

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

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8 BOARD OF ADMINISTRATION

9 CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM

10 In the Matter of the Application for Industrial
Disability Allowance of:

11 SAN JUANA N. NAVARRO,

12 Respondent

13 v.

14 CALIFORNIA DEPARTMENT OF
15 CORRECTIONS & REHABILITATION,
WASCO STATE PRISON,

16 Respondent.
17

) AgencyCase No: 2015-0887
) OAH Case No. 2015101025
)
) SAN JUANA NAVARRO'S OBJECTION
) TO THE PROPOSED DECISION
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) Hearing Date: November 15, 2016
) CalPERS Board Meeting: March 15, 2017
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) RESPONDENT'S ARGUMENT
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1 CalPERS member, San Juana N. Navarro objects to the Proposed Decision in the above
2 referenced hearing on her application for an industrial disability retirement. Objections are for
3 several reasons, but primarily for applying little or no evidenciary weight to the medical opinions
4 supporting an industrial disability retirement because according to the Proposed Decision, those
5 examiners did not apply CalPERS law, the "CalPERS Standard." Other objections to the
6 Proposed Decision are an incomplete statement of issues and erroneously applying greater weight
7 to a medical examiner's legal conclusion, therefore making the proposed decision unsupported
8 by the evidence.

9 Ms. Navarro respectfully requests this board to review the Closing Briefs, the evidence
10 referred to in those briefs and to exercise its authority under the California Government Code and
11 grant her an industrial disability retirement. *California Government Code § 11517*

12 **1. The Evidence Weighed in Calpers Cases must Be Substantial Evidence Which Does**
13 **Not Include a Medical Expert's Knowledge of CalPERS Law**

14 The Proposed Decision states that the medical evidence in support of the application for
15 industrial disability retirement should be given little or no weight because those doctors did not
16 apply or weren't familiar with the "CalPERS Standard."

17 Drs. Sall's and Potter's opinions are entitled to little weight because the standards in
18 CalPERS' s disability retirement cases are different from those in workers' compensation
19 matters. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 567; *Kimbrough v.*
Police & Fire Retirement System (19~4) 161 Cal.App.3d 1143, 1152-1153; *Summerford*
v. Board of Retirement (1977).72 Cal.App.3d 128, 132.)

20 Similarly, Dr. Eldrageely's and Mr. Simmons's treatment records are not entitled to any
21 weight because there was no explanation of the standards they used when evaluating Ms.
Navarro. (Proposed Decision Page 9)

22 This is an erroneous application of CalPERS law because medical evidence in a disability
23 retirement case must be "substantial evidence," and not whether a medical expert is familiar or
24 applies CalPERS law. The application of law, CalPERS law, or other law, by a medical expert is
25 not substantial evidence according to the California Supreme Court.

26 Further, as discussed in her Closing Brief, In *McCoy v. Bd. of Retirement*, 183 Cal. App.
27 3d 1044, 1055 (1986) the court stated that workers compensation records, even though not
28 binding, **must** be considered.

1 The employee seeking a service connected disability retirement bears the burden of
2 proving his incapacity and its relationship to the job by a preponderance of substantial evidence.
3 (*Glover v. Board of Retirement* (1989) 214 CA 3d 1327, 1332).

4 Only substantial evidence may be placed on either side of the scales that will determine
5 the "preponderance" or "weight" of the evidence. (*Ergo v. Merced Falls Gas & Electric* (1911)
6 161 Cal. 334, 339-340 [119 P. 101].)

7 Substantial evidence is evidence of "sufficient quality."

8 **"Substantial evidence" defined:**

9 Evidence is "substantial" if it is reliable, solid proof. "Substantial evidence" is evidence
10 that ". . . is reasonable in nature, credible, and of solid value . . ." (*Estate of Teed* (1952) 112
11 Cal.App.2d 638, 644 [247 P.2d 54].)

12 Ms. Navarro discussed in her Closing Brief, why the medical reports in support of her
13 application for Industrial Disability Retirement should be given more weight than the reports by
14 the CalPERS medical expert. The CalPERS medical reports by Dr. Ha'Eri are conclusionary and
15 fail to give useful reasoning for his conclusions.

