

ATTACHMENT C
RESPONDENT'S ARGUMENT

Mr. Thomas Stawicki
8797 Robles Way
San Diego, CA 92119



August 1, 2014

Ref No. 2013-0290

CalPERS
Legal Office
P.O. Box 942707-2707

SUBJECT: In the matter of the cancelation of the application for Disability Retirement of THOMAS STAWICKI, Respondent, and SAN DIEGO UNIFIED SCHOOL DISTRICT, Respondent; RESPONSE TO PROPOSED DECISION AND ORDER DATED JUNE 3, 2014.

In response to and as an appeal of the June 3, 2014 proposed decision, the following is hereby submitted by Thomas Stawicki, for review and consideration:

1. Respondent Thomas Stawicki was employed as a Custodian by Respondent San Diego Unified School District (SDUSD,) a contracting entity with the Public Employees' Retirement System (CalPERS). By reason of his employment, Mr. Stawicki was a local agency member of CalPERS and subject to Government Code 21154. **Also subject to Government Code 21150**, which states in relevant part: **(b) a member who becomes incapacitated for the performance of 10 years of state service, regardless of age.**
2. On July 3, 2012 CalPERS received my application for Disability Retirement Election. I claimed in that application, the right to receive Disability Retirement based on an injury to my lumbar spine (August 8, 2007) effective April 18, 2012. **The proposed order (number 2) states that there were no medical records to substantiate my claim that an injury qualifies me for disability retirement; when in fact there are multiple medical reports available to qualify me for disability retirement. The following are taken directly from those reports, which have been submitted to the board in regard to this matter:**

03/14/07: Dr. Ralph Venuto M.D. "Thoratic back strain"

03/21/07 "Recommend physical therapy"

03/28/07 "Modified duty unavailable, therefore is TTD"

05/03/07 "...referred to orthopedics"

05/23/07 "...recommend MRI scan of thoratic spin and lumbar spin"

06/06/07 MRI of lumbar spine: Loril Baker @ Laural Imaging Center. "L4-5 small central/right paramedian disc protrusion, which impinges upon right L-5 nerve root and mildly deforms the

thecal sac. L5-S1: significant left sided neural foraminal narrowing, basis of degenerative disc and facet disease. MRI of thoracic spine: multi-level degenerative disc disease of varying degree. T3-4: 2mm right paramedian disc protrusion, which abuts the right aspect of the spinal cord and proximal portion of exiting right T3 nerve root.”

06/14/07: Orthopedic follow up with Roman Cham M.D. “Offered epidural injection, declined. Will try physical therapy”

07/19/07 Orthopedic consultation, Thomas Harris, M.D.- Shoulder Knee Institute. “Seen for lower back pain. Recommend MRI scan of lumbar spine with contrast. Will try Naprosyn.”

08/15/07 Progress report; “Physical therapy has not helped.”

08/20/07 MRI of lumbar spine with and without contrast. Daniel Fagerson, M.D.- Del Mar Medical Imaging. “L5-S1: severe left facet arthropathy changes posteriorly. Moderate right facet arthropathy changes also present.” “L4-5 3mm right sided disc bulge is seen, which is slightly increased since prior study”

08/27/07 Orthopedic follow up, Thomas Harris, M.D. “ MRI scan review and recommend consultation with Dr. Howard Tung for surgical consideration.”

10/04/07 Orthopedic consultation, Jeffery Bernicker M.D. “Acute industrial thoracolumbar strain/sprain; industrial aggravation of lumbar degenerative disease, most pronounced at L4-5 and L5-S1, with stenosis and facet arthropathy.

11/28/07 Blake Thompson, M.D. Center for Orthopedic Care. “lumbar strain: L4-5 herniated disc impinging on the right L5 nerve root with right radiculopathy.

11/30/07 Outpatient Surgery of Del Mar. Underwent a lumbar epidural steroid injection and right L4-5; lumbar epidurogram. Surgeon: Blake Thompson.

02/01/08 underwent 2nd epidural injection

05/19/08 “Plateaued with conservative care. Absent anticipation for surgery, patient has reached maximum medical improvement.”

12/15/09 MRI of lumbar spine: “Moderate right stenosis”

02/19/09 “Seen for severe low back pain”

03/19/09 “Patient is not improving significantly”

09/21/11 George Colson M.D. “Probable back strain” After mopping “floors yesterday for four hours at work. He has only been back to work for two weeks. He may work modified duty with no repetitive bending or twisting and no lifting over 20 lbs.”

11/30/11 “This is not a new claim, but an aggravation of previous condition. Recommend consultation with orthopedic spine surgeon.”

12/14/11 “Work status: Patient is temporarily disabled”

The above referenced report was prepared on 05/17/12 in the county of Orange.

