


ATTACHMENT C

RESPONDENT(S) ARGUMENT

Tamara S. Dunn,


In Pro Se

Ms. Sabrina Savala
Assistant to the Board
Board Services Unit Coordinator
California Public Employees' Retirement System
Post Office Box 942701
Sacramento, CA 94229-2701
Email: Board@CalPERS.ca.gov
Facsimile: (916) 795-3972

December 29, 2022

**Board of Administration of the California Public
Employees Retirement System(CalPERS)**

CalPERS Case No. 2022-0115 OAH NO.: 2022060319

In the Matter of the Application for Disability Retirement of Tamara S. Dunn, Respondent

RE: Respondent Argument

To the CalPERS Board of Administration:

Respondent Tamara S. Dunn hereby submits this Respondent Argument for consideration by the Board of Administration at its January 17, 2023, meeting concerning its Full Board Hearing on Ms. Dunn's appeal.

Sincerely,


Tamara S. Dunn, In Pro Se

cc: Ms. Cristina Andrade
CalPERS, Legal Office
By Fax: (916) 795-3659

I. INTRODUCTION

Respondent, Tamara S. Dunn urges this Board to reconsider the November 1, 2022, Decision by ALJ Jessica Wall, to deny her application to CalPERS for disability retirement benefits. The weight of the evidence shows that Respondent is entitled to a disability retirement based on her disabling hands and wrists condition.

ALJ Wall's denial decision commits prejudicial error in two important respects. First, ALJ Wall erred in her failure to consider and analyze Respondent's ability to perform the essential functions of her position. In fact, the essential functions of Respondent Dunn's specific job position are never discussed in ALJ Wall's decision. Second, the judge based her denial decision solely on the testimony of Dr. Harry Khasigian. ALJ Wall's denial decision for Disability Retirement fails to take into account the Respondent's ability to work full-time, does not consider her ability to perform her usual job duties, and never discusses the essential function of her position. Having failed to define or consider the essential

functions of Respondent Dunn's specific job position -- while simultaneously failing to diligently consider the totality of medical evidence ALJ Wall herself admitted into evidence, ALJ Wall lacks grounds for determining if Respondent Dunn is in fact capable or unable to perform her job. For these reasons, ALJ Wall's denial decision should therefore not be adopted.

II. LEGAL ARGUMENT

A. Respondent is Eligible for a Disability Retirement Because She Is Substantially Incapacitated from Performing Her Usual and Customary Job Duties for California State University Sacramento as outlined in her position description, Since Respondent's Duties Require Her to Work on a computer and other job duties using her bilateral hands and wrists, where she experiences numbness and pain.

To qualify for a disability retirement, Respondent has to offer sufficient evidence, based upon competent medical opinion, that she is permanently and substantially incapacitated for the performance of her usual duties as an Administrative Analyst NE, I, for the California State University Sacramento. Government Code sections 20026, and 21156.) In denying Respondent's application, the ALJ concluded, "[r]espondent's did not present competent, objective medical evidence to establish that she was substantially incapacitated from performance of her duties as an Administrative Analyst/Specialist for California State University, Sacramento at the time she filed her disability retirement application." (See *Decision*, at 8, pg. 22.)

ALJ Wall's analysis here is flawed in two ways. First, it ignores the evidence that at the time the Respondent applied for disability retirement (July 14, 2021), the Respondent's job in fact required her to perform the essential functions of her job using a computer and Dragon Naturally speaking software that was prescribed by her treating physician.

On June 12, 2021, she was allowed to return to work on modified duty, which required her to work a maximum of four (4) hours a day, no typing or use of her hands and the use Dragon Naturally Speaking software to perform her job functions. In June 2021, the Dragon Naturally Speaking software and headset, was not compatible with the Employers online computer financial and human resource applications and no other accommodation was offered by her employer. Since March 2020, and the July 2021 submission of her disability application the respondent was working remotely from home and remained so until March 2022 when she was placed back on temporary disability leave due to the excessive swelling and excruciating pain in her right hand. The Employer never took steps to find an alternative accommodation, until after the Respondent became symptomatic and further exacerbated her hand injury leading to her being placed on medical leave (March 29, 2022). The ALJ's finding that the Respondent is not entitled to retire for disability pursuant to Government Code section 21150." (See *Decision*, at 8, pg. 22.)

