

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

December 4, 2013

TO: Board of Administration
California Public Employees Retirement System
CalPERS Executive Office
PO Box 942701
Sacramento, CA 94229-2701

RE: Case No. 9065

OAH No. 2012120803

Proposed Decision of The Honorable Karl S. Engeman, Administrative Law Judge

Received

DEC - 9 2013

CalPERS Board Unit

Respondent (A)'s Argument Against the Proposed Decision

The following items are to either to provide explanations or to amend information in the Proposed Decision of the Administrative Law Judge. In no way should this be considered as a criticism of either Judge Engeman or the Administrative Hearing process. Rather, I believe my having to represent myself had a major impact on the incongruence found between what I intended to present and focus upon and what my layman's efforts actually offered. For this reason, I am grateful for this opportunity to re-state my case, and hopefully, to make my position on the pertinent issues more clear.

(For clarity, **TITLES**, *Subject Descriptions*, Page numbers, and Paragraph numbers from the Proposed Decision are referenced prior to *Argument* statements.)

FACTUAL FINDINGS

PG 2, PP 3: Had I known the correct nomenclature at the time, I would have indicated my primary debilitating condition was "Neuromuscular" and not "Orthopedic" in nature.

Additional Note: While I initially retired on October 7, 2007, the 2009 settlement of the *Cargill vs. Metropolitan Water District* class-action suit (in which I, as a former MWD Recurrent Employee, was included) **changed my retirement date to December 7, 2007**, as the Settlement awarded me additional service credit not previously given).

Usual Duties for a Team Leader I Employed by Respondent Metropolitan Water District of Southern California

PG 2, PP 7: Why would the Physical Requirements of Position/Occupational Title for "Motor Vehicle Field Representative" (possibly a typographical error?) be evidence, when my position was "Team Manager I" and more specifically, "Facility Services Team Manager"?

PG 3, cont'd PP 7: *Correction* – I supervised from 14 to 34 direct-report employees. *Correction* – Beginning January 2004, I was responsible for a detailed quarterly report of all job requests, offers, acceptances and denials of work for all (11 to 22) Recurrent employees, and, for yearly evaluations of Recurrent employees in addition to my Full-Time employees.

MWD payroll record documents attest to my "inability to attend work on a regular basis" (my position schedule was 40 hours per week, 4 consecutive 10-hour days) due to the muscular spasms/constrictions and associated pain caused. These greatly restricted my motor skills, my ability to travel to the work locations of my employees throughout the MWD Desert Region and, at times, to even attend to personal care needs.

Competent Medical Opinion

PG 3, PP 9: **RE:** "...spent 60 to 80 percent of her time ... using her computer": When the incidents of Myofascial Pain Syndrome ("MPS") occurred, I was often unable to perform the more strenuous requirements of my job. At those times if I was able to be at the office, I did computer work. At my promotion to Team Manager in 2002, computer work was about 35-40% of my job. When additional administrative responsibilities were added in early 2004, my computer-related duties increased by @ 15-20%. Only when I was on special assignments, when quarterly Recurrent reports had to be compiled, or when multiple employees' yearly evaluations were due did my computer workload reach @ 80%, but that was not a regular occurrence.

RE: The initial diagnosis of Myofascial Pain Syndrome was first made when E. Franklin Livingstone, MD, (then) Director of Rehabilitative Medicine for Havasu Regional Medical Center tested and examined me in September 2005. I was referred to him while on an FMLA leave to focus on physical therapy, consultation with a pain specialist and rest, as prescribed by my primary physician. He gave directions on use of ice therapy to treat the condition and to avoid 'flare ups' to some degree. This (ice) therapy could also be used when MPS episodes began to keep them from becoming more severe.

Dr. Livingstone recommended that I follow a strict regimen of the ice therapy several times a day (whether or not there was muscle pain, etc.) for a period of 6 weeks or more, as he said that should greatly reduce the occurrences of MPS. This required a 45 minute-to-1 hour period of therapy every 3 hours. He also recommended continuation of the physical therapy I was currently taking. To enable me to follow his advice, I took an additional 4 weeks of FMLA leave.

NOTE: After following Dr. Livingstone' s ice pack therapy while on FMLA leave (and at various times since then), it is obvious that I could not (and cannot) work on a regular, full-time basis at any position if I follow this (very valid) course of treatment to restore muscular health and minimize the MPS.

