

**ATTACHMENT A**

**RESPONDENT'S PETITION FOR RECONSIDERATION**

CASE NO. 2010-0638  
OAH NO. 20130202106

BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA

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CARLA D IVORY,  
Applicant/Respondent

And

CALIFORNIA DEPARTMENT OF CORRECTIONS  
AND REHABILITATION, PAROLES  
AND COMMUNITY SERVICES DIVISION,  
Respondent.

**PETITION FOR RECONSIDERATION AND/OR  
OTHER APPROPRIATE RELIEF**

CARLA D IVORY,  
IN PRO PER

**Received**  
MAR 24 2014  
CalPERS Board Unit

## TABLE OF CONTENTS

PETITION .....	1
VERIFICATION .....	4
MEMORANDUM OF POINTS AND AUTHORITIES .....	5
SUMMARY OF ARGUMENT .....	6
STATEMENT OF THE CASE .....	7
CONCLUSION .....	8

1 **BOARD OF ADMINISTRATION**  
2 **CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM**

3 In the matter of the application for  
4 Disability Retirement of:

5 CARLA D IVORY,

6 Respondent,

7 and

8 CALIFORNIA DEPARTMENT OF  
9 CORRECTIONS AND REHABILITATION,  
10 PAROLES AND COMMUNITY SERVICES  
11 DIVISION,

12 Respondent.

**CASE NO. 2010-0638**

**OAH NO. 2013020106**

**PETITION FOR RECONSIDERATION**

13 The applicant, Carla D Ivory (her after known as the applicant/respondent) sustained and admitted  
14 to industrial injury to her lower back and psyche on May 7, 2003, while working for the California State  
15 Department of Corrections.

16 The applicant has been under the care of Dr. Sunny Uppal since December 13, 2005 Medical records  
17 were compiled (onto a CD) and sent to the Board of Administration of the Public Employees'  
18 Retirement System on or before March 18, 2014. The Applicant/respondent requested these documents  
19 in October of 2013 and the order was never fulfilled until March 17<sup>th</sup> 2014. (see attached Exhibit 1)  
20 Therefore medical records were not available for the last meeting on February 20<sup>th</sup> 2014 and we are  
21 asking for the Board of California Public Employees' Retirement System State of California to  
22 "Reconsider" their decision.

23 The issue arose if Ms. Carla D Ivory was in fact permanently disabled or incapacitated from  
24 performing the regular and customary duties of a program technician with the Department of  
25 Corrections due to orthopedic (low back and radiculopathy) and psychological conditions (depression,  
26 anxiety, and chronic pain) when she filed her application for disability retirement.

27 The applicant/respondent has in fact been on workers compensation since May 7, 2003. She was  
28 permanent and stationary on both February 18, 2004 and May 13, 2008. The applicant sought medical

**PETITION FOR RECONSIDERATION**

1 Care from Dr. Wade Faerber, who declared her permanent and stationary on February 18, 2004.  
2 The applicant came under the care of Dr. Sunny Uppal on December 13, 2005 Who wrote a report in  
3 which he declared her temporary partially disabled with restrictions of no heavy lifting and no repetitive  
4 bending and stooping, as well as the need to alternate sitting and standing at will. Since the Department  
5 of Corrections did not have any work available in the applicant's job classification with these  
6 restrictions, she was placed on total temporary disability from December 13, 2005 until May 18, 2008  
7 Dr. Uppal declared the applicant/respondent permanent and stationary again in his report dated May 13,  
8 2008, therefore the applicant has two permanent and stationary dates. (see attached exhibit 2)

9 The applicant/respondent was evaluated by Dr. Kaitlin Bassett and Dr. Ted Greenzang of Psychiatry.  
10 The court found that the medical report of Dr. Greenzang's was more closely aligned to the credible and  
11 unimpeachable testimony of the applicant/respondent, and is substantial evidence to support an award  
12 made in her favor of permanent disability indemnity and future orthopedic and psychiatric care through  
13 the State of California, Division of workers' Compensation Workers' Compensation Appeals Board.