Second, ALJ Wall's decision making is flawed because it relied solely on the hostile testimony and opinion of Dr. Harry Khasigian but did not consider the opinion of three equally qualified Medical Doctors who have been treating Ms. Dunn for 2-10 years. ALJ Wall uncritically accepted Dr. Khasigian's dismissive assertion regarding findings contra a CalPERS approval of the application for disability retirement. In fact, ALJ Walls cites that (Dr. Khasigian) "explained that they relied on respondent's subjective statements rather than objective medical evidence, like Cal PERS requires. He further noted that treating physicians often serve as advocates for their patients, while his role is one of a on-treating evaluator"(See *Decision*, at 27, pgs. 13). It is both concerning and unclear why the ALJ would accept as fact -- and furthermore quote -- transparently obvious speculation.

Counsel for CalPERS, and the Administrative Law Judge Jessica Wall cites six California cases interpreting disability retirement laws Mansperger, Hosford, Harmon, Bianchi, Smith and Glover. Benefits were denied in five of those cases. However, those cases are distinguishable because they involve different facts and different retirement laws than this case. The fourth case cited in the Bianchi Decision-in which disability retirement benefits were granted-is closer to the Respondent's case and should be followed by this Board.

In *Beckley v. Bd. of Admin. of Cal. Pub. Employees' Ret. Sys.*, 222 Cal.App.4th 691, 699 (Cal. Ct. App. 2013), Beckley worked as a CHP officer for approximately 23 years. He was diagnosed with lumbar disc degeneration and sciatica and was taken off work temporarily on several occasions in 2003 and 2004, until the CHP determined he was not able to perform the tasks required of an officer. He applied for disability retirement, and the Board of Administration of California Public Employees' Retirement System (CalPERS) denied his application. *Beckley* brought a petition for writ of mandate, which the trial court granted. CalPERS has appealed

In *Beckley*, the trial court granted the petition. The court prepared a statement of decision concluding CalPERS erred in measuring Beckley's disability against his assigned usual duties as a PAO, rather than against the usual duties of a CHP officer, including the 14 critical tasks, and that the weight of the evidence showed Beckley was incapacitated for his performance of his duties. The court entered judgment directing CalPERS (1) to set aside its decision denying *Beckley's* application for disability for retirement and (2) to grant the application. Three weeks later, the court issued a preemptory writ of mandamus commanding CalPERS "to reconsider [its] action in light of this Court's Statement of Decision, and take further action especially enjoined on you by law."

Beckley is also nearly identical to Respondent Dunn's case and should lead this Board to consider the approval of the Respondent's disability application. The measurement of Respondent Dunn's disability against her assigned essential functions and critical tasks is essential in making a determination. ALJ Wall did not make a determination based on the essential functions of the Respondent's job, but rather the Physical Requirements and the general classification Job Description of Respondent's position.

Parker v. Pub. Emps.' Ret. Sys., No. C085763, 9 (Cal. Ct. App. Dec. 10, 2018), Karen K. Parker applied for a disability retirement alleging she could not perform her job as a rehabilitation therapist at due to a work injury that prevented her from controlling assaultive patients. After the California Public Employees Retirement System (PERS) denied her application, she filed an administrative appeal. An administrative law judge (ALJ) filed a proposed decision denying her appeal which the PERS Board adopted as its own. Parker then filed this successful administrative mandamus petition compelling PERS to grant her disability retirement application. PERS timely filed this appeal.

The trial court disagreed with the Board and found Parker "could not perform MAB due to her shoulder injury as stated by three separate physicians."

"The facts in this case indicate that Management of Assaultive Behavior ('MAB') occurred anywhere from at least once up to four times each day. Petitioner Karen Parker could not perform MAB due to her shoulder injury as stated by three separate physicians. Napa State Hospital informed her she was no longer qualified to perform her job. These facts clearly show that she was disabled under the PERS standard."

Parker is nearly identical to the Respondent's case and should lead this Board to Reject ALJ Wall's denial decision, and to grant Respondent's application. As in *Parker*, Respondent Dunn's bilateral hand and wrist injuries as documented by two separate physicians, prevent her from

physically being able to perform the requirements of her job. Moreover, *Parker* demonstrates that the opinion of non-CalPERS doctors must be taken into consideration in disability retirement decisions. The *Parker* decision demonstrates that capacity and ability to perform the essential functions of a job must be taken into consideration when determining an applicant's disability eligibility.

In *Wolfman v. Board of Trustees*, 148 Cal.App.3d 787, 196 Cal. Rptr. 395 (Cal. Ct. App. 1983) The underlying facts are not in dispute, and we adopt those of the trial court in its statement of decision: "[*Wolfman*] is a 36-year-old elementary school teacher who taught for 12 1/2 years before applying for a disability allowance with respondent. [*Wolfman*] suffers from severe asthma and chronic bronchitis. She has been steroid-dependent since 1963 and will have to use steroids permanently. Steroids are potent and dangerous drugs, with extremely adverse side effects from prolonged use. In [*Wolfman*'s] last year of teaching school (1978-79), she found it necessary to substantially increase her steroid intake in order to function and, even with that, she became increasingly ill.

