

**ATTACHMENT C**

**RESPONDENT(S) ARGUMENT(S)**

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**FAX COVER SHEET**

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NOV - 7 2019

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6  
 7 **BOARD OF ADMINISTRATION**  
 8 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**  
 9

10  
 11 **In the Matter of the Application of for Disability**  
 12 **Retirement System of,**

13 **SHELLEY LIPE,**

14 **Respondent,**

15 **and**

16 **SALINAS CITY ELEMENTARY SCHOOL**  
 17 **DISTRICT,**

18 **Respondent.**

) AGENCY CASE NO. 2019-0153

) OAH NO. 2019040856

) RESPONDENT'S ARGUMENT

) Hearing Date: 09/04/19

) Hearing Location: Oakland

) Prehearing Conf: None

) Settlement Conf: None

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21  
22 Respondent Shelley Lipe objects to the proposed decision and responds as follows:

23 **I. UNDISPUTED FACTS**

24 On or around May 23, 2015 Shelley Lipe suffered a heart attack. On May 26, 2015, Ms.  
 25 Lipe underwent heart surgery. Following recovery from her heart surgery and an extended  
 26 hospital stay, Ms. Lipe entered a cardiac rehabilitation program in September 2015. After  
 27 completing eight weeks of this program, Ms. Lipe's cardiologist released her to return to work.  
 28 Ms. Lipe returned to work in November 2015, however after about two hours on the job, she had  
 swelling in both feet and both legs, and she limped when walking. Dr. Fernandez precluded her

1 from returning to work beginning January 2016 through the filing of Ms. Lipe’s Disability  
2 Retirement Election Application in January 2017. Ms. Lipe applied for disability retirement in  
3 January 2017.

4 Dr. Fernandez’s Physician Report on Disability, which was part of Ms. Lipe’s  
5 Application, declared that as of February 3, 2017 Ms. Lipe was substantially incapacitated from  
6 performance of her usual job duties and that her incapacity was permanent. Dr. Spowert’s  
7 Physician’s Report on Disability, which was part of Ms. Lipe’s Application, declared that as of  
8 March 31, 2017 Ms. Lipe was substantially incapacitated from performance of her usual job  
9 duties and that her incapacity was permanent.

10 Dr. Schmitz did not examine Ms. Lipe until May 25, 2017. In Dr. Schmitz’s AME  
11 Report, he opines that Ms. Lipe was substantially disabled due to her heart attack in May 2015.  
12 Dr. Schmitz further opined that Ms. Lipe was substantially disabled through at least January or  
13 February 2016. Dr. Schmitz testified at the hearing that he had no information or evidence that  
14 would contradict Dr. Spowert’s findings or opinion that Ms. Lipe was permanently disabled at  
15 the time the Disability Retirement Election Application was submitted on January 1, 2017. Dr.  
16 Schmitz testimony did not contradict Dr. Fernandez’s findings or opinion that Ms. Lipe was  
17 permanently disabled on March 3, 2017.

18 **II. DISPUTED FINDINGS OF ADMINISTRATIVE LAW JUDGE**

19 CalPERS and Ms. Lipe stipulated to the foundation and authenticity such that they can be  
20 introduced to prove the truth of the matter asserted of all documents submitted as part of Ms.  
21 Lipe’s Disability Retirement Election Application, which included Dr. Fernandez’s treating  
22 records and Physician’s Report on Disability and Dr. Spowert’s treating records and Physician’s  
23 Report on Disability. Therefore, the Administrative Law Judge was incorrect in her  
24 determination that Dr. Fernandez’s “treating records and his Physician’s Report on Disability  
25 were admitted as hearsay only. As such, they cannot be relied upon to a make a  
26 finding of fact in this proceeding. (See Gov. Code, § 11513, subd. (d).)” Proposed Decision  
Footnote 1.

