

**ATTACHMENT C**  
**RESPONDENT(S) ARGUMENT(S)**

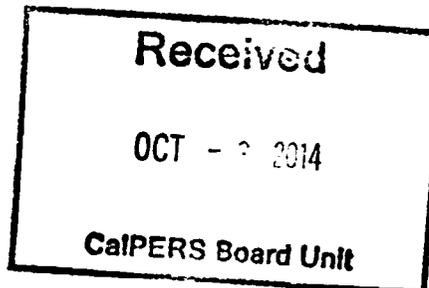
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September 30, 2014

Cheree Swedensky, Assistant to the Board  
CalPERS Executive Office  
P.O. Box 94270  
Sacramento, CA 94229-2701

Re: In the Matter of the Application for Industrial Disability Retirement of SUZANNE LOWE, Respondent, and DEPARTMENT OF CORRECTIONS AND REHABILITATION, CENTRAL CALIFORNIA WOMEN'S FACILITY, Respondent

Dear Ms. Swedensky:

You will find enclosed Written Argument of Suzanne Lowe which we request be presented to the Board at its meeting scheduled for October 15, 2014 at which we understand the above captioned matter will be considered.

Pursuant to the instructions contained in the September 8, 2014 letter from Odessa Moore of the Legal Office, we are not submitting a copy to opposing counsel with the understanding that our Written Argument will be provided to that attorney in accordance with your procedures. However, we are copying opposing counsel as a courtesy so that she will be aware of the filing of our Written Argument.

Thank you for your attention to this matter.

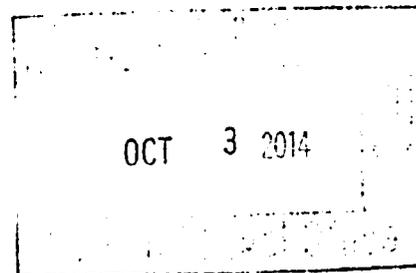
Very truly yours,

THOMAS J. TUSAN

TJT:tjp

Enclosure

cc: Suzanne Lowe (w/encl)  
Jeanlaurie Ainsworth, Senior Staff Counsel (w/o encl)



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Attorney for Respondent, Suzanne Lowe

**BOARD OF ADMINISTRATION**

**CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT BOARD**

-00000-

In the Matter of the Application for	)	REFERENCE NO.:	2012-0801
Industrial Disability Retirement of	)	OAH NO.:	2013040573
SUZANNE LOWE, Respondent,	)		
	)		
and	)		
	)	<b>WRITTEN ARGUMENT OF</b>	
DEPARTMENT OF CORRECTIONS	)	<b>SUZANNE LOWE</b>	
AND REHABILITATION, CENTRAL	)		
CALIFORNIA WOMEN'S FACILITY,	)		
Respondent.	)		
_____	)		

Respondent, Suzanne Lowe, (hereinafter referred to as "Ms. Lowe"), presents the following written argument to be considered by the Board in the determination of her application for industrial disability retirement:

Ms. Lowe commenced work at the Department of Corrections in 1995 as a registered nurse and continued in that capacity until May of 2005. During the course of that employment, she has sustained injuries to her neck, shoulders, carpal tunnel syndrome, and low back. These injuries led to the development of a condition known as fibromyalgia.

Her job duties in the correctional facility involved working as a triage nurse where she

would see anywhere from 40 to 200 inmates a day, and would typically see 80 inmates per day. These job duties included taking vital signs, urinary samples, dressing wounds, helping inmates out of wheelchairs and onto gurneys, as well as extensive charting requiring handwriting. At the start of her day, she would push a heavy cart loaded with patient charts from the main hospital into each of the yards of the hospital. This would require her to repeatedly open and close heavy prison doors.

Ms. Lowe originally filed her application on the basis of orthopedic disability and CalPERS chose to have her examined by orthopedic surgeon, Kenneth L. Baldwin, M.D. Dr. Baldwin found that she was not substantially incapacitated from performing her job duties.