14 In CalPERS proposed decision filed December 12<sup>th</sup> 2013, CalPERS argues that the respondent/applicant  
15 did not meet her burden of proof, and that her appeal should be denied. CalPERS also argues that the  
16 respondent/applicant did not have insufficient evidence to refute Dr. Nijjar's and Dr. Adeyemo's  
17 opinions.

18 Due to her current injuries and psychiatric state it has been a struggle to access certain documents and  
19 the mental strain placed upon her has been overwhelming.

20 I declare under the penalty of perjury under the laws of the State of California that the foregoing  
21 Is true and correct. Executed this 23<sup>rd</sup> day of March, 2014 at Moreno Valley, California

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23 Carla D Ivory 3/24/14  
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25 CARLA D IVORY  
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**VERIFICATION**

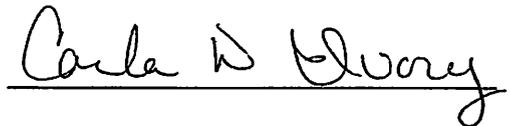
I, Carla D Ivory, declare as follows

I am the Defendant in the above captioned matter. I have personal knowledge of the facts contained in this Petition for Reconsideration and if called upon to do so, I could and would testify competently under oath to the matters contained herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing

Is true and correct.

Dated: 3/24/14



Carla D Ivory

**APPLICABLE STATUTES**

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20027. "Disability," "disabled," or "incapacitated" means, with respect to qualification for an allowance payable to a surviving child, inability to engage in any substantial gainful occupation by reason of any physical or mental impairment that is determined by the board, on the basis of competent medical or psychiatric opinion, to be of permanent or extended and uncertain duration.

21150. (a) A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age, unless the person has elected to become subject to Section 21076, 21076.5, or 21077.

1 **BOARD OF ADMINISTRATION**  
2 **CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM**

3 In the matter of the application for  
4 Disability Retirement of:

5 CARLA D IVORY,

6 Respondent,

7 and

8 CALIFORNIA DEPARTMENT OF  
9 CORRECTIONS AND REHABILITATION,  
10 PAROLES AND COMMUNITY SERVICES  
11 DIVISION,

12 Respondent.

**CASE NO. 2010-0638**

**OAH NO. 2013020106**

**MEMORANDUM OF POINTS AND  
AUTHORITIES**

13  
14 This petition concerns an order issued by the Board of Administration California Public Employees'  
15 Retirement System, In the matter of the Application for Disability Retirement of Carla D Ivory. Good  
16 cause exists for submission of "Petition for Reconsideration" the facts are stated herein.

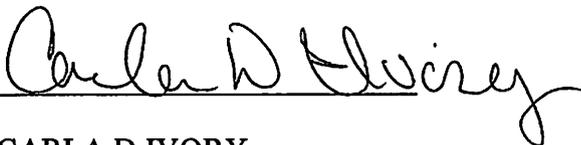
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- 18 1. The applicant was found to be permanent and stationary on May 13, 2008 by Dr. Sunny Uppal  
19 who has been her Primary Treating Physician since December 12, 2005. The "primary treating  
20 physician" is the physician who is primarily responsible for managing the care of an employee,  
21 and who has examined the employee at least once for the purpose of rendering or prescribing  
22 treatment and has monitored the effect of the treatment thereafter. The primary treating physician  
23 is the physician selected by the employer, the employee pursuant to Article 2 (commencing with  
24 section 4600) of Chapter 2 of Part 2 of Division 4 of the Labor Code, or under the contract or  
25 procedures applicable to a Health Care Organization certified under section 4600.5 of the Labor  
26 Code, or in accordance with the physician selection procedures contained in the medical provider  
27 network pursuant to Labor Code section 4616.

28 "Permanent and stationary status" is the point when the employee has reached maximal medical  
improvement, meaning his or her condition is well stabilized, and unlikely to change  
substantially in the next year with or without medical treatment.

