ATTACHMENT A

RESPONDENT'S PETITION FOR RECONSIDERATION
Attached is the Petition for Reconsideration.
TO: ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

COMES NOW APPLICANT, KARIN CERVANTES, hereby files this Petition for Reconsideration

ISSUE PRESENTED

Did CalPERS err when it found that Applicant was not permanently and substantially incapacitated from her job when the all but one physician found her to be incapable of working?

SHORT ANSWER

Yes. The testimony of Ms. Cervantes combined with the reports of Dr. Richard Scheinberg and Dr. Marshall Lewis establish clearly that Ms. Cervantes is substantially and permanently incapacitated from her job.

STATEMENT OF FACTS

Ms. Cervantes was hired as an Office Assistant by the California Department of...
Corrections and Rehabilitation in 2007. (Transcript at 4-5). As an office assistant, Ms. Cervantes was responsible for processing mail for over 7500 inmates at Avenal State Prison. (Id. at 5). Processing mail consisted of carrying around 15 trays of mail weighing about 15 pounds, moving 23 bins of mail weighing up to 25 pounds, pushing carts that weigh in excess of 200 pounds and sorting all mail into assigned slots. (Id. at 5, 8). A machine is provided that opens some of the mail they receive, but some mail was manually opened using a letter opener-type knife. (Id. at 6).

Throughout Ms. Cervantes' eight-hour shift, she was expected to use her hands consistently. (Id. at 10).

Ms. Cervantes suffered an industrial injury to her right wrist, back, left knee and left shoulder on December 27, 2011. Ms. Cervantes testified that since her injury in December 2011, all of her doctors have placed work restrictions on her. (Id. at 15). As a result of the injury, Ms. Cervantes saw a number of doctors, including Dr. Scheinberg and Dr. Jahromi. (Id. at 13-15). Her restrictions started with “no sitting for 15 minutes or longer, no standing for 15 minutes or longer, no lifting, and no climbing ladders.” (Id. at 16). Aside from a short period where Ms. Cervantes attempted to work, she never returned to work as a result of these injuries as her work never accommodate these restrictions. (Id. at 14). She has continued to treat her wrists since the injury and began seeing Dr. Marshal Lewis since April of 2015. (Exhibit S). At the hearing, when Ms. Cervantes was asked to pick up a folder with her right hand, she was unable to pick it up. (Transcript at 18). Ms. Cervantes was unable to even pick up a Kleenex with her right hand at the hearing. (Transcript at 18). Due to this weakness, Ms. Cervantes explained that she would not be able to do essentially any of the job duties she was expected to do as an Office Assistant. (Id. at 19-20). In fact, Social Security found Ms. Cervantes permanently disabled from working.

As part of the retirement process, CalPERS sent Ms. Cervantes to Dr. G.B. Ha’Eri. Dr. Ha’Eri performed an evaluation on Ms. Cervantes while she was treating and before she had surgery. (Exhibit 8). In that report, he performed a number of tests on her, including a grip strength test. (Exhibit 8 at 6). Her grip strength measurements were “5/5/5.” (Id.). At this hearing, Dr. Ha’Eri first opined that he believed Ms. Cervantes did not put forth a good effort on the Jamar Dynamometer test and that this test was not valid. (Transcript at 58). Contrary to this new opinion,
Dr. Ha’Eri stated under penalty of perjury in his report that “[Ms. Cervantes] was cooperative during her examination and she appeared to put forth her best effort.” (Exhibit 8 at 48). There is no mention of Ms. Cervantes’ apparent bad faith effort anywhere in the report. (Exhibit 8).

Additionally, Ms. Cervantes had electrodiagnostic testing performed on both wrists. (Exhibit 8 at 33). According to Dr. Ha’Eri, this testing is “super sensitive.” (Transcript at 60). Yet, even though the electrodiagnostic testing confirmed “slight left carpal tunnel syndrome and moderate right carpal tunnel syndrome,” Dr. Ha’Eri opines that because of his manual testing performed at the exam, Ms. Cervantes does not have carpal tunnel syndrome and is not precluded from her job. (Exhibit 8 at 46-47). Dr. Ha’Eri agreed with multiple reports provided to him from Dr. Lewis, in which Dr. Lewis placed restrictions on Ms. Cervantes preventing her from returning to work. (Transcript at 77). Dr. Ha’Eri also reviewed a report from Dr. Scheinberg dated 11/4/2013, in which Dr. Scheinberg also placed restrictions on Ms. Cervantes preventing her from returning to work. (Id.). In that report, Dr. Scheinberg reviewed electrodiagnostics explicitly finding carpal tunnel. (Id.). Somehow, Dr. Ha’Eri inextricably concludes that there is no objective evidence to support a diagnosis of carpal tunnel. (Id., Exhibit B).