3) The record shows disability from 03/14/07 thru Current

4) Application for Disability Retirement was filed in a timely manner.

5) Issue: Is Mr. Stawicki barred from Disability Retirement by operation of *Haywood v. American River Fire Protection?*

No. In *Haywood*, the Respondent clearly was not disabled and had no evidence to prove a disability. Whereas, Mr. Stawicki has submitted clear and concise evidence proving his disability at the time of the claim for Retirement Disability and prior to that claim and currently still disabled. The “*unequivocal medical evidence*” submitted by Mr. Stawicki removes his termination from the purview of *Haywood*.

6) As for the allegations listed on pages 3-4 of the Proposed Order, there is no evidence supporting 1-5. There are no allegations listed, even if they were supported by clear evidence, which they are not, would not justify the termination of employment without prior disciplinary actions being taken.

7) As stated in #5, there were never any disciplinary actions taken against me with regard to any of the listed allegations, or any other matter during my 12 years at SDUSD.

8) Pursuant to Government Code 21156(a)(2)

In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

9) The attached decision reversal for the Employment Development Department (EDD) regarding unemployment insurance claimed by Mr. Stawicki; where Respondent SDUSD dishonestly stated to the EDD that Mr. Stawicki voluntarily walked off the job in an attempt to interfere with benefits available to Mr. Stawicki. Evidenced by the attached reversal, it was held that Mr. Stawicki was eligible to receive benefits.

Cause does not exist to preclude Mr. Stawicki from filing a Disability Retirement claim.

The arguments made herein show clearly that Mr. Stawicki will be granted Retirement Disability pursuant to the laws of California which govern CalPERS.

Government Code section 21150

Government Code section 21152

Government Code section 21154

Government Code section 21156

Government Code section 20997

Under penalty of perjury, under California law, I, Thomas Stawicki declare all of the statements made herein are true and correct to the best of my knowledge.

Thomas Stawicki

Date

Argument to exclude from publication.

Regarding the use of Stawicki as precedent, I do not wish for this case to be used in any other capacity than to decide this case only. The medical and other personal information contained therein is private and I do not give my permission or agree to any type of publication which includes such private/personal information.

Thomas Stawicki

Date

Case No.: 4584364

CLT/PET: Thomas E. Stawicki

Parties Appearing: Claimant

Parties Appearing by Written Statement: None

San Diego Office of Appeals

ALJ: Theresa Brehl

ISSUE STATEMENT

The claimant appealed from a determination disqualifying the claimant for unemployment benefits under Unemployment Insurance Code section 1256. The issue in this case is whether the claimant was discharged for misconduct connected with the most recent work or voluntarily left the most recent work without good cause.

FINDINGS OF FACT

The claimant was most recently worked doing custodial work for approximately five years at a final rate of pay of approximately \$2,800 per month. He last worked on December 14, 2011, and his employment ended under the following circumstances.

The claimant had a lower lumbar injury for which his doctor placed restrictions on what he could do. As a result, the employer had placed him beginning in October of 2012 in what was supposed to be a light duty position. In that position, the claimant was still required to do custodial work. That work included cleaning rooms, emptying trash, lifting things weighing more than between 50 and 100 pounds per day, with bending and lifting all day long. The claimant last worked on December 14, 2011, and did not return to work after that date because his doctor placed him on disability and told him that he could not perform any of the functions of his job. In particular, the doctor told him he could not perform stooping, bending, kneeling, squatting, and that he was limited to lifting, pulling, pushing things that weighed under 20 pounds. As a result, the claimant was unable to perform the duties of the work that his employer had supplied him, even when it had supplied him light duty work. The claimant and the employer then had disputes regarding whether he was eligible to take industrial injury leave or needed to use his paid time off leave as a result of those injuries. As of the time of the hearing, the claimant was still off work based on the recommendations of his doctor.

REASONS FOR DECISION

An individual is disqualified for benefits if the individual left the most recent work voluntarily without good cause or the individual was discharged for misconduct

connected with the most recent work. (Unemployment Insurance Code, section 1256.)

There is good cause for voluntarily leaving work where the facts disclose a real, substantial, and compelling reason of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action. (Precedent Decision P-B-27.)

In Precedent Decision P-B-225 the claimant left his employment because the only work available was beyond his physical and emotional capacity to perform. The appeals board held that the claimant left with good cause.

In the present case, the claimant left his work because he was unable to perform any of the duties, due to health reasons, of the work that was available to him through this employer. It is therefore concluded that the claimant voluntarily left his most recent work with good cause. Accordingly, the claimant is not disqualified for benefits under section 1256.

DECISION

The determination is reversed. The claimant is not disqualified for benefits under section 1256. Benefits are payable, provided the claimant is otherwise eligible.

BARSU:km: AMC