When Ms. Lowe amended her application to add fibromyalgia as a disabling condition, CalPERS directed she be examined by JaNahn Scalapino, M.D., a rheumatologist. Ms. Lowe drove from her home in Raymond to the office of Dr. Scalapino in Sacramento. However, the appointment letter by CalPERS erroneously directed her to report to the administrative offices of Dr. Scalapino. Upon making a timely arrival at those offices, she was advised that the appointment was at a different location. By the time she arrived at the correct address, she was late. She was told she needed her drivers license for identification. On her way back to her vehicle to get her license, the elevator in the building stalled. She and other passengers needed to wait for assistance so that the elevator doors could be opened and Ms. Lowe could step out of the elevator. Dr. Scalapino was made aware of these events and assessed whether to go forward with the examination. Dr. Scalapino determined there was no reason not to go forward with the examination.

In addition to the examination and review of records, Dr. Scalapino also viewed the

sub rosa surveillance video of Ms. Lowe. Dr. Scalapino's report stated Ms. Lowe was permanently incapacitated from performing the essential duties of her job.

CalPERS wrote to Dr. Scalapino asking her to review the matter again, and determine whether the late appointment, elevator incident, and viewing of the sub rosa surveillance video, could be the basis of changing her opinion. Dr. Scalapino responded with a report stating:

My opinion about her disability is unchanged, as are my answers to your questions, which can be found in my IME report. She cannot work as a registered nurse in the prison system. To do so would put her and possibly her colleagues at risk.

In the context of Ms. Lowe's workers' compensation claim, she was directed to see Dr. Kneapler, M.D., a rheumatologist, for a neutral and unbiased opinion. Dr. Kneapler's report confirmed that Ms. Lowe had fibromyalgia syndrome, and that she would have permanent disability, in spite of treatment.

Based on what had Ms. Lowe being late for the appointment, which was not her fault, and the elevator stalling, which was not her fault, the CalPERS retirement program specialist sought to have Ms. Lowe be examined by another rheumatologist. Having already been examined by Dr. Scalapino at the request of CalPERS, Ms. Lowe advised that she would not submit to further examinations. Ms. Lowe's application for industrial disability retirement was denied by CalPERS.

The matter was set for hearing before an administrative law judge. Although CalPERS arranged for Dr. Baldwin to appear and testify, it chose not to present testimony from Dr. Scalapino. Without Dr. Scalapino being present to testify, CalPERS objected to the

admission into evidence of Dr. Scalapino's reports. Counsel for Ms. Lowe requested the matter be continued so that Dr. Scalapino's testimony could be presented. This request was granted by the ALJ and a second hearing was held in Sacramento. At the expense of Ms. Lowe, the CalPERS IME, Dr. Scalapino, was subpoenaed and called to testify. Dr. Scalapino testified Ms. Lowe was permanently incapacitated from performing her job duties. In addition to the physical restrictions, Dr. Scalapino also advised that the fibromyalgia condition reduces alertness and mental agility that would be essential for Ms. Lowe to protect herself and others in a prison setting.

To contradict the opinions of Dr. Scalapino, CalPERS presented testimony from rheumatologist Douglas Haselwood, M.D. He acknowledged he has been a colleague of Dr. Scalapino for a long time and that Dr. Scalapino is a "very well-respected rheumatologist." Dr. Haselwood was asked whether the incident in the elevator at the time of the examination of Ms. Lowe by Dr. Scalapino, would cause him any concern about the objectivity of Dr. Scalapino's opinion. He stated that he did not have any concern in that regard. He felt it was reasonable for Dr. Scalapino to have made the decision to move forward with the examination.

Dr. Haselwood did not examine Ms. Lowe. Dr. Haselwood did not view the sub rosa video surveillance of Ms. Lowe. Dr. Haselwood did review the medical records, which included the report of Dr. Kneapler (referenced above). Dr. Haselwood states that Dr. Kneapler is a "highly respected rheumatologist." He also recognizes that Dr. Kneapler was serving as an Agreed Medical Examiner and was expected to be unbiased and objective. He found no reason to state that Dr. Kneapler was anything other than unbiased and objective.