Not mentioned anywhere in Dr. Ha’Eri’s report is the fact that Ms. Cervantes was still treating for her conditions and had surgery shortly thereafter. (Exhibit 8, Transcript at 16). The result of this treatment was that her hand became “suck.” (Id. at 18). After recovering from the surgery, Ms. Cervantes was provided work restrictions by Dr. Scheinberg that precluded her from using her right hand. (Exhibit D at 4). In fact, Dr. Ha’Eri agreed with this restriction and that Ms. Cervantes could not return to work. (Transcript at 66).

DISCUSSION

Ms. Cervantes Is Now Permanently And Substantially Incapacitated From Performing The Duties Of An Office Assistant

Government Code section 31270 defines permanent incapacitation for the purpose of disability retirement. Incapacitation from the performance of duty means the substantial inability of
the applicant to perform her duties. *(Mansberger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 876)*. Applicant has the burden of proving that her condition rendered her permanently incapacitated. *(See Masters v. San Bernardino County Employees' Retirement (1995) 32 Cal. App.4th 30, 47)*. Government Code section 20026 provides disability and incapacity for the performance of duty as the basis of retirement, which means disability of permanent or extended and uncertain duration.

Any assertion that Ms. Cervantes is not permanently and substantially incapacitated from her job are unequivocally inaccurate. As demonstrated at trial, Ms. Cervantes is unable to even lift a Kleenex off a table with her right hand. Yet CalPERS is arguing that Ms. Cervantes is fit to return to work in the prison mailroom where she sorts 7500 pieces of mail a day, that she is apparently not disabled from a job where she is expected to carry 15-pound trays of mail and push carts weighing in excess of 200 pounds. The court was able to view Ms. Cervantes' hand. It looks like a claw. She has no movement in any finger. In fact, in order to move a finger she must manually move it with her other hand. However, CalPERS would have the court return Ms. Cervantes to work based on the single report of Dr. Ha'Eri.

When weighing the importance that Dr. Ha'Eri’s opinion should have, the court must consider a couple of issues. First, Dr. Ha'Eri is the only physician to argue that Ms. Cervantes does not have carpal tunnel syndrome. Ms. Cervantes testified she was diagnosed with carpal tunnel syndrome by Dr. Scheinberg, Dr. Lewis, and Dr. Cantrell. Yet Dr. Ha'Eri says no. Ms. Cervantes had electrodiagnostic testing performed, testing which Dr. Ha'Eri testified was supersensitive, which confirmed the presence of carpal tunnel syndrome in both wrists. Yet Dr. Ha'Eri says no. Dr. Ha'Eri tested Ms. Cervantes' grip strength himself at her evaluation. Her grip strength was extremely low. Dr. Ha'Eri says no. Astonishingly, Dr. Ha'Eri opines that Ms. Cervantes did not put forth full effort in this testing. However, there is no mention of Ms. Cervantes’ alleged deception anywhere is his report. To the contrary, he states, “[Ms. Cervantes] was cooperative during her examination and she appeared to put forth her best effort.” It seems oddly convenient to accuse Ms. Cervantes’ of deception since the numbers don’t match his theory. Never mind that all
attempts at grip strength by other physicians resulted in even lower scores. Is Dr. Ha’Eri to be trusted? Should we trust a doctor whose medical opinion is contrary to every other medical opinion available? Should we trust a doctor whose opinion is contrary to testing he testified was “super sensitive?” Should we trust a doctor who directly contradicts statements he made in his medical report? Is this the story?

The story is actually much different. The story is one of an office assistant suffering from a severe industrial injury. As a result of this injury, she has had work restrictions placed on her by a number of doctors, precluding her from returning to work. Throughout the time since she injured herself, she has been treating. She continued to treat up through the surgery she had in 2016. It wasn’t until after the surgery that she was finally permanently incapacitated.

