilera and Dr. Shute, both physicians and surgeons at CMF, would have provided testimony about the physical requirements of a physician and surgeon at CMF during and before the Covid pandemic.

Without evidence, ALJ Ed Washington accepted Ms. Mack's statement as true that physicians were no longer required to travel to inmate-patient cells.

Ms. Mack also testified that she saw an email from Dr. DiTomas that she used to formulate her decision to direct me to work. This was accepted as direct evidence without evidence of the email.

I objected to Ms. Mack's testimony about the physical work requirements as lacking foundation. ALJ Ed Washington overruled my objection.

CalPERS did not at any point supply evidence that walking and using stairs was not a physical requirement of employment, as noted in the physical requirement document or the essential function document.

G. Testimony by Ms. Mack that Dr. Kolondenker evaluated all my orthopedic conditions is not factual

Ms. Mack testified that Dr. Kolondenker evaluated all my accepted conditions. This is factually inaccurate. Dr. Kolondenker, a podiatrist, referred me to an orthopedic surgeon. Dr. Kolondenker did not provide guidance about my ability to ambulate or use stairs due to my right hip orthopedic injury since his area of expertise is limited to the ankle.

H. Inaccurate findings of truth by ALJ Ed Washington that, if corrected, would result in a decision in my favor

Section 31 of the proposed decision. ALJ Ed Washington noted,

“Respondent testified that in addition to his right ankle injury he suffered from other ailments not specified on his application that he experienced prior to his separation from employment with CDCR.”

In my application, Section 3, page 2, I noted,

“I am a new diabetic insulin dependent. I also have a new diagnosis of sleep apnea. Both I attribute to the significant stress I have experienced.”

I did specify in my application that I suffered from other ailments prior to my separation from state service.

Section 45, he noted,

“Moreover, that respondent reported a variety of ailments to his employer before refusing to return to work after being medically cleared to do so, does not mean he was terminated due to a disabling medical condition.”

The medical evidence excluded by ALJ Ed Washington shows that I was not medically cleared. Therefore, his conclusion would be reversed, and that I was terminated due to my disabling medical condition.

More importantly, there are multiple claims with Worker’s Compensation not yet adjudicated, and the medical records unequivocally demonstrate that I was substantially incapacitated at the time I applied for IDR and continue to be. This is for Type 2 Diabetes, Obstructive Sleep Apnea, and my heart condition, Sinus Tachycardia. Since I was not accommodated for any of these conditions, dismissing me by AWOL was a direct result of my disabling conditions.

In the same section, ALJ Ed Washington wrote,

“nor does his opinion that some of his reported ailments were not fully considered.”

CalPERS did not show any evidence that my other ailments, right hip injury, Obstructive Sleep apnea, and Type 2 Diabetes, were considered. Therefore, this is not merely my opinion as characterized by ALJ Ed Washington.

Moreover, ALJ Ed Washington was inaccurate when he wrote,

“right ankle injury, the only subject of his worker’s compensation claim.”

The record is clear that my right ankle is not the only subject of my worker’s compensation claim.

Further, ALJ Ed Washington concludes in this section that

There was no evidence that his stated work limitations or medical conditions were factors in his separation from employment.

This is inaccurate because CalPERS IME expert Dr. McHenry reported that I was substantially incapacitated for Obstructive Sleep Apnea, Type 2 Diabetes, Tachycardia, and my right ankle. ALJ Ed Washington did not explain why he dismissed this evidence.

Conclusion

Including the available medical evidence, his analysis of the Haywood and Smith courts' barring me from IDR benefits is incorrect.

However, ALJ Ed Washington's decision rests solely on a worker's compensation PQME report. He ignored the available medical record that was admitted as evidence over the PQME report even when the available medical evidence met CalPERS's standard about disability. He did not allow expert testimony on my behalf to refute the PQME report. He did not allow for medical evidence that demonstrates my ongoing disability. He accepted testimony from Ms. Mack without corroborating evidence to her statement. There are other points of error, but the limit to six pages precludes me from presenting them.

I request that the board also consider the record in its entirety, including the hearing and its exhibits and the excluded exhibits. The numerous motions and the associated exhibits I have filed. The board will identify the failures in the application of the law when the entire record is considered.

Therefore, the proposed decision should not be adopted, and in the interest of judicial economy, the board should grant me disability retirement.

Sincerely,

**Eusebio
Montejo**

Digitally signed by
Eusebio Montejo
Date: 2022.12.28
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Eusebio M. Montejo MD