

ATTACHMENT C
RESPONDENT ARGUMENT

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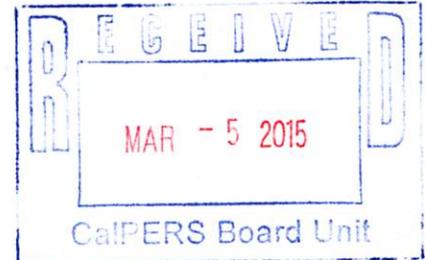
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Re: Moller, Lynn: PERS Hearing
Respondent's Argument

INTRODUCTION

Moller, by these Objections, requests that the PERS Board of Administration reject the Proposed Decision. It will be argued that the ALJ failed to perform the delegated task of actually considering the newly produced evidence using the artifice of claiming that she needed more specificity even though the exhibits were stipulated to and accepted into evidence.

Moller will also show that the ALJ made several crucial legal errors which render the Proposed Decision unlawful. Moller will address the individual Legal Conclusions to show this Board these errors.

I. Legal Conclusions 1 contains numerous incorrect and untruthful statements.

Moller has broken down this proposed Conclusion into its individual statements for ease in answering. Also the individual statements, in Conclusion 1, are identified by bolded italicized font.

1. Despite the terms of the Superior Court Order, dated December 9, 2013, Respondent Moller argued that only the new evidence should be considered and that the old evidence should not be given any weight.

Moller's Comment: What Moller argued was:

Respondent Lynn Moller's Argument

March 5, 2015

Page 2

. . . As it turns out, the old medical exhibits, [referring to the original hearing] principally Dr. Milling's, are no longer germane and are not based on MOLLER's current medical condition. . . .
(Moller's Remand Brief, page 1, lines 24-28)

1. (Continued) However, the language of the Superior Court Order does not limit the evidence that should be considered; rather, the Order refers to the record as a whole. In addition, among the "new evidence" submitted is Dr. Raiszadeh's report, dated February 2, 2012, submitted in the prior hearing.

Moller's Comment: Moller can find no exhibit, in either the original hearing or the remand hearing, from Dr. Raiszadeh dated February 2, 2012.

There could have been no Raiszadeh report, dated 2/2/12 submitted in the original hearing because the last day of evidence taking was January 6, 2012. Obviously, Moller could not have introduced a document in January 2012 that was not even prepared until February 2012. Therefore, the proposed conclusion is simply incorrect (untrue) in this statement.

1. (Continued) Respondent Moller cannot have it both ways. He cannot submit "new evidence" that incorporates information from the earlier record but then expect the court to reject exhibits from the prior record.

Moller's Comment: Moller did not introduce "new evidence" consisting of prior admitted exhibits, both because there is no Raiszadeh report bearing the date of 2/12/12.

The ALJ said that Moller asked the Court to "reject" exhibits from the earlier record. This is untrue. Moller said that the older medical reports are no longer "germane".

The reason why the earlier medical reports were no longer germane is that Moller's condition had worsened and her treating doctor, Dr. Raiszadeh, was now reporting on his findings after further examinations and treatment.

Moller's Additional Comment: Moller believes that the ALJ is confused because of a reference to a Raiszadeh report dated 2/2/10. Here is what happened.

Following the first decision of the CalPERS's Board of administration, issued on September 17, 2012, that Moller was not disabled, she made a written request that the R.J. Donovan Prison return her to her former job. On **October 31, 2012**, a letter was sent to R.J. Donovan Prison requesting that the Prison advise as to whether it would join Moller's judicial challenge to the CalPERS's decision and also whether it would reinstate Moller to either her job or the payroll in the interim. (See Moller's New Exhibits GGG-A, p. 24)

Respondent Lynn Moller's Argument

March 5, 2015

Page 3

On **November 19, 2012**, the R.J. Donovan prison, by Ms. Sheila De Jesus Workers' Compensation Return-to-work Analyst, sent a letter directly to Dr. Raiszadeh, soliciting responses to certain questions. (See MNE JJJ, pp. 71-71)

On **November 28, 2012**, Dr. Raiszadeh, responded to De Jesus's letter. (See MNE JJJ, p. 72) Dr. Raiszadeh had been asked to review a list of essential functions provided to him by De Jesus's November 19, 2012 letter. He was asked to respond to the question:

After reviewing the essential function, enclosed, is Ms. Moller able to perform all of the essential functions of the Clinical Social Worker position at the CDCR? Dr. Raiszadeh answered "No."

