

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

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7
8 **BOARD OF ADMINISTRATION**
9 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

10 In the Matter of	)	Case Number:	9333
)		
11 ESTHER CHODAKIEWITZ,	)	OAH Number:	2012040611
)		
12 Respondent.)		
)		
13 and	)	ARGUMENT AGAINST THE ADOPTION	
	)	OF THE PROPOSED DECISION	
)		
14 DEPARTMENT OF CORRECTIONS AND	)	Hearing Date:	November 28, 2012
15 REHABILITATION (CALIFORNIA	)	Hearing Place:	Orange, California
INSTITUTION FOR MEN, CHINO))		
)		
16 Respondent.	)	<i>The Honorable Roy Hewitt, Administrative</i>	
	)	<i>Law Judge</i>	

17
18 **I.**

19 **INTRODUCTION**

20 On March 20, 2013 the Proposed Decision in the above matter was served on the parties.
21 Respondent. Esther Chodakiewitz (hereinafter Respondent or Dr. Chodakiewitz), and the
22 Department of Corrections.

23 The Respondent submits that the CalPERS Board reject and not adopt the Proposed
24 Decision and remand the matter to the Administrative Law Judge, Roy Hewitt for further
25 proceedings.

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1 II.

2 NO DIRECT EVIDENCE WAS PRESENTED
3 ESTABLISHING A WORK ACCOMMODATION.

4 Esther Chodakiewitz was a psychiatrist with the State of California and specifically the
5 Chino Prison. Dr. Chodakiewitz worked as a Staff Psychiatrist until May 3, 2006 when she
6 suffered a specific orthopedic injury while at work.

7 After remaining off work for one year, she returned to work on May 7, 2007 and worked
8 until her last day of employment on May 29, 2007. Unfortunately, Dr. Chodakiewitz's return to
9 work in a more physically demanding position in the prison hospital aggravated and increased her
10 symptomatology requiring her to stop working at the recommendation of her treating physician,
11 Dr. Soheil Aval. The Administrative Law Judge summarizes the medical care provided by Dr.
12 Aval as well as the other examining physicians in this case, the Agreed Medical Examiner Dr.
13 Raymond Zarins, Dr. Neil Halbridge, and Dr. Jonathan Nissanoff. Each examining physician has
14 a different opinion as to the work restrictions applicable to Dr. Chodakiewitz's orthopedic
15 injuries.

16 In the Proposed Decision the Administrative Law Judge sets forth his legal conclusions at
17 page 8 when he states:

18 "4. As set forth in Findings 26 and 27, in the present instance and
19 evaluation of the medical evidence in conjunction with the
20 employer's offer of permanent accommodations established that
21 Respondent is not permanently disabled and incapacitated from the
22 performance of her duties within the meaning of Government Code
23 sections 20026 and 21156."

24 Judge Hewitt references Findings of Fact 26 which states:

25 "26. The experts all agree that Respondent is not malingering, she is
26 not exaggerating her injuries, and with adequate accommodation she
27 can perform all of her regular job functions as a Staff Psychiatrist for
28 the employer. (Emphasis added).

Likewise. Judge Hewitt references Findings of Fact 27 which states:

"27. The evidence established that at the time Respondent applied
for disability retirement employer was ready, willing and able to
fully accommodate respondent's limitations." (Emphasis added)

Thus, the issue is not whether Dr. Chodakiewitz is permanently incapacitated for the

1 performance of her normal job duties, all physicians agree that she cannot perform the full range of
2 duties of her assignment.

3 The issue becomes whether there was an employer accommodation to her work
4 restrictions.

5 At the Administrative Hearing no direct evidence was presented from either party setting
6 forth the specific work restrictions and the employer's accommodation.

7 CalPERS' Closing Brief states at page 10:

8 "It should be noted that CalPERS does not determine requests for
9 reasonable accommodation. CalPERS never participates in
10 discussions regarding the establishment of reasonable
11 accommodations, but CalPERS would always consider existing
12 reasonable accommodations that are made to an Applicant's job
13 duties.

14 * * *

15 Thus, CalPERS will merely respect whatever arrangement that has
16 been worked out between an employer and a member."

17 **A. CALPERS' BURDEN**

18 Once it has been established that Dr. Chodakiewitz is permanently incapacitated for her
19 normal job assignment, it is CalPERS' burden to present direct evidence that a reasonable
20 accommodation was made for her.

21 Accordingly, once the threshold question of permanent incapacity is met by Applicant, it is
22 CalPERS' burden to provide *substantial* evidence of a *reasonable* accommodation.

23 "... a party has the burden of proof as to each fact the existence or
24 nonexistence of which is essential to the claim for relief that he is
25 asserting." California Evidence §500.