**MEMORANDUM OF POINTS AND AUTHORITIES'**

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2. Carla D Ivory was declared temporary and partially disabled with restrictions of no heavy lifting and no repetitive bending and stooping, as well as the need to alternate sitting and standing at will. Since the Department of corrections did not have any work available in the applicants job Classification with these restrictions she was put back on total temporary disability from December 13, 2005 until May 18, 2005.
  3. The Applicant/respondents condition has only worsened since her injury in May 7, 2003. She has undergone two (2) back surgeries one in March of 2006 and July of 2007, and a hysterectomy in 2008 all of which may have been caused or increased by her industrial injury. She is also prescribed Norco, Robaxin, and Lunesta for pain and insomnia due to her sustained injuries some of the side effects to these medications are: shallow breathing, slow heartbeat, feeling light-headed, fainting, confusion, fear, unusual thoughts or behavior, seizure (convulsions), problems with urination; or nausea, upper stomach pain, itching, loss of appetite, dark urine, clay-colored stools, jaundice (yellowing of the skin or eyes), anxiety, dizziness, drowsiness, headache, mood changes, blurred vision, ringing in your ears and dry mouth.
  4. The patient applicant is currently under the care of Dr. Sunny Uppal who has repeatedly diagnosed this patient as disabled due to industrial injury and attributes only 5% of her injury due to non-industrial matters. Dr. Sunny Uppal has prescribed Carla D Ivory with medication in order to comfort her, but her permanent and stationary diagnoses means she will never get better and the stress and strain on her body only adds to her injury. In reviewing the medical records I hope you will pay special attention to her toxicology reports in which all have been negative, her attempts at returning to work, which have been unsuccessful to her daily pain, the numerous reports that were written in regard to her unimproved status and medical condition. (please refer to the medical record)

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24 CARLA D IVORY

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**EXHIBIT "1"**



**AUTHORIZATION FOR USE OR DISCLOSURE OF INFORMATION  
FOR PURPOSES REQUESTED OF PHYSICIAN'S OFFICE**

I, (Print Name) Carla D Ivory, hereby authorize Orthopaedic Medical Group of Riverside, Inc to (check those that apply):

- Use the following protected health information for OMG to provide medical services to me, and/or
- Disclose the following protected health information to:
- Provide to me X-ray films that I will hand carry to:

Carla D Ivory  
[Name of entity to receive information from OMG  or send information to OMG  ] [Please Print]

[Street Address] \_\_\_\_\_  
[City] U [State] CA [ Zip Code] \_\_\_\_\_

- I authorize the following protected health information to be used and/or disclosed:
- |   |   |  |
|---|---|--|
| <input checked="" type="checkbox"/> All medical records | <input type="checkbox"/> All Dates of Service | <input type="checkbox"/> Specific Dates of Service _____ |
| <input type="checkbox"/> Office Notes                   | <input type="checkbox"/> All Dates of Service | <input type="checkbox"/> Specific Dates of Service _____ |
| <input type="checkbox"/> Operative Reports              | <input type="checkbox"/> All Dates of Service | <input type="checkbox"/> Specific Dates of Service _____ |
| <input type="checkbox"/> X-rays                         | <input type="checkbox"/> All Dates of Service | <input type="checkbox"/> Specific Dates of Service _____ |
| <input type="checkbox"/> Laboratory                     | <input type="checkbox"/> All Dates of Service | <input type="checkbox"/> Specific Dates of Service _____ |
| <input type="checkbox"/> Billing Records                | <input type="checkbox"/> All Dates of Service | <input type="checkbox"/> Specific Dates of Service _____ |
| <input type="checkbox"/> Other Specify: _____           |   |  |
| <input type="checkbox"/> Other Specify: _____           |   |  |

This protected health information is being used or disclosed for the following purposes:  
Court for retirement  
[List specific purposes here]

This authorization shall be in force and effect until:  
 One (1) Year from the date of signing this form  
 Other (specify a date or an event) \_\_\_\_\_  
At which time this authorization to use or disclose this protected health information expires.

I understand that I have the right to revoke this authorization, in writing, at any time by sending such written notification to the OMG Medical Records Supervisor at 6800 Brockton Avenue, Riverside, CA 92506. I understand that a revocation is not effective to the extent that OMG has relied on the use or disclosure of the protected health information.

I understand that information used or disclosed pursuant to this authorization may be subject to re-disclosure by the recipient and may no longer be protected by federal or state law.

I understand that OMG may require 7 to 10 business days to comply with the requests generated by this Authorization. OMG will contact me, at the number listed below, when records are ready for pick up.