He was then asked: If the answer is no, please list the limitations below:

He responded:

As per my permanent and stationary report (2/2/10) Ms. Moller is unable to return to her occupation due to significant prolonged sitting. She is restricted from heavy lifting and bending. She has 50% less in capacity to lift and bend. She is precluded from prolonged sitting. She will not be able to safely react to life-threatening situations. Due to her injury she has decreased strength, agility and endurance. She has limitations to sitting at the computer. She has limitation in getting to attend meetings. (See MNE JJJ, p. 71)

The Doctor was asked whether such limitations were permanent or temporary, and he said "Permanent."

So on November 28, 2012, the treating doctor was asked by the Prison what he believed as to the ability of Moller to perform her essential job functions. His answer, although incorporating information from his report of 2/2/10, was his opinion as of November 28, 2012. But there is much more medical information from Dr. Raiszadeh relating to his treatment subsequent to the original hearing.

On **January 3, 2013**, Dr. Raiszadeh reported (signed by Dr. Wu) that they had seen Moller for a "flare up" one to two months previously. (See MNE GGG-E, p. 56) That would have meant that the flare up occurred some time in November to early December of 2012. (See MNE GGG-E, p. 56. Dr. Raiszadeh reported the results of his office's physical examination of Moller. (See MNE GGG-E, p. 57)

On **February 7, 2013**, Dr. Raiszadeh reported the results of another physical examination of Moller. (See MNE GGG-E, p. 53.)

Dr. Raiszadeh commented:

Respondent Lynn Moller's Argument

March 5, 2015

Page 4

Ms. Moller continues to be quite debilitated due to predominantly neck but also significant low back symptomatology. She has pathology that has progressed in her neck. She has chronic EMG-documented radiculopathy at C5-6 and evidence of foraminal stenosis at both C6-7 and C5-6. She has foraminal stenosis at C4-5 also, but predominantly on the right side. I have discussed the treatment options including continued nonoperative treatment and aqua therapy versus surgery. At this point since she continues to be debilitated, I have discussed the option of surgical intervention in detail, but as long as she can tolerate the symptoms' I would recommend that she continue with nonoperative treatment. (See MNE GGG-E, 54.)

Dr. Raiszadeh, and his staff, continued to monitor Moller's condition from March 20, 2013 through September 11, 2013. In order, the reports from these seven examinations are: March 20, 2013; April 8, 2013; May 21, 2013; August 14, 2013; August 20, 2013; September 11, 2013; and May 20, 2014. (See MNE GGG-E, pp. 34-50 and MNE KKK, pp. 73-74)

Moller's final Comment on Conclusion 1: Each of the reasons stated by the ALJ are untrue. Thus, her concluding summary on this point is also wrong and this Conclusion must not be adopted by the CalPERS's Board.

II. The ALJ said in Legal Conclusions 3 that the stipulated medical exhibits were insufficient because Dr. Raiszadeh did not explain his opinions to the ALJ's satisfaction.

The ALJ said:

... insufficient competent medical evidence was offered to establish that her orthopedic back and neck condition prevented Respondent Moller from performing the usual duties of a Clinical Social Worker employed by Respondent CDCR, albeit with pain or discomfort.

Moller's Comment: At the remand hearing the ALJ said:

On December 6, 2013, the parties (CalPERS and Respondent Moller) stipulated that newly produced medical evidence should be included in the administrative record and evaluated. . . (Proposed Decision, p. 3, underlining emphasis added.)

Respondent Lynn Moller's Argument

March 5, 2015

Page 5

At the time the stipulation was made, the ALJ accepted it and admitted into evidence – without any reservation – the additional exhibits. The CalPERS counsel did not make any argument against the exhibits. (See Proposed Decision, p. 1, footnote 1)

Belatedly, in her Proposed Decision, the ALJ, for the first time, objected to the stipulated exhibits because Dr. Raiszadeh had not explained his opinions to the satisfaction of the ALJ. (See Proposed Decision, pp. 5 - 8) Of course, the ALJ's desire for additional information was not communicated to the parties (both CalPERS and Moller) until after the hearing was finished.

