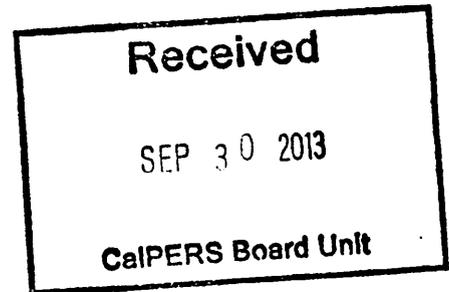


ATTACHMENT C
RESPONDENT'S ARGUMENT

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September 27, 2013

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re: Roberson v. CalPERS Case #2012 - 0288 OAH # 2012051062

**RESPONDENT'S WRITTEN ARGUMENT AGAINST THE BOARD'S
ADOPTION OF THE PROPOSED DECISION**

INTRODUCTION:

On September 12, 2013 CalPERS sent the undersigned a letter along with the Proposed Decision of Karen J. Brandt, Administrative Law Judge, which was rendered on September 6, 2013. The letter provided Respondent James Roberson, and the undersigned counsel, up through and including October 4, 2013 to submit written argument of no more than six pages by October 4, 2013.

Since this written argument is less than six pages, and is being received by the CalPERS Executive Office prior to October 4, 2013, it is proper and timely.

**THE PROPOSED DECISION SHOULD NOT BE ADOPTED BECAUSE IT IS
INCOMPLETE AND INACCURATE:**

Respondent begins by pointing out that ALJ Brandt had before her clear evidence that the Social Security Administration found Mr. Roberson was unable to engage in any gainful employment as of March, 2007. Mr. Roberson remains eligible for, and continues to receive, Social Security Disability benefits. The Proposed Decision fails to address this fact. This Social Security Administration Award is substantial evidence of disability which was not given any credit or weight by ALJ Brandt.

Cheree Swerdensky
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Page 2
September 27, 2013

ALJ Brandt was also presented with a certified copy of an Award by the Worker's Compensation Appeals Board. The Board determined, inter alia, that as a direct result of the December 6, 2006 incident (which is the subject of respondent's request for a disability retirement) respondent had sustained "... permanent disability of 60% ..." This fact and Award also was not addressed in the Proposed Decision. Apparently ALJ Brandt gave little or no credit or weight to this determination.

These two findings, which were reached after the respective agencies reviewed extensive medical evidence must be considered in determining whether Mr. Roberson is entitled to his disability retirement. By merely noting the existence of these reports in paragraph 26 of her decision, ALJ Brandt did not give proper credit or weight to these determinations. She provided no analysis as to why her findings were entirely opposite to the Social Security Administration and the Workers Compensation Appeals Board.

Both of these well reasoned determinations indicate that objective persons reviewing Mr. Roberson's medical issues believe him to be disabled.

In fact, all of the medical evidence submitted to ALJ Brandt, except the reports generated by CalPERS retained expert - Robert Henrichsen, M.D., found Mr. Roberson to be substantially incapacitated from his occupation.

The evidence was overwhelming that Mr. Roberson was substantially incapacitated from his occupation as a custodian for the State Capitol. Despite the very "competent medical opinion" of Carl Shin, M.D., the physician who has seen and treated Mr. Roberson monthly since June, 2008, and multiple other medical reports supporting disability, ALJ Brandt improperly determined that Dr. Henrichsen, a physician who is loyal to CalPERS and has a history of supporting CalPERS, was the only physician to be believed.

In fact, to the extent Dr. Kaufman, who is also a CalPERS "usual" retained expert, determined, in his initial report that Mr. Roberson was truly "substantially incapacitated," ALJ Brandt found reason to discount the initial report and then only give credence to Dr. Kaufman's later reports - where he changed his position completely based upon suggestions he received from CalPERS.

There is simply no support for the conclusion of ALJ Brandt. Over the past five years Dr. Henrichsen has spent about one hour with Mr. Roberson. He knows nothing of Mr. Roberson's daily life activities, or lack thereof. His opinions were the most bias and should have been given little weight.