26 In Farrow v. Montgomery Ward Long Term Disability Plan (1986) 176 Cal. App. 3d. 648,
27 651, 659, the Court turned to Social Security cases for guidance on the issue of which party had
28 the burden to prove *the availability* of an accommodation. The Farrow Court specifically
commented that courts turned "for analogies to the body of law regarding judicial review of
decisions of administrative agencies, even though that body of law was not directly [on] point. Id.
[Citations omitted]. Analogously, Applicant turns to Farrow on the issue of *whether CalPERS met
its burden to prove a permanent accommodation?*

1 Ms. Farrow injured her back lifting a pot of soup onto a stove during the course of her
2 employment. Under Montgomery Ward's particular ERISA plan, Ms. Farrow was entitled to
3 benefits, if she was unable to engage in any substantial gainful activity. *Id.*, pp. 651-652; 659.
4 The evidence demonstrated she was unable to engage in her prior occupation, but Respondent
5 claimed she could engage in *other* gainful activity. *Id.*, p. 654. However, the Court unequivocally
6 held that once a claimant "establishes a prima facie case of disability by showing that a physical ...
7 impairment prevents him from engaging in his previous occupation. **The burden of going**
8 **forward with the evidence shifts¹...**" *Id.*, p. 660. [Citations omitted; emphasis added]. The
9 Farrow Court further held:

10 "..."the plan administrators cannot rely solely upon **conclusory**
11 **statements** that a claimant can engage in 'some' work or perhaps
12 'light' or 'sedentary' work. The plan must **specify particular jobs**
13 which it contends the claimant **can perform** or could **reasonably**
14 become qualified to perform. **Specification of such a job should**
15 **be supported by a job description** indicating that the job does not
16 require exertion or skills beyond the capability of the claimant." *Id.*,
17 p.663. [Emphasis added].

18 Applicant maintains there is no such reliable evidence of a permanent accommodation in
19 the record. No witnesses were called to address the accommodation issue. The only evidence
20 presented were documents from Dr. Chodakiewitz's employer which is not direct evidence. The
21 hearsay written evidence cannot support a Finding of Fact.

22 While hearsay evidence is admissible in administrative hearings², the issue does not turn on
23 admissibility, but rather the fact that Respondent is trying to prove a material fact with hearsay and
24 speculation: and, therefore, cannot meet its burden with substantial evidence.

25 In Layton v. Merit System Commission of the City of Pomona (1976) 60 Cal.App.3d. 58 at
26 p. 67 the court considered "the quality of evidence" admissible in administrative hearings. In
27 Layton, the Court determined that a letter from a supervisor setting forth charges of misconduct
28 resulting in Petitioner's two day employment suspension, constituted hearsay and, therefore did

1 ...the burden of going forward is shifted from the claimant to the ... administrators of a pension or welfare
2 benefit plan ..." *Id.*, p. 662 [Citations omitted].

2 ²California Government Code §11513.

1 not provide substantial evidence of the truth of the charges or adequate support for the resulting
2 administrative decision. Specifically, the information upon which the charges were based *were not*
3 *within the supervisor's personal knowledge*, but had been relayed to him by others.

4 "Mere uncorroborated hearsay ... does not constitute substantial evidence." Martin v.
5 State Personnel Board (1972) 26 Cal. App. 3d 573, 580-585, *citing* Edison Co. v. Labor Board
6 (1938) 305 U.S. 197, 229-230. Indeed, it has long been held that hearsay, by itself, does not
7 constitute substantial evidence to support an administrative determination. Hearsay evidence
8 alone is insufficient to support the finding of a material fact; and, Respondent's claim that
9 Applicant is not permanently incapacitated because she could purportedly be accommodated.

10 "In California, recent case law has concerned the proper
11 interpretation of *Government Code section 11513, subdivision (c)*
12 which provides for the admissibility of hearsay evidence in state
13 administrative hearings. But *section 11513, subdivision (c)* also
14 provides that "[hearsay] evidence **may be used for the purpose of
supplementing or explaining but shall not be sufficient in itself
to support a finding unless it would be admissible over
objections in civil actions.**" Layton, supra, at p.67. (Emphasis
added)

15 In the instant matter there isn't any other evidence to supplement or explain. Other than
16 hearsay. Respondent's evidence is merely speculation and unreliable.

17 III.

18 CONCLUSION

19 Dr. Chodakiewitz requests that the CalPERS Board reverse the Proposed Decision or in the
20 alternative remand the matter for further proceedings consistent with this Argument.

21
22 DATED: April 24, 2013

Respectfully submitted,

23 LEWIS, MARENSTEIN, WICKE,
24 SHERWIN & LEE

25
26 BY:


THOMAS J. WICKE
Attorneys for Respondent,
ESTHER CHODAKIEWITZ

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 20750 Ventura Boulevard, Suite 400, Woodland Hills, California 91364-2338.

On April 29, 2013, I served the foregoing document described as

ARGUMENT AGAINST THE ADOPTION OF THE PROPOSED DECISION

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

John A. Mikita
Senior Staff Counsel
CalPERS
P.O. Box 942707
Sacramento, CA 94229-2707
Also sent via facsimile to (916) 795-3659

Cherec Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701
Also sent via facsimile to (916) 795-3972

BY MAIL.

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 Woodland Hills, 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 date of deposit for mailing in affidavit.

Executed on April 29, 2013, at Woodland Hills, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Terry Hernandez
Type or print name


Signature