

**ATTACHMENT C**  
**RESPONDENT(S) ARGUMENT**

CalPERS Executive Office  
P.O. Box 942701  
Sacramento, CA 94229-2701



August 3, 2013

RE: Case No 9775  
Proposed Decision of Industrial Disability Retirement of Kerry E. Carter  
Kerry E. Carter, 24150 Sorrel Ct., Tehachapi, CA 93561  
661-821-2815

Dear CalPERS Executive Board:

This letter is to address the proposed decision of H. Stuart Waxman, Administrative Law Judge of the Office of Administrative Hearings, dated June 12, 2013, in the matter of my Disability Retirement as a safety member of CalPERS.

I am requesting that the Board of Administration of the CalPERS Retirement System accept the decision and order of Judge H. Stuart Waxman, and adopt it as precedent so as to be useful in helping to decide future cases.

I am further requesting that my Disability Retirement begin payment immediately and retroactively, with interest, back to the date of my retirement in October 2006.

In his decision, Judge Waxman made extensive reference to my medical history and he notes that there is substantial evidence to show that my ability to return to my usual job as a Registered Nurse was not possible.

Judge Waxman also cited precedent for substantial inability to perform usual duties and government codes that further sustain my case, as a State Safety employee, for Disability Retirement. He cited three cases that showed that substantial disability to perform usual duties requires not only that the employee be able to perform their duties as outlined, but also those duties that include typical physical demands, and these duties must be able to be performed safely and effectively. My past and current heart condition prevents me from performing the necessary duties of my usual job as a Registered Nurse safely and effectively for my patients as well as for my own health and safety.

Judge Waxman also cited 3 Government codes referencing Disability Retirement for Government Safety employees. Government Code section 20026 states:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, 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.

Judge Waxman was of the opinion that the four (4) doctors that evaluated me extensively over time and treated me for my cardiac problems were far more credible than the one doctor, paid by CalPERS, and who only spent about 30 minutes talking to me and giving me a brief exam.

Also cited was Government Code 21151, subdivision (a) which states:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as a result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

And Government Code section 21156, subdivision (a) (1), states in pertinent part:

If the medical examination and other available information show to the satisfaction of the board, or in the case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability.

Based on the findings and evaluation and treatment of the first four (4) doctors whose care I was under, I was found to be 61% permanently partially disabled. This was sustained and recognized by State Workers Compensation.

This process has taken nearly seven (7) years, through many unnecessary delays, to get to this point and it has been a very stressful process for me.

At the time that I originally filed for retirement in 2006, I filed for Disability Retirement and had a pending State Workers' Compensation claim in process. I filed the application packet in person at the Fresno office and was made to understand that CalPERS would process my retirement pending the outcome of the Workers Compensation case. I understood that I would receive Service Retirement while in process. I had been in contact with the CalPERS office several times during this period, keeping them informed that the claim was still being evaluated.

About April 11, 2008, I called to inform the CalPERS office that my Workers Compensation hearing had been held and that I had been found to be 61% disabled and could not return to my usual job as a Registered Nurse. I wanted to know what paperwork they needed from me or State Worker's Compensation to go forward with my Disability Retirement. I was told that my application had been denied a few months earlier and that my attorney and I should have been notified of it. I informed them that neither my attorney nor I had received any notification of the denial and it was, in fact, my attorney that had told me to call CalPERS to see what was needed to process my Disability Retirement application.

I re-filed an application for Disability Retirement on April 20, 2008, in person at the Fresno office. CalPERS denied that application on October 13, 2009, now saying

that the outcome of the Workers Compensation case had no bearing on their decision. I filed an appeal on November 9, 2009.

As noted in Judge Waxman's decision, I have had a substantial history of heart problems while employed at California Correctional Institution in Tehachapi. I have suffered with arrhythmias, palpitations, prolonged dizziness related to the arrhythmias, and shortness of breath, all of which developed while employed by the Department of Corrections. The medications I was given to control these had significant side effects including weight gain, fatigue and fluid retention. This made it difficult to continue to meet the increasing physical demands of my job, which was so much more than what is outlined in the job description. These increasing physical demands at work aggravated my heart condition and I had to leave work several times with symptoms of chest pain and palpitations.

In February 2005 I had to undergo an ablation procedure on the right side of my heart to try to correct the arrhythmias. As noted on page 2 of Judge Waxman's decision, the procedure was only partially effective and after returning to work, my arrhythmias, chest pain and palpitations continued. I had to leave my job in June of 2005 with chest pain, nausea and palpitations and seek further medical care. I continue to take several heart medications on a daily basis to help control these arrhythmias and palpitations. I have been unable to return to work and continue to have limited ability to perform some household chores and must have help with them.

To this end I therefore again request that the decision of Judge Waxman be accepted, adopted as precedent and that I begin receiving my Disability Retirement, with back pay to the date of my retirement.

Sincerely,

A handwritten signature in cursive script that reads "Kerry Carter". The signature is written in black ink and is positioned above the printed name.

Kerry Carter