OMG will not condition my treatment, payment, enrollment in a health plan or eligibility for benefits (if applicable) on whether I provide authorization for the requested use or disclosure.

I understand that I have the right to:

- Inspect or copy the protected health information to be used or disclosed as permitted under federal law (or state law to the extent the state law provides greater access rights),
- Refuse to sign this Authorization.

Carla D Ivory Carla D Ivory 10/2/13  
Name of Patient (Print) Signature of Patient or Personal Representative Date

Description of Personal Representative's Authority (i.e. parent, legal guardian, power of attorney)

\_\_\_\_\_  
Patient's Date of Birth Patient's Social Security # Patient's daytime phone #

**EXHIBIT "2"**

Division of Workers' Compensation  
Workers' Compensation Appeals Board

CASE NUMBER: .

CARLA IVORY

-vs-

DEPARTMENT OF  
CORRECTIONS; legally  
uninsured; STATE  
COMPENSATION  
INSURANCE FUND

WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE: Leonard Silberman

DATE: 6/16/2009

**OPINION ON DECISION**

**PERMANENT AND STATIONARY DATE:**

*The applicant was permanent and stationary on both February 18, 2004 and on May 13, 2008.*

The applicant, Carla Ivory, born on October 23, 1965, sustained an admitted industrial injury to her low back and psyche on May 7, 2003, while working for the California State Department of Corrections.

The applicant sought medical care from Dr. Wade Faerber, who declared her permanent and stationary on February 18, 2004 (applicant's Exhibit #8). He also released her to continue with her regular job duties.

The applicant came under the care of Dr. Sunny Uppal on December 13, 2005. He wrote a report that date (applicant's Exhibit #1) in which he declared her

temporary partially disabled (page 2 of his report), with restrictions of no heavy lifting and no repetitive bending and stooping, as well as the need to alternate sitting and standing at will. Since the Department of Corrections did not have any work available in the applicant's job classification with these restrictions, she was put back on total temporary disability from December 13, 2005 until May 18, 2008.

Dr. Uppal declared the applicant permanent and stationary again in his report dated May 13, 2008 (applicant's Exhibit #1).

Therefore, the applicant has two permanent and stationary dates, February 18, 2004 and May 13, 2008.

**PERMANENT DISABILITY and APPORTIONMENT:**

*The applicant has permanent disability indemnity in the amount of 87%, which is the dollar amount of \$133,285.00, payable @ \$230.00 per week, beginning May 14, 2008, and, thereafter, a life pension of \$104.36 per week.*

Dr. Sunny Uppal, the applicant's Primary Treating Physician, declared her permanent and stationary on May 13, 2008 (applicant's Exhibit #1) and in that report stated that the applicant was limited to sedentary work. He also apportioned 5% of her impairment to her non-industrial factors (page 2 of his report).

The applicant was found to be permanent and stationary by Dr. Ted Greenzang psychiatrically in his report dated April 18, 2008 (applicant's Exhibit #9). He stated the applicant's Work Function Impairments on page 22 of that report, which the Court utilized to formulate the rating of her permanent disability, as the Court found that this report was substantial medical evidence to support an Award.

Dr. Greenzang found that there was not any apportionment to any non-industrial factors.

The applicant had been seen soon after the injury by a Panel Qualified Medical Examiner, Dr. Nick Sharma, who wrote a report on June 17, 2004 (applicant's Exhibit #7). In this report, he restricted the applicant to light work and apportioned 75% of her orthopedic disability due her prior metabolic problems (page 12-13 of his report).

At a supplemental trial held on June 3, 2009, the applicant submitted the November 14, 2008 report of Dr. Sharma (applicant's exhibit #7). In that report the applicant was limited to light work.

Since Dr. Uppal saw the applicant over a three year period and performed two surgeries, the Court will defer to the Primary Treating Physician's opinions over Dr. Sharma who only saw the applicant on two occasions.

The applicant was seen for the defense by Dr. Katalin Bassett, a Psychiatrist, who wrote a report on February 26, 2008 (applicant's Exhibit #10). The parties submitted the Work Impairment Functions chart of Dr. Bassett at a supplemental trial held on June 3, 2009 (applicant's exhibit #10).