He said the same about Dr. Scalapino. Nevertheless, Dr. Haselwood offered the opinion that Ms. Lowe was not permanently incapacitated from performing her job based on the fibromyalgia.

Richard G. Baker, M.D., is an orthopedic surgeon that examined Ms. Lowe in the workers' compensation claim as an Agreed Medical Examiner and reported she was not able to resume her usual and customary work. There were also multiple reports from neurologist Frank L. Cantrell, M.D., where he stated that Ms. Lowe was unable to do her work as a registered nurse.

Regarding the significance of the sub rosa surveillance video, CalPERS called Dr. Baldwin to testify about the significance of the video. Dr. Baldwin testified the video "did not add or detract."

The ALJ's Proposed Decision asserts the medical opinions finding permanent incapacity, were on the basis of "prophylactic work restrictions." The ALJ references case authority that prophylactic restrictions are not sufficient to support a finding of disability in the context of a disability retirement proceeding. However, there is nothing in this record to demonstrate that the physicians who found Ms. Lowe permanently incapacitated, were limiting their opinion to a "prophylactic restriction." The letter by CalPERS to Dr. Scalapino asked whether Ms. Lowe was "substantially incapacitated for the performance of her duties." Those letters did not ask whether Dr. Scalapino was conditioning her opinion on a prophylactic or non-prophylactic restriction. Dr. Scalapino responded, "She is presently substantially incapacitated for the duties required of her." Dr. Scalapino was also specific regarding that disability. Without qualifying her opinion, Dr. Scalapino testified

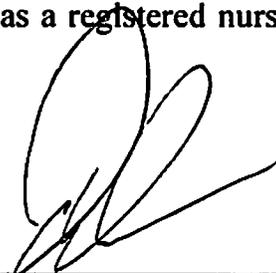
“Specifically, she [Ms. Lowe] is unable to lift or carry heavy medical records, write continuously over six-ten hours per day in charts. She is not able to maintain the alertness level and mental acuity necessary to protect herself and coworkers.” Dr. Scalapino did not qualify that disability as being only prophylactic.

Likewise, none of the reports in evidence from other physicians who examined Ms. Lowe and stated that she was permanently incapacitated, presented any qualification that the opinions were based on “prophylactic” restrictions. Each of the reports stated, in a straightforward manner, that Ms. Lowe was permanently disabled from performing those job duties.

In the Proposed Decision, the ALJ references case law that states *risk* of future injury or harm to the employee seeking the disability retirement is not sufficient to support a finding of disability.” The ALJ seizes on one sentence in Dr. Scalapino’s report where Dr. Scalapino states there is a “risk” of harm to Ms. Lowe and others because Ms. Lowe cannot perform her job duties. The existence of that risk is a *result* of Ms. Lowe’s incapacity, rather a *definition* of the incapacity. With due respect to the ALJ, she has chosen to read into the record opinions as to prophylactic restrictions which are not there.

It is respectfully requested that the Board find respondent, Suzanne Lowe, permanently incapacitated from performing her job duties as a registered nurse with the Department of Corrections and Rehabilitation.

Date: September 30, 2014



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THOMAS J. TUSAN  
Attorney for Suzanne Lowe

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am employed in the County of Fresno, State of California. I am over the age of 18 and not a party to the within action; my business address is 1233 West Shaw, Suite 100, Fresno, CA 93711.

On September 30, 2014, I served the foregoing document described as Written Argument on Parties Listed Below in this action by placing a true copy thereof enclosed in a sealed envelope and by causing such envelope to be delivered as noted below:

- X   MAIL – Placed in the United States Mail at Fresno, California.
- EXPRESS MAIL – Placed in the Express Mail Box of the United States Mail at Fresno, California.
- PERSONAL SERVICE – Delivered by hand to the Addressee addressed as follows:
- FACSIMILE – Sent by FAX at the number indicated.

Suzanne Lowe

Cheree Swedensky, Assistant to the Board  
CalPERS Executive Office  
P.O. Box 94270  
Sacramento, CA 94229-2701

Executed on September 30, 2014, at Fresno, California.

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

  
TERESA J. PERALES