In order to qualify for an industrial disability retirement, Ms. Cervantes must be permanently and substantially incapacitated from the duties of her job. Permanent and substantial incapacity is disability of permanent or extended and uncertain duration. If her testimony that she cannot perform specific functions is not sufficient, surely her inability to even pick up a Kleenex would be. Even if we are to believe Dr. Ha’Eri that at the time of her evaluation she was not incapacitated, she clearly was not at a permanent place. She had been treating with Dr. Lewis for over a year and had surgery only three months later. Whatever disability existed at the time of the evaluation was neither permanent nor extended and uncertain. There is no dispute that she is permanently and substantially incapacitated from her job now. Dr. Ha’Eri surprisingly now agrees with all other physicians, that she cannot perform the duties of her job.

The intent of an industrial disability retirement is to provide some benefits to an injured worker who, because of a work injury, cannot return to work. The point of these hearings is to provide a check on those trying to game the system. That is not this case. In fact, if there ever was a case that an industrial disability retirement was meant for, it would be Ms. Cervantes’ case. She has lost all function in her hand. She was found permanently disabled by social security. At this point, doctors have concluded that she has no use of her right hand altogether. Yet, CalPERS wants the court to find her not permanently and substantially incapacitated. The inextricable
conclusion is that Ms. Cervantes is permanently and substantially incapacitated from her job. Any finding other than her being permanently and substantially incapacitated from her job would be a travesty to the entire CalPERS retirement system.

This is a simple case. Applicant has been disabled from her job since the date of injury. Starting with Dr. Jahromi and continuing on with Dr. Scheinberg and Dr. Lewis, each doctor has placed work restrictions on her that precluded her from performing her job. However, it was not until she recovered from her surgery that she was at a permanent disability. Under Piscioneri v. City of Ontario, Applicant need only show that she was continuously disabled through the period until she is finally permanently and substantially incapacitated. ((2002) 95 Cal.App.4th 1037, 1044). She was disabled at the time of injury. She was disabled at the time of filing the Application. She is permanently incapacitated at this time. The reports from every doctor other than Dr. Ha’Eri confirm these facts.

CONCLUSION

When looking at the totality of the facts, there is only one just conclusion; Ms. Cervantes is permanently and substantially incapacitated from her job. Is it not telling that her employer essentially never took her back after this injury? Is it not telling that all of her treating doctors kept her off work after the injury? Is it not telling that Dr. Ha’Eri has performed over 100 of these evaluations and never once testified for the injured worker? What is the likelihood that, in over 100 cases, not one of them was substantially incapacitated? The intention of an industrial disability retirement is to compensate an injured worker who can no longer return to work because of a work injury. This is that case. The only just result is to award Ms. Cervantes an industrial disability retirement. Any other conclusion flies in the face of justice and equity.

Dated: August 30, 2017

Respectfully Submitted,

[Signature]

Ryan T. Tyotta, Esq.
ADAMS, FERRONE & FERRONE
STATE OF CALIFORNIA  } ss.  
COUNTY OF LOS ANGELES  }

I am the Applicant's Attorney, RYAN T. TROTTA in the above entitled action I have read the foregoing PETITION FOR RECONSIDERATION and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true. I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on 8/30/17 at Westlake Village, California
(date)  (place)

Ryan T. Trotta, Esq.
ATTACHMENT "A"

CalPERS Board Administration  
Attn: Cheree Swedensky, Assistant to the Board  
400 Q Street  
Sacramento, CA 95811  
*Also sent via facsimile: (916) 795-3972

Matthew G. Jacobs, General Counsel via facsimile: (916) 795-3659

Karin Cervantes
PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 4333 Park Terrace Dr., Suite 200, Westlake Village, CA 91361.

On August 31, 2017, I served the foregoing documents described as PETITION FOR RECONSIDERATION with VERIFICATION on all interested parties in this action by placing the true copies thereof enclosed in sealed envelopes addressed as stated on Attachment "A" hereto.

By Mail I caused such envelope to be deposited in the mail at Westlake Village, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after the date of deposit for mailing in affidavit.

EXECUTED on August 31, 2017, at Westlake Village, California.

I DECLARE under penalty of perjury under the laws of the State of California that the above is true and correct.

[Signature]

JENNIFER CARR