After a complete review of Dr. Bassett's and Dr. Greenzang's reports on a psychiatric basis, the Court finds that the medical report of Dr. Greenzang is more closely aligned to the credible and unimpeached testimony of the applicant, and is substantial evidence to support the Award.

The Disability Evaluation Unit rated the medical reports of Dr. Uppal and Dr. Greenzang @ 87%, which is the dollar amount of \$133,285.00, payable @

\$230.00 per week, beginning May 14, 2008, and, thereafter, a life pension of \$104.36 per week, which the Court adopts and incorporates into its opinion.

**NEED FOR FUTURE MEDICAL CARE:**

*The applicant is in need of both orthopedic care and psychiatric care.*

Based upon the applicant's testimony, and the medical opinions of Dr. Uppal and Dr. Greenzang, the applicant is entitled to future medical care for her low back and her psyche.

**ATTORNEY'S FEES:**

*The applicant's counsel is awarded 15% of the permanent disability indemnity awarded to the applicant, which includes the life pension. This amount is to be commuted from the far end of the Award.*

*Leonard J. Silberman*

**LEONARD J. SILBERMAN**

**Workers' Compensation Administrative Law Judge**

**cc:**

BRENT THOMPSON SANTA ANA, US Mail  
CARLA IVORY, US Mail  
DEPARTMENT OF CORRECTIONS, US Mail  
NEW AGE PHARMACEUTICALS INC, US Mail  
SCIF, US Mail  
SCIF STATE EMPLOYEES COMMERCE, US Mail  
SCIF STATE EMPLOYEES RIVERSIDE, US Mail  
SUPERIOR MED SURGICAL, INC., US Mail  
TED GREENZANG, US Mail

**EXHIBIT "3"**



California Public Employees' Retirement System  
Legal Office  
P.O. Box 942707  
Sacramento, CA 94229-2707  
TTY: (877) 249-7442  
(916) 795-3675 phone • (916) 795-3659 fax  
www.calpers.ca.gov

CHRON

February 24, 2014

Ref. No. 2010-0638

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Carla D. Ivory

**Subject:** In the Matter of the Application for Disability Retirement of CARLA D. IVORY, Respondent, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, PAROLES AND COMMUNITY SERVICES DIVISION.

Dear Ms. Ivory:

We enclose a copy of the Board of Administration's Decision in the above matter. Please be advised that this Decision was made pursuant to the Administrative Procedure Act (Gov. Code, §§ 11370, et seq.) and California Code of Regulations, Title 2, sections 555-555.4, on February 20, 2014.

Any party who participated in this case and is dissatisfied with this Decision has a right to petition the Board for reconsideration within 30 days of the date of mailing of the Decision (the date of mailing is indicated on the attached Proof of Service), and the right of appeal to the courts within 30 days after the last day on which reconsideration can be ordered. (See Gov. Code, §§ 11521 and 11523.) It is not necessary that a Petition for Reconsideration be filed in order to appeal to the courts. (Gov. Code, § 11523.) **If you choose to file a Petition for Writ of Mandate, please submit a written request to our office for preparation of the administrative record.**

The Chief Executive Officer may grant a stay of the effective date of the Decision, not to exceed 30 days, so that a Petition for Reconsideration may be filed. If additional time is needed by the Board to evaluate a petition prior to the expiration of the stay, the Chief Executive Officer may grant an additional stay for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied. (Gov. Code, § 11521.)

All Petitions for Reconsideration **MUST BE** received by the CalPERS Executive Office within 30 days from the date the Decision was mailed in order for the Chief Executive Officer to grant a stay of execution.

Carla D. Ivory  
February 24, 2014  
Page 2

Please title your submission "Petition for Reconsideration" and insure that all personal information has been redacted, as this will become a public document when included in the agenda item. Please send this to:

Cheree Swedensky, Assistant to the Board  
Executive Office  
California Public Employees' Retirement System  
P. O. Box 942701  
Sacramento, CA 94229-2701  
FAX: (916) 795-3972

In addition, it is recommended that you send, via facsimile, a copy of any Petition for Reconsideration to the attention of GINA M. RATTO, Interim General Counsel, at (916) 795-3659.

