

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

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RESPONDENT'S ARGUMENT

In Re: Alfredo Macias' Appeal of the Board of California Public Employees Retirement System's Denial of his Rights to a Disability Retirement Benefit
San Diego Board of Administration
California Public Employees' Retirement System

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I. INTRODUCTION

This matter was heard before Debra D. Nye-Perkins, Administrative Law Judge on August 22, 2016. CalPers presented testimony of their expert, John Serocki, M.D. and he was cross examined. CalPers also presented documentary evidence. Mr. Macias testified and was cross examined. Mr. Macias offered the testimony of Dr. Khalid Bashir Ahmed, and he was cross examined. Mr. Macias offer documentary evidence.

After listening to the testimony of each witness, weighing the credibility of each witness and considering the evidence coupled with the law, Administrative Law Judge Debra D. Nye-Perkins found in favor of Mr. Alfredo Macias and ruled:

“Alfredo Macias’s appeal of CalPers’s determination that he was not permanently disabled or incapacitated from performance of his duties as a District Sales Representative at the time he filed his application for disability is granted.”

Mr. Macias concurs with the Proposed Decision of the Administrative Law Judge and concurs with the decision as the evidence established that Mr. Macias was in fact permanently disabled or incapacitated from performance of his duties as a District Sales Representative at the time he filed his application for disability.

Respondent requests that this decision be designated as precedent as it provides contains an important analysis on the determination of an important issue: the disability evaluation of an employee of a District Sales Representative for the California State Lottery. As outlined below, the Proposed Decision provides an exemplary analysis of the disability issues that interested parties can understand why the findings of fact were made, and how the law applies.

II. STATEMENT OF FACTS

The Parties

The petitioner, Mr. Alfredo Macias (herein after referred to as “Mr. Macias”), was employed as a California Lottery District Sales Representative from 1985 to June

1 29, 2013, and as such employee he is a state miscellaneous member of CalPERS
2 subject to Government Code section 21150.

3 In 2006 Mr. Macias suffered an injury to his right knee which required surgical
4 intervention. The surgery was performed in 2008 and afterwards Mr. Macias went
5 through several courses of physical therapy, but due to his work he constantly
6 aggravated his knee condition. In 2011, while engaged in his working capacity, Mr.
7 Macias also injured his right toe when he accidentally dropped a 40 pound box on it
8 during his work.

9 Mr. Macias saw several doctors for his toe injury and was placed on a medical
10 leave for a couple of months. However, after he returned to work, Mr. Macias suffered
11 continuous pain in his injured toe and knee in the performance of his daily job duties
12 as required by his employer. In order to somehow perform his duties, Mr. Macias had
13 to use naproxen – a pain-killer medicine which reduced his pain, but never completely
14 eliminated the pain and prevented Mr. Macias performing each of the job duties as
15 mandated by his employer.

16 After numerous complaints Mr. Macias made to his supervisor, he was
17 provided with accommodations in form of retrofitted step in his working van and
18 instructed to just do the best he can and do his job. Mr. Macias' "back to work"
19 coordinator; however, told him that he should retire pending disability as Mr. Macias'
20 medical incapacity and pain associated with his numerous medical conditions
21 prevented him from effectively doing his job.

22 **Mr. Macias' Job Duties**

23 During the course of his work, Mr. Macias was required to be able to perform
24 tasks critical to his position, such as sitting, standing, walking (including walking on
25 uneven grounds), bending at the neck and waist, twisting at the neck and waist,
26 reaching above the shoulder, simple grasping, repetitive use of hands, lifting up to 25
27 pounds, and driving. These tasks occupied 6 hours of each work day of Mr. Macias
28 and more.

1 Other tasks which Mr. Macias was required to perform frequently and which
2 occupied from 3 and up to 6 hours of his day were: power grasping, reaching below
3 the shoulder, getting in and out of the van, and operating foot controls or repetitive
4 movement.

5 In addition, Mr. Macias was required to perform such occasional tasks as:
6 crawling, kneeling, squatting, climbing and lifting up to 75 pounds. These tasks
7 occupied up to 3 hours each day.

8 Furthermore, Mr. Macias was required to perform such tasks as: use of hand
9 carts frequently, and going up and down steps frequently.

10 Mr. Macias testified that he had continuous pain in his right toe and right knee
11 that got progressively worse during the work day. The pain that Mr. Macias suffered
12 during the day affected his ability to concentrate, negatively affected his mood. Mr.
13 Macias enjoyed his job but due to the nature and extent of his medical disabilities, he
14 simply could not perform his duties as the pain was unbearable.

15 **Medical Evidence of Disability**

16 The medical disability of Mr. Macias is clearly established. Dr. Khalid Bashir
17 Ahmed, M.D., who is board certified in orthopedic surgery since 1978, runs his private
18 practice in Southern California since 1979 was Mr. Macias' primary treating physician
19 with respect to his injuries. Dr. Ahmed's practice is heavily focused on worker's
20 compensation and occupational medicine cases, and particularly on occupational and
21 orthopedic medicine.

22 Dr. Ahmed conducted numerous examinations of Mr. Macias, asked Mr.
23 Macias to demonstrate how he gets in and out of his work van to observe Mr. Macias'
24 leg function and see if he is able to perform his job duties. As a result of extensive
25 review of Mr. Macias' medical file and personally performed examinations as to
26 whether Mr. Macias can perform his job duties, Dr. Ahmed reached conclusion that
27 Mr. Macias required a surgery and he should remain temporarily totally disabled.
28

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1 Dr. John Lane examined Mr. Macias on April 7, 2014, for worker's
2 compensation purposes and made findings similar to the ones of Dr. Ahmed. Dr. Lane
3 concluded that Mr. Macias, due to his physical condition, could not perform
4 prolonged weight bearing, squat, kneel, or to repetitively climb. As such, Dr. Lane
5 found that Mr. Macias was permanently disabled and unable to return to work.