Unlike *Mansperger*, *Harmon*, and *Hosford*, *Wolfman* is disabled from her usual and customary duties. Proximity to small children and their rampant infectious agents is not a remote occurrence nor an activity in which she indulges outside the classroom. There is no elementary teaching position to which she could be reassigned for limited duty that would not place her in the same contagious environment. Nor do we find her disability speculative within the context of *Hosford*. During her final years of employment she consistently reached a medically determinable stage of severity. It was not merely a prospective probability, but a medical certainty. *Wolfman v. Board of Trustees*, 148 Cal.App.3d 787, 791 (Cal. Ct. App. 1983)

Moreover, we find it significant that disability or retirement for a law officer requires "incapacity" (Gov. Code, §§ 21022 and 31724), while a teacher's disability is determined upon a finding of "impairment." (Ed. Code § 22122) (1c) We conclude *Wolfman* is disabled under the standards set forth in *Mansperger*, *Harmon*, and *Hosford*. She is a fortiori disabled under the less stringent statute and we need not explore the requirements of this lesser threshold.

The *Wolfman* appeals court decision concludes that an employee's inability to perform her specific job given the constraints (physical environment and essential functions) necessarily means the employee is sufficiently disabled and therefore unable to perform the actual (rather than notional) conception of her job. Respondent Dunn's Employer has not facilitated a set of circumstances in which she can perform the essential functions of her position.

B. The Medical Evidence Supports a Finding that Respondent is Substantially Incapacitated from the Performance of Her Duties.

In her conclusion, ALJ Wall States, "Respondent did not present competent, objective medical evidence to establish that she was substantially incapacitated from performance of her duties as an Administrative Analyst/Specialist for California State University, Sacramento at the time she filed her disability retirement application". Therefore, based on the Factual Findings and Legal Conclusions, respondent is not entitled to retire for disability pursuant to Government Code section 21150.

The 2022 QME report is not narrowly focused on causation but also includes medical conclusions as to the Respondents disability status at the time the CalPERS application was filed, and the IME examination took place.

Medical Evidence exhibits containing medical records meeting the California State evidence code 1561(a) were not taken into consideration in the judge's decision. Specifically, medical evidence

presented at the hearing showed conclusively that: (1) Dr. Shtutman and Dr. Wolfson determined that Respondent was physically incapacitated by the numerous repetitive stress injuries to her hands and wrists resulting in her not being able to perform the essential duties of her job description; and (2) Prior to Respondent submission of disability application she had been placed on medical leave from May 2020 until May 2021. Upon returning to work in June 2021, Respondent was placed on modified duty with restrictions of four (4) hours per day and no use of hands. Due to her employers (California State University, Sacramento, Respondent) inability to properly accommodate her, she was again placed on total disability leave in March 2022 until the present due to her hand injuries.

Evidence Code §1561 states:

- (a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following: (1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records; (2) The copy is a true copy of all the records described in the subpoena duces tecum ... , or pursuant to subdivision (e) of Section 1560, the records
- (b) were delivered to the attorney, the attorney's representative, or deposition officer for copying at the custodian's or witness' place of business, as the case may be; (3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event; (4) The identity of the records; (5) A description of the mode of preparation of the records;

ALJ Wall accepts Dr. Khasigian's opinion that Respondent "has an essentially normal presentation on a clinical basis," and she did "not have any updated diagnostic tests to correlate with her subjective complaints." " but " did not present competent, objective medical evidence" "that she was substantially incapacitated from performance of her duties" In her decision, ALJ Wall ignored the opinions of three (3) Medical board-certified Physicians, who all have determined that the Respondent is substantially incapacitated from the performance of her job duties. Performing her job duties would require the Respondent not to use her hands, and that she would be temporarily and totally disabled from performing the essential functions of her job.

The CalPERS disability application, the physician report on disability form specifically asked "1. Is the member currently, substantially incapacitated from performance of the usual duties of the position, for their current employer?" to which Dr. Natalya Shtutman, MD, who has been treating the Respondent since January 2020 responded "yes" and listed the following duties the Respondent is unable to perform: Repetitive hand finger motions, Move fine hand coordination, Lift Carry, operate equipment over 5lbs, limited keyboard entry. On the question that asked if injury is permanent, Dr. Shtutman marked "yes".

In their denial of Respondent Dunns' medical disability application, ALJ Wall failed to consider readily available medical records that would have proven the Respondents claim.