If your Petition for Reconsideration is denied, the next step in the appeal process is to file a Petition for Writ of Mandate in Superior Court.

Sincerely,



GINA M. RATTO  
Interim General Counsel

GMR:odm

Enclosure

cc: Joanne Cordy – CDCR, Sacramento  
California Department of Corrections & Rehabilitation, Los Angeles

1 BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

2 In the Matter of the Application for ) CASE NO. 2010-0638  
3 Disability Retirement of: ) OAH NO. 2013020106  
4 CARLA D. IVORY, ) DECISION  
5 Respondent, )  
6 and )  
7 CALIFORNIA DEPARTMENT OF )  
8 CORRECTIONS AND REHABILITATION, )  
9 SERVICES DIVISION, )  
Respondent. )

10 RESOLVED, that the Board of Administration of the California Public  
11 Employees' Retirement System hereby adopts as its own Decision the Proposed  
12 Decision dated December 11, 2013, concerning the application of Carla D. Ivory;  
13 RESOLVED FURTHER that this Board Decision shall be effective 30 days following  
14 mailing of the Decision.

15 \*\*\*\*\*

16 I hereby certify that on February 20, 2014, the Board of Administration,  
17 California Public Employees' Retirement System, made and adopted the foregoing  
18 Resolution, and I certify further that the attached copy of the Administrative Law  
19 Judge's Proposed Decision is a true copy of the Decision adopted by said Board of  
20 Administration in said matter.

21 BOARD OF ADMINISTRATION, CALIFORNIA  
22 PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
23 ANNE STAUSBOLL  
CHIEF EXECUTIVE OFFICER

24 Dated: 2/24/14 BY Donna Ramel Lum  
25 DONNA RAMEL LUM  
Deputy Executive Officer  
Customer Services and Support

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA

In the Matter of the Application for the  
Disability Retirement of:

CARLA D. IVORY,

Applicant/Respondent,

and

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION,  
PAROLES AND COMMUNITY  
SERVICES DIVISION,

Respondent.

Case No. 2010-0638

OAH No. 2013020106

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 1, 2013, in San Bernardino, California.

Jeanlaurie Ainsworth, Senior Staff Attorney, California Public Employees' Retirement System (CalPERS), represented petitioner Mary Lynn Fisher, Chief, Benefit Services Division.

Carla Ivory, applicant/respondent (Ivory), represented herself in these proceedings. She was assisted by her sister.

No appearance was made by or on behalf of respondent, California Department of Corrections and Rehabilitation, Paroles and Community Services Division (Department of Corrections).

The record remained open until November 14, 2013, to allow Ivory to submit her medical records and to give CalPERS an opportunity to respond. Ivory did not submit any medical records and the matter was submitted.

## ISSUE

Was Ivory permanently disabled or incapacitated from performing the regular and customary duties of a program technician with the Department of Corrections due to orthopedic (low back and radiculopathy) and psychological conditions (depression, anxiety, and chronic pain) when she filed her application for a disability retirement?

## FACTUAL FINDINGS

### *Preliminary Matters*

1. Ivory was employed by the Department of Corrections as a program technician. By virtue of her employment, Ivory was a state industrial member of CalPERS and was subject to Government Code sections 20048 and 21150.
  2. On September 1, 2009, Ivory filed a Disability Retirement Election Application with CalPERS. She claimed the right to receive a disability retirement because of a back injury with pain that radiates down both legs. Ivory attempted to return to work, but the pain prevented her from being able to perform her job duties. Ivory also claimed that her injury caused depression. Ivory last received compensation on December 1, 2008.
  3. CalPERS obtained medical records and reports related to Ivory's orthopedic and psychological conditions. CalPERS selected an orthopedic surgeon and a psychiatrist to perform disability evaluations. Both physicians provided CalPERS with narrative reports of their findings and conclusions. After reviewing those reports, CalPERS determined that when Ivory filed her application for a disability retirement, she was not permanently disabled or incapacitated from performing the usual and customary duties of a program technician.
  4. On July 13, 2010, CalPERS notified Ivory that her claim was denied. CalPERS advised Ivory of her right to appeal that adverse determination.
  5. On July 26, 2010, Ivory filed her appeal.
  6. On January 4, 2013, petitioner filed the statement of issues in her official capacity. The statement of issues and other jurisdictional documents were served on all respondents. The Department of Corrections did not respond to the statement of issues or appear in this matter.
- ### *Evidence Presented at Hearing*
7. Mohinder Nijjar, M.D., a board-certified orthopedic surgeon, performed an independent medical evaluation and testified in this hearing. Dr. Nijjar's testimony was consistent with his report. Dr. Nijjar performed a lengthy review of Ivory's medical records and performed a physical examination of Ivory on February 22, 2010. Dr. Nijjar noted that Ivory injured her back in 2003 while moving files at work. Ivory was initially treated