PG 3, PP 10: **RE:** "(Dr. Mikulics) performed a grip strength test and respondent (A) averaged 25 pounds on the right and 45 pounds on the left. In the absence of a serious injury ... most people have similar grip pressure in both hands and respondent (A)'s reading of 25 was so abnormally low, that Dr. Mikulics concluded the result was due to respondent (a)'s lack of effort and he concluded that she was exaggerating her symptoms." Lines 11 & 12 of PP 9 indicate that on the day of that exam, I had "complained of neck pain ... right shoulder and arm pain." I indicated to Dr. Mikulics that I had experienced a severe MPS episode during the previous night which affected those very areas. I told him that those were still very sore and, when he told me to "try (my) hardest" to grip the instrument, I did. However, when doing so became so painful I was afraid I might 'aggravate' my hand, arm & shoulder (triggering another episode of spasms in those areas), I did not 'push' my body any further. Since I explained all that to him, I was and still am shocked (even angered) that he would make such an unfair statement (and false) about my condition.

PG 4, PP 11: Dr. Cynthia Chabay was a California W/C QME (Qualified Medical Examiner) I was required to see. **Line 12:** "Grip strength was 60 pounds right and 55 pounds left." At both visits with her, she administered the grip strength test, and I was neither in pain nor experiencing MPS at that time. There were physicians other than Dr. Chabay and Dr. Mikulics who administered this test {Exhibit C entered into evidence on 10-01-2013, gives a full listing of all physicians and medical service providers seen since the auto accident on 9-01-2004}, and I always fully complied with their directions to 'squeeze' the instrument as hard as I could. If I was unable to exert full force due to intense pain/soreness, and/or fear of triggering an MPS episode, no physicians (other than Dr. Mikulics) ever indicated anything other than an understanding of my avoiding excruciating pain or an additional severe MPS episode.

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PG 4, PP 12: RE: (At end of visit to Mayo Clinic June 19-23, 2006) "On June 23, 2006, Dr. Snyder approved respondent (A)'s return to work without restrictions." Exhibit G was entered into evidence on 10-01-2013, and testimony is on record explaining these 5 (five) various formats (dated from 8-04-2005 [2 pages] to 5-22-2007) of "Return to Work / Doctor's Release" documents.

My primary physician recommended I undergo examination, testing and evaluation at Mayo Clinic to determine whether or not my high ANA markers indicated that I have Rheumatoid Arthritis or a form of Lupus. If so, it would mean that my severe MPS episodes could be triggered by a systemic condition rather than being the result of the 9-1-2004 accident, and medication and related treatments might afford a decrease in MPS symptoms and possibly provide restoration and significantly improved motor function without waxing and waning debilitating pain and spasms. However, when all the tests were analyzed, both R A and Lupus were eliminated as causes or 'triggers' of my MPS.

While Dr. Snyder (Mayo Specialist in Internal Medicine) "chaired" my evaluation and participated in it, I was also examined and evaluated by Dr. Mertz (Rheumatology Specialist) and Dr. Gantar (Physical Medicine and Rehabilitation Specialist). On 6-21-2006, Dr. Gantar confirmed a diagnosis of "C spine DJO/ODD, myofascial pain" and prescribed 9 (nine) types of physical therapy for me to follow. In discussing these with me, he asked if I could modify my work schedule, as I would not be able to work to receive some of these therapies {EX: Item 8: "May consider trial of cervical traction → home traction device Tx 3-10 visits" .}

At my concluding visit with Dr. Snyder, I explained to him that I would follow the recommendations of all three Mayo physicians, however, I could not afford to be out of work for an extended period of time. I also explained to him that, according to MWD Administrative Code (and the MOU of my represented group) since I had been off for the 5 days I was at Mayo Clinic, I could not return to work without a note from a physician that I could do so.

After going over all the recommendations to help improve my MPS again, and my promise to follow them, Dr. Snyder wrote the note in question.

PG 4, PP 13: RE: Dr. Jacob Rabinovich is an orthopedic physician to whom my W/C Attorney referred me for an evaluation. While he requested my entire medical file since the 9-1-2004 accident prior to my appointment, he performed a very 'basic' examination and discussion which was less than 15 minutes in length. My second appointment with him, after the MRI he ordered, he gave me the findings, told me what my on-the-job limitations should be, said that he believed I should have surgery on my right shoulder due to findings on the MRI that he stated were from the accident, and that I should "check out" at the office next to his. That office gave me the 'return to work with restrictions' form, and gave me 2 different topical medications that Dr. Rabinovich had not discussed with me. I received those medications in the mail periodically for @ 1 year.