6 Dr. Ahmed was credible as he based his testimony on being thorough, complete
7 and accurate. Dr. Ahmed testified to a reasonable degree of medical certainty that Mr.
8 Macias was in fact permanently disabled or incapacitated from performance of his
9 duties as a District Sales Representative at the time he filed his application for
10 disability.

11 CalPERS presented the testimony of Dr. John Serocki, M.D. Dr. Serocki was
12 impeached on cross examination and it was established that he was not thorough,
13 complete and accurate in his 15-20 minute examination of Mr. Macias.

14 The lack of credibility and the unfounded opinions of Dr. Serocki were properly
15 weighed by the Administrative Law Judge who found that Dr. Serocki did not perform
16 extensive physical examination of Mr. Macias; that Dr. Serocki did not ask if Mr.
17 Macias took any pain-killing medication on the day of the examination; that Dr.
18 Serocki did not review how Mr. Macias would have gotten in and out of the work van
19 and how that would have impacted his injuries.. Nonetheless, Dr. Serocki decided that
20 these difficulties do not render Mr. Macias incapable of performing his essential job
21 duties.

22 **II. THE BOARD OF ADMINISTRATION'S PROPOSED DECISION IS CORRECT AND**
23 **SHOULD BECOME FINAL**

24 **The Board Considered Correct Case Law Authorities In Reaching Its**
25 **Proposed Decision**

26 In reaching its Proposed Decision, the Administrative Law Judge considered
27 important case law authorities where the court explained the proper approach to the
28 interpretation of the term "incapacitated for the performance of duty."

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1 The Board properly considered *Mansperger v. Public Employees' Retirement*
2 *System* (1970) 6 Cal.App.3d 873, where the court explained that to be found
3 incapacitated for performance of job duties, the applicant must show that he is
4 substantially unable to perform his usual duties. In applying this standard the Board
5 correctly considered testimony of Mr. Macias as to what his regular duties were and
6 gave proper weight to Dr. Ahmed's evaluation based on the actual job duties Mr.
7 Macias performed.

8 The Administrative Law Judge also properly considered *Hofsford v. Board of*
9 *Administration* (1978) 77 Cal.App.3d 854, where the court explained that to be found
10 substantially incapacitated from his "usual duties," it also established that the
11 consideration must be given to the actual duties performed by the applicant at his job
12 rather than exclusively duties listed in his job description. In applying this standard
13 the Board correctly considered the foundation of the medical opinion given by Dr.
14 Ahmed, who actually discussed and reviewed usual duties performed by Mr. Macias.
15 The Administrative Law Judge also correctly utilized this standard considering
16 testimony of Dr. Serocki, who limited his review to the description contained in the
17 duty statement and did not interview Mr. Macias as to what duties he actually
18 regularly performed.

19 **The Administrative Law Judge Properly Evaluated the Weight Of**
20 **Experts' Testimony**

21 During the hearing the Administrative Law Judge conducted a deep and
22 thoughtful evaluation of the evidence presented by the parties. The Administrative
23 Law Judge heard medical opinions of competent experts presented by the both sides.

24 The Administrative Law Judge properly considered the foundation for the
25 opinion of Dr. Ahmed that Mr. Macias is substantially incapacitated from
26 performance of his job duties in a position of District Sales Representative and, in fact,
27 is disabled. The Board considered the fact that Dr. Ahmed discussed actual job duties
28 with Mr. Macias and even asked for demonstration of such performance during the

1 physical evaluation. Dr. Ahmed made full body examination of Mr. Macias throughout
 2 three or four visits. Finally, Dr. Ahmed found objective evidence of the physical
 3 condition of Mr. Macias that could cause the very pain and discomfort Mr. Macias
 4 complained about as verified by MRI findings.

5 Furthermore, the Administrative Law Judge correctly considered findings
 6 made by Dr. Lane through his independent medical examination. These findings
 7 corroborated Dr. Ahmed's opinion that Mr. Macias was prevented from performing
 8 his job duties as District Sales Representative due to the pain he experienced.

9 In contrast, the medical opinion rendered by Dr. Serocki and properly
 10 considered by the Administrative Law Judge was based only on 15 minutes to one
 11 hour examination of Mr. Macias. Dr. Serocki did not discuss Mr. Macias' job duties at
 12 all and did not examine Mr. Macias' neck or shoulder.


13 III. CONCLUSION

14 The Administrative Law Judge extensively investigated the facts of the case,
 15 properly evaluated testimonies of the Petitioner Mr. Macias and medical experts Dr.
 16 Ahmed and Dr. Serocki. In its consideration the Administrative Law Judge applied a
 17 correct legal standard and reached well-merited conclusion solidly based in facts and
 18 law. Therefore, the Proposed Decision should become the Final Decision and Mr.
 19 Macias' application for disability should be granted and awarded his attorney fees and
 20 costs for his successful appeal.

21 Moreover, the Final Decision should be designated as precedent.
 22

23 Dated: November 3, 2016

24 **GOMEZ LAW GROUP, P.C.,**

25 
 26 **ALVIN M. GOMEZ, ESQ.**
 27 **Attorney for Petitioner**
 28 **ALFREDO MACIAS**