16 **2. Medical Reports of Dr. Ha'eri Are Not Substantial Evidence Because His Opinions Are**
17 **Legal Conclusions.**

18 There are limits to expert testimony, not the least of which is the prohibition against
19 admission of an expert's opinion on a question of law. This limitation was recognized in *Ferreira*
20 *v. Workmen's Comp. Appeals Bd.* (1974) 38 Cal.App.3d 120 [112 Cal.Rptr. 232].

21 In *Ferreira*, the plaintiff filed a workman's compensation claim due to a hernia he
22 suffered. A doctor for the insurance company submitted a report in which he stated: "The
23 responsibility for the recurrent left inguinal hernia is, in our opinion, his own and not the
24 responsibility of the employer or his workmen's compensation insurance carrier." He further
25 opined: "The strain when he lifted the battery out of his truck was not an industrially related
26 injury and we do not believe that the employer or the Aetna Insurance Company should be
27 considered responsible for this condition." (*Ferreira v. Workmen's Comp. Appeals Bd., supra*,
28 38 Cal.App.3d at p. 124.)

1 On appeal the Court held the doctor's report was *not admissible evidence*. "... *these*
2 *statements are clearly legal conclusions and not medical opinions* and *1179 *do not constitute*
3 *substantial evidence*. [Citation.] The manner in which the law should apply to particular facts is
4 a legal question and is not subject to expert opinion. [Citation.]" (Id. at pp. 125-126.) *Summers*
5 *v. A.L. Gilbert Co.*, 69 Cal. App. 4th 1155, 1178-79 (1999)

6 Dr. Ha'Eri's opinion that her medical condition is not severe enough to prevent her from
7 performing her job is not supported by studies, data or any medical evidence. This is not a
8 medical opinion or diagnosis, but a conclusion without reasoning, it should not be considered.

9 In his first his report, Exhibit 8, Dr. Ha'Eri's opinion is confusing and contradictory. This
10 happens when a doctor is asked to give a legal conclusion, such as their question 2 which asks:
11 "is the member presently, substantially incapacitated for the performance of his usual duties?"
12 This question asks the doctor to apply the legal definitions that courts have given these terms to
13 reach a conclusion. As stated above, the manner in which the law should apply to particular facts
14 is a legal question and is not subject to expert opinion. [Citation.]" (Id. at pp. 125-126.)
15 *Summers v. A.L. Gilbert Co.*, 69 Cal. App. 4th 1155, 1178-79 (1999). The first question that
16 CalPERS asks "Are there specific job duties that you feel the member is unable to perform
17 because of physical or mental condition?" is more in line of what should be asked of an expert.
18 Dr. Ha'Eri answered that question by issuing a list of restrictions which he says are temporary.
19 However, he states that the temporary disability began in 2010 (Exhibit 8, Page 9). Medical
20 restrictions which last for four years mean disability and incapacity for performance of duty as a
21 basis of retirement according to CalPERS law. As discussed in her Closing Brief, Government
22 Code § 20026 provides "'Disability' and 'incapacity for performance of duty' as a basis of
23 retirement, mean disability of *permanent or extended and uncertain duration*,..., on the basis of
24 competent medical opinion."

25 In his first report, Dr. Ha'Eri states: "It is my professional opinion that the claimant is
26 presently substantially incapacitated for the performance of her duties as a Correctional Officer."¹

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28 ¹ This statement is a legal conclusion and bears no evidentiary weight.

1 The disability began on 12/27/10.” (Exhibit 8, Page 9) Therefore, applying CalPERS law to this
2 medical opinion is the job of a fact finder or jury, not a medical expert, one is to conclude that
3 Dr. Ha’Eri’s medical opinion supports disability as a basis of retirement because four years of
4 disability is “*extended and uncertain.*”

5 At our hearing Dr. Ha’Eri testified that he misapplied CalPERS law and it was not his
6 opinion that Ms. Navarro is permanently incapacitated. He testified that he was confused by
7 what was asked of him, that the restrictions he issued were prophylactic restrictions, and that he
8 applied workers’ compensation law.