RE: Footnote 1 - {Exhibit J} When I received the *Offer of Modified ... Work* I called my (former) Manager, Terry Raymond (as shown on the form), to ask what I would be doing. Mr. Raymond had no idea that I was being offered (what amounted to) my former job. In fact, he was in the interview process for my replacement at that time. I turned down the *Offer* because there was no stated accommodation for not being able to be at work on time nor on a regular schedule. I did not want to be placed in a position of not having actual productive job duties, whenever I could be at "work". Because of our close working relationship and my great respect for my up-line managers, I sent the original "rejection" to the person the cover letter directed to receive it. However, I also sent copies with individual notes (yellow 'Post-Its') attached to each copy to each of my managers at the time of my retirement: Terry L. Raymond (Desert Region Unit Manager), Bill Pecsí (Conveyance Area Manager), and Eddie L. Rigdon (Water Systems Operations Manager), to let them know I would readily have come back to MWD if I thought my health had improved so that I could be the responsible, dependable Team Manager I had been before the 9-01-2004 accident, and that I had tried unsuccessfully to be for nearly 3 years after it.

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PG 5, PP 15: **RE:** *My appearing without legal counsel on 10-01-2013 was because I could not afford one. Shortly before the 6-26-2013 Hearing, my daughter called and said she was in a position to help me pay for an attorney. I was unable to find an experienced attorney who could represent me on 6-26-2013. When Judge Engeman gave me a continuance to obtain legal representation, I was thrilled and immediately after the hearing began contacting attorneys in this regard.*

Unfortunately, once I began discussing the fees with attorneys familiar with CalPERS Appeal Hearings, the amounts were well above what my daughter and I together could afford, without her putting her retirement account in jeopardy. Although she was willing to do so, as a parent, I could not let her take that risk.

RE: *"Dr. Livingstone is the Director of Rehabilitation Medicine..."* Please see the details of the difference in Dr. Livingstone's roles from my initial contact with him in 2005, and my second contact with him in 2010.

NOTE: Due to the 6-Page limit for my Argument, I am unable to provide all the corrections and to clarify some misperceptions and misinformation in the entire PROPOSED DECISION. Therefore, I am truncating my Items and providing what I believe are the most important components of it.

PG 7, PP 2: **RE:** *" 'Disability' and 'incapacity for performance of duty' as a basis of retirement, mean disability of permanent or extended and uncertain duration... on the basis of competent medical opinion..."* {Exhibits K, L and M were entered into evidence on 10-01-2013 and related testimony contained in that transcript.} Although I first saw Dr. (E. Franklin) Livingstone in 2005 through a referral of Pain Specialist (Mandeep Powar, MD) – {See Exhibit C}, when I saw Dr. Livingstone in August of 2010, it was at the direction of Reliance Standard Life Insurance Company (the Disability Insurance carrier for MWD).

As I testified on 10-01-2013, I had received 2 years of Disability Insurance payments from RSLI. Then they notified me that in order to receive the 3rd year of benefits, I would have to be examined by an Independent Medical Examiner of their choosing, to verify that I was still unable to work at *any* position on a full-time basis. On August 7, 2010, I received a notice {Exhibit L} from MES Solutions (of Saddle Brook, NJ, at the request of RSLI of Philadelphia, PA) to see Independent Medical Examiner E. Franklin Livingstone, MD, on 8-17-2010. At that time, Dr. Livingstone was in private practice of General Physiatry and Electrodiagnosis.

In his report of that date {Exhibit M} to MES Solutions (who reported his findings to RSLI), he was requested (Page 9, Request 9): "Please advise if the claimant has work capacity on a full-time consistent basis. Please include the basis for your opinion. Please complete the enclosed Physical of Capacities Form."