At the very least, a proper judicial temperament would require that the ALJ further develop the record by reopening the evidentiary phase and request counsel to provide additional evidence.

Instead of pursuing such a course, the ALJ rejected all of the stipulated exhibits and recommended a denial of Moller's claim. This is unconscionable. In effect, the ALJ refused to do what the Superior Court instructed the CalPERS system to do which was to evaluate the newly produced evidence to determine what effect, if any, such would have on the overall decision.

This ALJ (who seems to be mainly defending her earlier decision) actually rejected all the stipulated exhibits in order to find that there is no change in her proposed decision made earlier.

Moller's further Comment: However, the proposed decision of the ALJ violates important evidentiary rules established by the California Supreme Court in *Lumbermen's v. Mut. Cas. Co. v. Ind. Acc. Com.*, 29 Cal.2d 492 (1946). Here are the two rules:

1. "[w]here an expert witness, such as a medical witness, bases his scientific opinion on his observation, such as an attending or treating physician observing his patient, he need not state the reasons for his opinion—the facts upon which they are based—to render his opinion competent and probative evidence."
(*Lumbermen's, supra*, at 500.)
2. When a treating physician renders an expert opinion, "it may be assumed [he or she] made observations and acquired sufficient facts as a basis for [the opinion]."
(*Lumbermen's, supra*, at 501.)

Counsel for both parties are very experienced in handling PERS disability hearing cases. When such counsel stipulate to the receipt into evidence of exhibits, they are aware of the consequences and have to weigh whether it would be productive to materially expand the hearing in terms of time required and cost involved by requiring the witnesses to appear for examination.

Respondent Lynn Moller's Argument

March 5, 2015

Page 6

In this case **both** counsel agreed that it would not be productive to require the medical and Prison personnel to appear. The information reflected in the written exhibits would only be substantiated by requiring attendance for the treating doctor to explain further why he opined as he did. Also, it is absolutely clear that the Prison representative refused to return Moller to her prior usual duties because her treating doctor advised that she was permanently unable to perform all of her essential functions.

The ALJ refused to accept the treating doctor's opinion and would rather continue to deny Moller's claim than accept the most recent and germane medical information. – that Moller cannot do the essential functions of her prior job. Nor would the hearing officer accept the clear finding that the Prison would not place Moller back into the prison population with the inability to perform those essential functions. In short, the ALJ refused to consider the exhibits stipulated to and which she accepted.

III. In Legal Conclusion 6, the ALJ relied on an incorrect legal theory, to wit, that Moller's claim for disability retirement requires that she apply for other jobs than which she was performing at the time of her injury.

ALJ said that Moller was not refused a return to work because she did not show that she participated in an effort to find light or alternative work. (Dec. p. 8)

No evidence was offered to establish that Respondent Moller pursued the positions identified by De Jesus or any other positions with Respondent CDCR. No evidence was identified to show that Respondent CDCR failed to locate any positions for Respondent Moller, or that Respondent CDCR located positions for Respondent Moller but failed to offer them to her.

Given the facts in the foregoing paragraphs, insufficient evidence was offered to establish that Respondent CDCR was unable to find a position for Respondent Moller that she is capable of performing with the limitations imposed by Dr. Raiszadeh. (Dec. p. 8)

The California Supreme Court has already settled this question in *Nolan v. City of Anaheim*, 33 Cal.4th 335, at 342-343 (2004). In *Nolan*, the employee argued that he is not considered to be disabled if the City offered him a "light duty" assignment. But the *Nolan* Court disagreed holding that the "light duty" cases are distinguishable because they involved City Charters which had a different standard for determining disability than the PERS standard. (*Nolan*, at 342-343)

The *Nolan* Court held that the PERS disability standard, as explained in *Mansperger v. Public Employees' Retirement System*, 6 Cal.App.3d 873, (1970), required only that a disabled

Respondent Lynn Moller's Argument

March 5, 2015

Page 7

employee demonstrate a "substantial inability . . . to perform his usual duties." (*Nolan*, at 343, citing *Mansperger*, at 876-877) "Usual duties" is a much more restricted set of duties than light duty or alternative employment within the State. Thus, in deciding disability claims under the CalPERS system, the *Nolan* Court held that "light duty" cases, are irrelevant to disability cases arising under the PERS law and the standard of the *Mansperger* case .