Cheree Swerdensky
Assistant to the Board
CalPERS Executive Office

Page 3
September 27, 2013

**THE PROPOSED DECISION SHOULD NOT BE ADOPTED BECAUSE IT
INCORRECTLY EVALUATES RESPONDENT'S MEDICAL CONDITION**

The Proposed Decision states that "disability" must be based upon "competent medical opinion." Although such is the terminology found in Government Code sec. 20026, it appears that ALJ Brandt interpreted the term to mean that disability can only be found if it is supported by objective evidence of injury.

The conclusion is based on the fact that in numerous parts of the Proposed Decision, and specifically in paragraph 15, ALJ Brandt admits that all Mr. Roberson offered was "subjective complaints of pain." Hence, she appears to have given little or no credit to subjective complaints.

There is absolutely no case law, statutory law or Precedential Decision law which requires that the only way for an applicant to prove "disability" is through "objective evidence of disability." In fact, such a "standard" fails to comply with modern medicine.

From a practical standpoint, almost all medical care is rendered based on the subjective complaints of patients. Other than broken bones, cancer and some ailments which are visible through x-ray, CT scan or MRI, and chemical tests through blood and/or urine analysis, doctors routinely treat patients based solely on their subjective complaints.

Carl Shin, M.D., who ALJ Brandt found to be less credible than Dr. Henrichsen, is a Physical Medicine and pain specialist. His entire medical career has been, and remains, devoted to helping persons who are in "chronic pain."

Government Code sec. 20026 does not require "objective medical evidence" to prove disability. It merely requires "competent medical opinion." Dr. Shin, who has treated Mr. Roberson for more than five years, offered "competent medical opinion" that Mr. Roberson could not return to his occupation as a Custodian. He could not meet the lifting requirements. He could not meet a number of the job requirements. Dr. Shin's medical opinions were "competent" and were clearly supported by the evidence.

Modern medical practice is an art of "exclusion." Physicians rarely are able to determine an exact "cause" of injury or illness. They merely treat what is brought to them and when they are unsure of how to treat an injury or illness, they try different therapies. If a therapy works, they continue with it. If it does not, they try a new therapy.

Cheree Swerdensky
Assistant to the Board
CalPERS Executive Office

Page 4
September 27, 2013

That is how Mr. Roberson has received his medical care for the past six years. The fact that his injuries may not show up on an x-ray, CT or MRI does not mean that he is not "Incapacitated." The fact that he had extensive, and life threatening, back surgery on January 26, 2010, which ultimately failed, is evidence that he is trying the best he can to recover and simply is unable to engage in his occupation.

SHOULD THE BOARD ADOPT THE PROPOSED DECISION, IT MUST
REINSTATE RESPONDENT TO STATE EMPLOYMENT

The Proposed Decision clearly found that Mr. Roberson was not "substantially incapacitated" and that his disability application should be denied. However, the Proposed Decision fails to comply with the Precedential Decision of *Keck v. Los Angeles County Schools* (00-05, September 29, 2000).

In *Keck, supra*, the Administrative Law Judge determined that Ms. Keck was not substantially incapacitated from her occupation. However, upon such a finding, the ALJ was required to order the employee "reinstated." In *Raygoza v. County of Los Angeles* (1983) 17 Cal.App. 4th 1240, the court determined that if the employee is found to not be "substantially incapacitated" from his occupation, he must be reinstated.

Here, since the Proposed Decision finds that Mr. Roberson is not "substantially incapacitated", he must be offered his job back. Therefore, if the Board adopts the Proposed Decision, the final Decision must be amended so as to include a direction to reinstate Mr. Roberson to his Custodian position.

CONCLUSION

For reasons set forth herein, respondent respectfully requests that the Board not adopt the Proposed Decision but that it enter a new and different Decision which finds that Mr. Roberson is substantially incapacitated from his Custodian position and award him his disability retirement.

In the alternative, should the Board agree that Mr. Roberson is not substantially incapacitated from his Custodian position, pursuant to *Raygoza, supra*, the Board must order him reinstated to his Custodian position.

Sincerely,



Daniel S. Glass