conservatively. In March 2006 Ivory underwent disk excision and fusion at the L4-L5 level. Ivory returned to work in January 2007 but went off work in March 2007. In July 2007 Ivory had her hardware removed. She returned to work in September 2008 but left her job in December 2008. Ivory has been off work since that time. After examining Ivory and reviewing her records, Dr. Nijjar diagnosed Ivory with sprain/strain of the lumbosacral spine; spondylolisthesis, L4-L5, status post surgical fusion and decompression at L4-L5 and L5-S1; degenerative disk disease and disk protrusion at L4-L5 and L5-S1; and status post removal of the hardware from her spine.

In his March 24, 2010, addendum, written after reviewing Ivory's job description, Dr. Nijjar concluded that Ivory was not substantially incapacitated from performing her job duties as a program technician.

8. Oluwafemi Adeyemo, M.D., a psychiatrist, conducted an independent psychiatric evaluation of Ivory on May 13, 2010, and wrote a report. Dr. Adeyemo testified consistently with his report at the hearing. Dr. Adeyemo reviewed Ivory's medical records. Dr. Adeyemo noted that Ivory reported a history of anxiety and depression related to the pain from her injury and the physical limitations caused by that pain. Dr. Adeyemo opined that claimant's psychiatric symptoms were not severe at the time of his evaluation. Ivory's symptoms were "of mild intensity" and increased with stress. Dr. Adeyemo concluded that Ivory was not substantially incapacitated from performing her job duties.

9. Although Ivory requested an opportunity to submit her medical records, she did not do so. However, the opinions of Dr. Nijjar and Dr. Adeyemo were based, in part, upon their review of those medical records. As such, it was unclear how introducing those records would refute the opinions of Dr. Nijjar or Dr. Adeyemo.

10. Ivory and her sister testified about the profound changes in Ivory's personality and life since her injury. While their testimony was sincere and heartfelt, it was insufficient to refute the opinions of CalPERS' medical experts.

#### *Arguments*

11. Ivory, who had the burden of proof, argued that she was unable to perform her usual and customary duties due to her injuries, related pain and psychiatric condition. However, Ivory introduced no evidence to support her position. She introduced insufficient evidence to rebut Dr. Nijjar's and Dr. Adeyemo's opinions.

12. CalPERS argued that Ivory had not met her burden of proof and that her appeal should be denied.

## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

### *Applicable Statutes*

2. Government Code section 20026 provides in part:

‘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 . . . on the basis of competent medical opinion.

3. Government Code section 21151, subdivision (a), provides that a member who is “incapacitated for the performance of a duty” shall receive a disability retirement.

4. Government Code section 21156 provides that if the medical evaluation or other evidence demonstrates that an eligible member is incapacitated physically or mentally, then CalPERS shall immediately retire the member for disability.

### *Appellate Authority*

5. “Incapacitated” means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the public employee is not “incapacitated” and does not qualify for a disability retirement. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 886-887.)

6. The fact that an injury increases an individual’s chances of further injury does little more than demonstrate that the injury is prospective, hence, speculative, and presently not in existence. It is insufficient to support a finding of disability. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863).

