

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO REMAND THE PROPOSED DECISION

Respondent Wendy Lucas (Respondent) applied for disability retirement on December 9, 2013, based on fibromyalgia, chronic back pain, degenerative joint disease and osteoarthritis. At the time of her application, Respondent was employed as an Office Technician (OT) for California Department of Corrections and Rehabilitation, Central California Women's Facility (CDCR). On July 23, 2014, CalPERS determined that Respondent was not substantially incapacitated from the performance of her duties as an OT for CDCR. Respondent appealed. A hearing was completed on May 3, 2016. Respondent was represented by counsel at the hearing.

As part of CalPERS' review of her medical condition, Respondent was sent for Independent Medical Examinations (IME) to board certified Orthopedic Surgeon, Dr. Ghol Ha'Eri and to board certified Rheumatologist, Dr. Douglas Haselwood.

Dr. Ha'Eri reviewed medical records, x-rays, MRI studies and completed a physical examination. He opined that Respondent had no orthopedic disability, and that she was not substantially incapacitated to perform her usual job duties as an OT.

Dr. Haselwood also reviewed Respondent's medical records and performed a clinical joint and musculoskeletal exam, which was limited due to Respondent's request that he not examine her neck or low back with the exception of using very minor light touch. She told Dr. Haselwood that she suffered tenderness, pain and limited range of motion in her neck, back and joints, but he was unable to examine any of these subjective complaints. Even with the light touch, soft-tissue, musculoskeletal exam, Dr. Haselwood noted that Respondent's expressions of discomfort, guarding and withdrawal were inconsistent and exaggerated, implicating significant "non-organic symptom embellishment." Dr. Haselwood also noted that when she walked in the exam room, her gait was quite slow and unsteady, but when he later observed her walking into and leaving the exam room and office building, her gait was more fluid and rapidly paced. The Administrative Law Judge (ALJ) made similar observations before, during and after the evidentiary hearing.

Dr. Haselwood found that Respondent has "some legitimate (albeit predominantly age-appropriate) sources of musculoskeletal discomfort and dysfunction." He added that the "unusually high, diverse and incapacitating level of widespread musculoskeletal pain and dysfunction and the resulting levels of physical impairments perceived by applicant are based, to a large part, on self-reporting and subjective criteria." Dr. Haselwood found there were no job duties Respondent was unable to perform. He testified that Respondent has "lots of complaints that cannot be explained." Dr. Haselwood's opinion is that Respondent's "constellation of conditions and complaints" do not prevent her from being able to perform sedentary clerical and administrative job duties, and that there are no duties on her job duty statement that she cannot perform.

At the hearing, Respondent testified on her own behalf. She did not call any medical professionals or other witnesses to testify.

The ALJ found that a historical overview of Respondent's medical history and claims appear to show a pattern of strong motivation to seek out and obtain medical opinions to find her disabled. The ALJ stated that her claimed disabling conditions, highlighted by her presentation at hearing "has a smorgasbord feel," wherein lack of success in obtaining medical confirmation of disability elicits redoubled efforts to present new or additional conditions to shore up her claim. The ALJ also found that "applicant's credibility is essential to her case, and as a corollary matter, her lack of credibility, in this instance, is fatal to her claims here."

The ALJ found that Respondent bears the burden to show by a preponderance of the evidence (based on competent medical evidence) that she is substantially incapacitated for the performance of her usual job duties. He concluded that she did not meet her burden of showing that at the time of her application, on the basis of her claimed physical disorders, that she was substantially incapacitated.

The ALJ also found that it is not CalPERS' responsibility to analyze and identify all potential causes for disability when a member seeks disability retirement. The applicant has the responsibility to identify and claim her disabling conditions. At hearing, Respondent claimed that CalPERS should have identified and evaluated her on various conditions not identified in her application. Respondent claimed that CalPERS should have worked up these various conditions, all the way through IME evaluations. The ALJ found that Respondent's contention,

upends and reverses the statutory requirements that an applicant claiming disability retirement identify the claimed disabling condition, produce medical evidence supporting the claim, and if disputed by CalPERS, then an IME is ordered to assess whether applicant's medical evidence does or does not have merit. The system does not place an obligation on CalPERS to order an IME in order to prove what applicant is required to prove as a threshold matter, or to develop medical evidence in support of applicant's claim, rather than assessing and evaluating medical evidence already produced by applicant in support of the claim.

Despite all the findings in the favorable 26-page Proposed Decision, the ALJ nevertheless rendered a conflicting Order. The Order states:

The appeal of Wendy Macy aka Lucas of the CalPERS' BSD denial of her application for an industrial disability retirement is AFFIRMED. The application of Wendy Macy, aka Lucas, for Industrial Disability Retirement is DENIED.

Because it is impossible for Respondent's appeal to be affirmed, while at the same time denying her application for disability retirement, staff recommends that this case be remanded for clarification of the Order.

Since the Decision should be remanded for clarification of the Order, staff also recommends that all references to "industrial" disability be stricken. The Decision states that Respondent applied for industrial disability. This is incorrect. Respondent applied for service pending disability retirement. Staff recommends that the order to remand also include a request to strike all references to "industrial" disability retirement, including in the second paragraph of page two under "Issues."

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