9 Dr. Ha’Eri was asked if when he was answering these questions he was answering them
10 with the Worker’s Compensation standard in mind. He answered he was. (RT 73)

11 Dr. Ha’Eri, should not be applying any law, Workers’ Compensation or CalPERS, he
12 should be giving a medical opinion about whether Ms. Navarro is physically capable of
13 performing the duties of her job, and if she is disabled is it permanent or not.

14 Dr. Ha’Eri’s opinion should be disregarded because he states that he issued the
15 restrictions in order to have more time to order tests..to “buy time” to postpone “final opinion.”
16 Based on Dr. Ha’Eri’s testimony, he is uncertain one way or another of whether Ms. Navarro is
17 permanently incapacitated. He does not know and therefore needs more exams.

18 Dr. Ha’Eri speculates that she is not incapacitated. In his first report and as he explained
19 in his testimony, he needed more information, more tests, more time. The natural conclusion that
20 can be reached from his opinion is that he does not know whether she is disabled or not and that
21 he needs more time for more exams. That is his medical opinion.

22 After being asked for a legal conclusion: “In your professional opinion, is the member
23 presently, substantially incapacitated for the performance of his usual duties?,” he concludes that
24 she is not. He states: “After further review of the medical records which do you reveal
25 degenerative changes at multiple levels of the spine, it is this examiner’s opinion that *these*
26 *changes are not to the level of severity that they would interfere with the claimants ability to*
27 *perform her job as a correctional officer.*” This opinion has no evidentiary value because the
28 doctor does not give the trier of fact an opportunity to consider the doctor’s reasoning as to why

1 the changes are not severe enough.

2 The value of opinion evidence rests not in the conclusion reached but in the factors
3 considered and the reasoning employed. (*People v. Coogler* (1969) 71 Cal.2d 153, 166 [77
4 Cal.Rptr. 790, 454 P.2d 686]; *People v. Bassett* (1968) 69 Cal.2d 122, 141 [70 Cal.Rptr. 193,
5 443 P.2d 777].) Where an expert bases his conclusion upon assumptions which are not supported
6 by the record, upon matters which are not reasonably relied upon by other experts, or upon
7 factors which are speculative, remote or conjectural, then his conclusion has no evidentiary
8 value. [Citations.] In those circumstances the expert's opinion cannot rise to the dignity of
9 substantial evidence. [Citation.] When a trial court has accepted an expert's ultimate conclusion
10 without critical consideration of his reasoning, and it appears the conclusion was based upon
11 improper or unwarranted matters, then the judgment must be reversed for lack of substantial
12 evidence. *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-1136

13 Dr. Ha'Eri's opinion that "degenerative changes at multiple levels of the spine... are not
14 to the level of severity that they would interfere with the claimants ability to perform her job as a
15 correctional officer" is speculative and not valuable evidence because he does not give the trier
16 of fact enough medical information to draw a legal conclusion. He states that there is
17 degenerative changes, but does not state the level of change, only that it is "his opinion" that they
18 are not severe enough to incapacitate Ms. Navarro. To give this comment some context, he
19 should have at least mentioned how severe the changes should be that would cause incapacity.

20 **3. The Issues of this Hearing**

21 To preserve the all the issues, Ms. Navarro is compelled to state that the issues of this
22 hearing are 1) Whether Respondent San Juana Navarro is permanently incapacitated from her
23 usual duties as a Correctional Officer for the State of California? 2) If so, whether the incapacity
24 is industrial. 3) The proper effective date of the disability retirement. The Proposed Decision
25 erroneously states that the sole issue is incapacity. (Proposed Decision, Page 2)

26 **CONCLUSION**

27 San Juana Navarro respectfully requests the CalPERS Board review the Closing Briefs
28 and find that she is permanently incapacitated from her Correctional Officer duties within the

1 meaning of the California Public Employees' Retirement Law, and that her incapacity is
2 industrially related.

3 Dated: March 2, 2017



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San Juana N. Navarro

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