III. CONCLUSION

ALJ Wall committed prejudicial error by failing to distinguish between job descriptions and essential functions and ADA requirements of Respondents job position in her decision. In fact, ALJ Wall only discusses percentages of overall labor associated with the job title (Decision, Factual Findings, 5). ALJ Wall admitted the Essential Functions Exhibits (F1, F2) during the October 5, 2022, appeals hearing over and against CalPERS' objection. Despite this fact, ALJ's decision never describes the specific physical tasks (Essential functions: Exhibit F1, F2) and ADA requirements fundamentally required to perform that labor. ALJ Wall's notional conception of labor requirements undercuts ALJ's denial decision regarding Respondents capacity to perform specific labor requirements.

The essential functions of Respondent's California State University Sacramento job position require her to work while extensively using her hands and computers, which triggers her disability.

Appeal Court decisions in *Parker, Beckley and Wolfman* center employee incapacity to perform essential functions of their specific job position when deciding favorably regarding Respondents' applications for disability retirement.

ALJ Wall based her decision solely on the testimony of Dr. Harry Khasigian, failing to consider the opinions of other qualified medical doctors. The Court's decision in *Parker* takes into consideration the opinion of qualified doctors not contracted with PERS in its favorable decision regarding Parkers disability claim.

After his review of the 2022 QME reevaluation report, Dr. Khasigian explained that the QME examination focused on what caused respondent's medical condition, rather than whether her medical condition was so severe that it incapacitated her from performing her job's essential functions. (See *Decision*, at 26, pg. 13)

This is not true. ALJ Wall erred in relying upon this assertion in the formulation of her decision. The multiple QME reports written by Dr. Ronald Wolfson, entered into evidence by the judge, and other medical reports and records go, into great detail regarding causation of the Respondents comprehensive hand and wrist injuries and how it affected her ability to perform the essential functions and duties of her job.

CalPERS and Dr. Harry Khasigian received, reviewed and used the same medical record, reports and other evidence to make their determinations. However, when the Respondent submitted the same medical records and reports as evidence, it was only allowed into the record as Hearsay. (See *Decision*, at 26, pg. 13)

In his various reports, Dr. Khasigian does not reference essential functions in exhibit F, offered at the hearing, nor ADA requirements listed on the Respondents job position description. Nor does he address her ability to use her hands and fingers for typing, handling materials and other related duties in light of her work restrictions. (See *Decision*, at 10, 15 and 26, pg. 6, 8, 13). Dr. Khasigian claims Respondent has full range of motion but never spoke to the issue of swelling as shown in exhibits nor the Respondent's capacity to type to perform job duties using her hands. (See *Decision*, at 15 & 19, pgs. 9 & 10). Dr. Harry Khasigian assumes that the Respondents December 2020 Carpal Tunnel surgery was the Respondents only hand and wrist issue and fixed everything. Furthermore, he asserted in his hearing testimony that 100% of carpal tunnel surgeries were successful.

I hereby request that the Board of Administration of the California Public Employees' Retirement System, acting pursuant to Government Code Section 11425.60, hereby designates its final Decision concerning the application of Tamara S. Dunn as a not Precedential Decision of the Board and request that the decision not be published.

For the foregoing reasons, Respondent Dunn respectfully urges this Board to not consider and accept the decision of ALJ Jessica Wall, when rendering its Decision and grant her application for a disability retirement.

December 29, 2022
Dated


TAMARA S. DUNN, Respondent

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my address is: 2233 23rd Avenue, Sacramento, CA 95822.

On December 29, 2022, I served the foregoing document described as:

RE: RESPONDENTS ARGUMENT TO CalPERS BOARD OF ADMINISTRATION – In the Matter of the Application for Disability Retirement of TAMARA S. DUNN, Respondent
CalPERS Case No. 2022-0115; OAH No. 2022060319.

ATTORNEY:

California Public Employees'
Retirement System – Legal Division
Attorney Cristina Andrade
Telephone: (916) 795-3675
Facsimile: (916) 795-3659***
Sent by Facsimile

PARTY:

Respondent CalPERS Representative

Ms. Sabrina Savala
Board Services Unit Coordinator
California Public Employees' Retirement System
Post Office Box 942701
Sacramento, CA 94229-2701
Email: Board@CalPERS.ca.gov**
Facsimile: (916) 795-3972***
Sent by Email and Facsimile

Assistant to the Board

- BY CERTIFIED AND FIRST-CLASS MAIL -- As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.
- BY ELECTRONIC TRANSMISSION: I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.***
- BY ELECTRONIC FILING: I caused such documents to be e-Filed via Board of Administration e-MAIL.**

Executed on December 29, 2022, at Sacramento, California. I do declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Tamara S. Dunn
Printed Name


SIGNATURE