### *Evaluation*

7. Ivory was a very credible witness. She testified in a straightforward manner, made eye contact, and did not appear to be exaggerating her complaints. Her affect was very subdued and withdrawn. Before her injury, Ivory enjoyed working and loved her job. After the injury, her life changed dramatically because of her pain. She is limited in her activities and no longer engages in her previous activities. However, Ivory had the burden of proof in this matter. She simply did not provide sufficient evidence to refute the opinions of Dr. Nijjar or Dr. Adeyemo. The evidence did not support Ivory’s claim that she was unable to

perform the usual and customary duties of a program technician for the Department of Corrections.

*Cause Exists to Deny the Application*

8. Cause exists to deny Ivory's application for a disability retirement. A preponderance of the evidence did not establish that Ivory became permanently disabled and incapacitated from performing the regular and customary duties of a Department of Corrections program technician when she filed her application for a disability retirement with CalPERS as a result of her orthopedic or psychiatric conditions.

ORDER

The application for a disability retirement filed by Carla D. Ivory with the California Public Employees Retirement System on September 1, 2009, is denied. CalPERS' denial of Ivory's application is affirmed.

DATED: December 11, 2013

  
\_\_\_\_\_  
MARY AGNES MATYSZEWSKI  
Administrative Law Judge  
Office of Administrative Hearings

## PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On February 24, 2014, I served the foregoing document described as:

**DECISION – In the Matter of the Application for Disability Retirement of CARLA D. IVORY, Respondent, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, PAROLES AND COMMUNITY SERVICES DIVISION.**

on interested parties in this action by placing \_\_\_ the original XX a true copy thereof enclosed in sealed envelopes addressed as follows:

Carla D. Ivory

Office of Administrative Hearings  
1350 Front Street, Suite 3005  
San Diego, CA 92101  
Via Electronic Mail: [sanfillings@dgs.ca.gov](mailto:sanfillings@dgs.ca.gov)

Parole & Community Services Division  
California Department of Corrections & Rehabilitation  
307 West 4th Street, 2nd Floor  
Los Angeles, CA 90013

Joanne Cordy  
California Department of Corrections & Rehabilitation  
Office of Personnel Services  
1515 "S" Street, Room 556-North  
Sacramento, CA 95811

[ X ] BY CERTIFIED MAIL/RRR -- As follows: 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 Sacramento, 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 the date of deposit for mailing an affidavit.

Executed on February 24, 2014, at Sacramento, California.

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

NAME \_\_\_\_\_

SIGNATURE \_\_\_\_\_

## PROOF OF SERVICE

I am registered with the County of Riverside, State of California. I am over the age of 18 and not a party to the action; my business address is: P.O Box 7223 Moreno Valley, CA 92552.

On March 24, 2014, I served the foregoing documents described as:

PETITION FOR RECONSIDERATION W/ATTACHEMENTS AND MEMORANDUM OF POINTS AND AUTHORITIES.

On all interested parties in this action by placing the original true and correct copy thereof enclosed in sealed envelopes addressed as follows:

Parole & Community Services Division  
California Department of Corrections &  
Rehabilitation  
307 West 4<sup>th</sup> Street, 2<sup>nd</sup> floor  
Los Angeles, CA 90013

Office of Administration Hearings  
1350 Front Street, Ste 3005  
San Diego, CA 92101

Joanne Cordy  
California Department of Corrections & Rehabilitation  
Office Personnel Services  
1515 "S" Street, Room 556-North  
Sacramento, CA 95811

Cheree Swedensky, Assistant to the Board  
Executive Office  
California Public Employees' Retirement System  
P.O Box 942701  
Sacramento, CA 92449-2701  
(916) 795-3972  
By mail and facsimile

Gina M Ratto, Interim General Counsel  
California Public Employees' Retirement System  
P.O Box 942701  
Sacramento, CA 92449-2701  
(916) 795-3659  
By facsimile

By certified mail as follows: I am readily familiar with the practice, collection and processing  
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Service on that same day with the postage thereon fully prepaid at Moreno Valley, California, in  
The ordinary course of business.

EXECUTED on March 24, 2014

I declare under penalty of perjury under the laws of the state of California that the above  
Is true and correct

Krystal Brown

A handwritten signature in black ink, appearing to read "K. Brown". The signature is stylized with a large, sweeping initial "K" and a cursive "Brown".

3/24/14

1}

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