

ATTACHMENT A

RESPONDENT'S PETITION FOR RECONSIDERATION

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Received
NOV 18 2013
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November 18, 2013

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

RESPONDENT'S PETITION FOR RECONSIDERATION

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. Respondent submitted his timely written argument.

CalPERS submitted its STAFF'S ARGUMENT on, or about, October 16, 2013. The matter was calendared as Agenda Item 8c on the October 16, 2013 meeting of the Board of Administration.

Thereafter, on October 21, 2013 the Board of Administration adopted as its own the Proposed Decision dated September 6, 2013, issued by Karen J. Brandt, Administrative Law Judge.

Pursuant to the October 21, 2013 letter from Gina R. Ratto, Respondent now has up through and including November 20, 2013 to submit this Petition for Reconsideration via facsimile. Since this Petition is being submitted prior to November 20, 2013, it is timely.

Respondent specifically reserves his right to file a Writ of Administrative Mandamus should this Petition for Reconsideration be denied or should the Board uphold its earlier decision to adopt as its own the Proposed Decision of ALJ Karen J. Brandt.

Gina M. Ratto
Interim General Counsel
CalPERS Legal Office

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BASIS FOR PETITION FOR RECONSIDERATION

1) ALJ Brandt failed to follow the law and failed to consider all evidence before her when rendering her Proposed Decision. Specifically, she 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.

2) ALJ Brandt failed to follow the law and failed to consider all evidence before her when rendering her Proposed Decision. Specifically, she had before her 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% . . ."

These two findings, which were reached after the respective agencies reviewed extensive medical evidence, must be fully 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.

3) ALJ Brandt's finding that CalPERS retained expert - Robert Henrichsen, M.D., was more credible than Carl Shin, M.D., who has been Mr. Roberson's treating physician for the past five years, is not supported by the evidence.

4) ALJ Brandt's willingness to ignore the initial medical opinion of Benjamin Kaufman, M.D., which clearly found that Mr. Roberson was "substantially incapacitated" from his occupation, and only give credit to Dr. Kaufman's later opinions, which were rendered after being "coached" by CalPERS, is objective evidence of Judge Brandt's lack of objectivity.

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Interim General Counsel
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5) 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 is obvious that ALJ Brandt interpreted the term to mean that disability can only be found if it is supported by objective evidence of injury. Judge Brandt stated, in paragraph 15 of her Proposed Decision:

When all of Dr. Shin's medical records regarding respondent are considered, other than respondent's subjective complaints of pain, there is little additional support for either Dr. Shin's opinion that respondent is substantially incapacitated or the work restrictions Dr. Shin imposed." [emphasis added]

Nowhere in the law is there a provision which requires that the only admissible evidence of disability is "objective evidence of injury." Subjective complaints must be considered. In reality, subjective complaints of pain and/or injury is the reason all persons seek medical care which is not based on immediate emergent need.

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.

To only accept "objective evidence of injury" and to, either partially or completely, ignore "subjective complaints of pain" is a failure to follow the law.

6) Although Judge Brandt's Proposed Decision contains a section titled LEGAL CONCLUSIONS, this section fails to address any of the legal authority relating to the legal mandate that if Respondent is found to be "not substantially incapacitated" from his occupation, he must be reinstated to State Service.

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.

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Interim General Counsel
CalPERS Legal Office

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Here, since the Proposed Decision found that Mr. Roberson is not "substantially incapacitated", he must be reinstated to his Custodian position. This issue must be addressed.

CONCLUSION

For reasons set forth herein, respondent respectfully requests that the Board reconsider its decision to adopt the Proposed Decision. It should 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.

As a further alternative, this matter should be referred back to a new and different Administrative Law Judge for a Reconsideration hearing.

Sincerely,



Daniel S. Glass

cc: Gina M. Ratto, Interim General Counsel, CalPERS Legal Office
via facsimile only at (916) 795-3659

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FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: (916) 795-3972

To: Cheree Swedensky, Assistant to the Board
 Of: California Public Employees' Retirement System
 From: Daniel S. Glass, Esq.
 Client/Matter: Roberson v. CalPERS (Department of General Services)
 Date: November 18, 2013

DOCUMENTS	NUMBER OF PAGES
Petition for Reconsideration	4

Original will follow via U.S. Mail.

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