After *Nolan* CalPERS disability determinations must focus on the duties which the employee was both actually performing or required to be able to perform in their job classification assignment and not some other modified or light duty assignment.

The notion that alternative or light duty job availability could defeat Moller's claim that she is disabled was not argued by CalPERS at the hearing. The ALJ raised this issue, for the first time, in the proposed decision.

Because this issue had not been raised prior to the hearing nor been briefed, a more judicious approach would have been for the ALJ to inquire of both counsel whether this was an issue and, if so, to brief the subject. Had that approach been adopted, the ALJ would have been advised by Moller's counsel of the holding of the *Nolan* case and the irrelevancy of light or alternative jobs outside of Moller's prior job usual duties. Because the ALJ failed to utilize both counsels' expertise, the proposed decision veered off the road and crashed into the *Nolan* edifice.

Nonetheless, it is clear that the ALJ did understand the fact that Moller's employer would not offer to return her to her prior usual duties based on the additional information gained from Dr. Raiszadeh. Accordingly, the proposed decision cannot be adopted as it stands.

- IV. The proposed decision Legal Conclusion 5, also relies on the incorrect legal theory that Moller needed to apply for other State jobs or lose her right to a disability retirement from her "usual duties" of her prior job.**

The ALJ said:

Respondent Moller argued that she is stuck between two state agencies, i.e., CalPERS saying that she is not disabled and Respondent CDCR stating that she cannot return to work. Therefore, she is entitled to a disability retirement. (*English v. Board of Administration* (1983) 148 Cal.App.3d 839; *Roccaforte v. City of San Diego* (1979), 89 Cal.App.3d 877). However, insufficient evidence was offered to establish that Respondent CDCR denied her either to return to work or failed to offer her a position. (Underlining emphasis added.)

Respondent Lynn Moller's Argument

March 5, 2015

Page 8

This conclusion must be rejected because of the erroneous legal standard relied on in the last sentence. As before, it is simply irrelevant whether the CDCR offered Moller a light or alternative position. The ALJ failed to obtain any assistance from competent counsel to assist the tribunal to correctly identify the applicable standard. The ALJ's erroneous belief that Moller had to both demonstrate inability to substantially perform her usual duties AND also show that she was unable to perform the duties of other duties has infected this conclusion and rendered it incorrect. The proper conclusion would be:

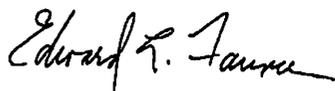
Respondent Moller is stuck between two state agencies, i.e., CalPERS saying that she is not disabled and Respondent CDCR stating that she cannot return to work. Therefore, she is entitled to a disability retirement. (*English v. Board of Administration* (1983) 148 Cal.App.3d 839; *Roccaforte v. City of San Diego* (1979), 89 Cal.App.3d 877). Sufficient evidence establish that the Respondent CDCR denied Moller a return to her prior job usual duties for medical reasons.

CONCLUSION

This ALJ appears to be focused on establishing that her initial decision was correct. To accomplish this, the proposed decision relies upon clear incorrect and untruthful statements, and reliance on incorrect legal theories. The ALJ has not exhibited a judicial concern for the legitimate interests of Moller by refusing to consider any of the newly produced medical exhibits despite stipulation by both CalPERS and Moller's counsel. Additionally, the ALJ accepted the stipulation and "hid" her objections thereto until too late for additional evidence to be brought forward. Her insistence that Moller can be denied a disability finding because she did not seek another State job is likewise in violation of the PERS standard which measures disability against the employee's usual duties in the prior job.

The Proposed Decision is so wrong that this Board must not adopt it.

Respectfully submitted,



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ELF/tr

cc: Lynn Moller