Dr. Livingstone, in his role of an Independent Medical Evaluator, responded: *"(Respondent A) is physically capable of sedentary level work activities as defined in the Dictionary of Occupation Titles from the U.S. Department of Labor. However, there will likely be periodic absenteeism based on her history of symptomatic flares. Again, with a better approach to control and resolution of her myofascial pain syndrome, this may improve over time; however, while she is physically capable of sedentary level work activities, she would do best if she were able to work at her own pace and schedule, and in her home environment by computer, telephone, and fax machine. There is no physical reason that she cannot work at sedentary level on a full-time basis; but again, the waxing and waning nature of her pain problems and the level of subjective pain experience will at times prevent her from maintaining a regular schedule. If she were allowed to work out of her home where she could take breaks as needed, lie down to rest periodically, and not deal with the stress of an office environment, she may do well at sedentary level activities and manage a full-time equivalent schedule over the course of a week and consistently at her current status medically and physically."*

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In response to Judge Engeman ' s LEGAL CONCLUSIONS the pertinent questions are:

[1] Is a physical inability to consistently work the schedule (i.e., working on the days of the week mandatory for the Position, working the requisite number of hours each work day, reporting to work at the designated time each work day, etc.) required for a Position considered a 'Disability' and an 'incapacity for performance of duty' [Government Code section 20026]?

NOTE: Review Exhibit G; on each of the 'Return to Work / Doctor' s Release' documents dated 8-04-2005, 9-28-2005, 1-01-2006 & 5-22-2007, Section B (which must be documented and signed by the employee' s supervisor, before being given to the physician) directs the supervisor/manager: "In this position, the employee must be capable of performing the following activities (check all that apply):"

The first item checked on all 4 (four) forms is "Ability to arrive at work on time" .

As the MWD payroll records clearly indicate, I was frequently unable to be at work at my scheduled 6:00 a.m. (Pacific Time) report time, as a direct result of suffering an MPS episode between the end of work the previous day and before my scheduled time to report to work..

[2] Is consistently working the required schedule (refer to description in [1] above) of a Position considered an essential part of the 'actual (physical) demands of the Job' [Thelander v. City of El Monte (1983) 147 Cal.App.3d 736]?

[3] Is consistently working the schedule (refer to description in [1] above) required for a Position fundamental to 'substantially perform the usual job duties' (Hosford, supra, 77 Cal.App.3d 854, at p. 862)?

With all due respect to Judge Engeman and to you, the esteemed members of the Board of Administration of the California Public Employees' Retirement System, I seriously doubt you would hold or have held your own primary employment positions very long without meeting the most basic of job requirements – being at work, on time, as scheduled, on a consistent, reliable basis. As a former business owner and having held supervisory/management positions in diverse entities in both the private and public sectors for over 20 years {See Exhibit A}, I would not indefinitely allow an employee to work without their consistently being at work on time and on their regular, required schedule. For those of you in (or who have been in) similar management/employer positions, I am certain you would expect the same from those in your charge.

The knowledge that I was expecting more from my direct-report MWD employees than I was able to give myself, that my MWD Managers had been extremely 'lenient' and understanding in allowing me to work as often as I could because they were aware of my physical challenges, and, finally, during the lengthy (12-week) FMLA Leave (which began 6-03-2007) – which was the 3rd FMLA Leave in the 3 years since the 9-01-2004 accident – I reluctantly accepted the fact that I could not be the dependable, reliable employee that the agency I so respected and had enjoyed working for deserved.

Therefore, I filed for "Service Retirement Pending Disability" effective 10-07-2007 – establishing the date by when the final amounts of my 50% Disability Leave would expire.

A final note for consideration: Nearly ten years ago, on December 17, 2013, I had to have a Total Knee Replacement of my left knee as a result of a snow skiing injury years before. My Orthopedic Surgeon advised me to take 12 weeks off work and then return part-time (as the subsequent intense Physical Therapy continued) for another 6 weeks.

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Although I did not take that full amount of time off, the time I was unable to work meant that I used not only my accrued Sick Leave but a good deal of my Annual Leave. Therefore, when the accident occurred just 7 months after I returned to my position on a full-time basis, I was limited on how many hours I could take.

Going on "No Pay" under the MWD Administrative Code eventually results in dismissal. Had I not retired and my MPS difficulties continued (which they have, even with the exercises and ice pack therapy prescribed years ago), my absences would have eventually resulted in my being fired for the absences I would have.

Thank you for your service as a member of this Board, and for your consideration of my Arguments Against the Proposed Decision.

Respectfully,



Respondent (A)