27 According to Dr. Fernandez’s Report, he last examined Ms. Lipe on February 3, 2017.  
28 Dr. Fernandez’s findings were weight gain; edema; depression/anxiety; fatigue; DOE (dyspnea  
on exertion); and low back pain. Dr. Fernandez’s diagnosis of Ms. Lipe were:

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- 1. CAD (Coronary artery disease) CHF (Congestive heart failure) Ischemic Cardiomyopathy, based on findings of edema, weight gain, carotid artery occlusion, elevated ESR (erythrocyte sedimentation rate), and EF (ejection fraction) of 10-54%.
- 2. Lumbar radiculopathy based on findings of limited ROM (range of motion) and abnormal MRI of lumbar spine.

Dr. Fernandez found that Ms. Lipe was substantially incapacitated from performance of her usual job duties and that her incapacity was permanent as of March 3, 2017.

The Administrative Law Judge was incorrect that Dr. Spowert did not examine Ms. Lipe after September 27, 2016. Dr. Spowert testified at the hearing that he did see Ms. Lipe and examined her just prior to submitting the Physician’s Report on Disability dated March 31, 2017. In Dr. Spowert’s Report he found and diagnosed Ms. Lipe with Carotid Stenosis/disease. Dr. Spowert also wrote that “[Lipe] is unable to stand for extended periods of time due to chronic back issues and lower extremity edema.” Dr. Spowert found that Ms. Lipe was incapacitated from performance of her usual job duties and that her incapacity was permanent as of March 31, 2017.

The Administrative Law Judge was incorrect that “The medical evidence presented by respondent fails to establish that she is permanently incapacitated from the performance of her duties as a Health Aide by reason of edema associated with her heart or carotid stenosis.” There is substantial evidence in the record that Ms. Lipe had continued edema and problems stemming from her surgery and lack of recovery. In addition to Dr. Fernandez’s treating records and Physician’s Report on Disability discussed above (which was erroneously not considered by the Administrative Law Judge), Ms. Lipe testified about ongoing edema, inability to stand for extended periods, fatigue during all relevant time frames, which evidence was uncontradicted. Further, Dr. Schmitz also admitted that his theory of edema stemming from the location of the vein graft is inconsistent with edema having lasted for such an extended period (even for the period before he examined her).

The Administrative Law Judge was incorrect that “The medical evidence does not establish that respondent’s medical conditions of carotid stenosis or stroke precludes respondent from being able to substantially perform the duties of a Health Aide.” The Administrative Law

1 Judge erroneously did not consider Dr. Fernandez's treating records and Physician's Report on  
2 Disability. Dr. Fernandez's treating records and Physician's Report on Disability diagnosed Ms.  
3 Lipe with CAD (Coronary artery disease) CHF (Congestive heart failure) Ischemic  
4 Cardiomyopathy based on findings of edema, weight gain, carotid artery occlusion, elevated  
5 ESR (erythrocyte sedimentation rate), and EF (ejection fraction) of 10-54%. This diagnosis was  
6 as of March 3, 2017. Dr. Schmitz's testimony did not contradict Dr. Fernandez's findings or  
7 opinion that Ms. Lipe was disabled due to carotid stenosis as of March 3, 2017.

8 The Administrative Law Judge was incorrect that "The medical evidence does not  
9 establish that respondent has a psychological condition (depression) that precludes her from  
10 being able to substantially perform the duties of a Health Aide." The Administrative Law Judge  
11 erroneously did not consider Dr. Fernandez's treating records and Physician's Report on  
12 Disability. Dr. Fernandez's Physician's Report on Disability including findings that Ms. Lipe  
13 suffered from depression/anxiety as of March 3, 2017. This evidence was uncontradicted.

14 The Administrative Law Judge was incorrect that "The medical evidence does not  
15 establish that respondent has a back condition that precludes her from being able to substantially  
16 perform the duties of a Health Aide." The Administrative Law Judge erroneously did not  
17 consider Dr. Fernandez's treating records and Physician's Report on Disability. Dr. Fernandez's  
18 treating records and Physician's Report on Disability diagnosed Ms. Lipe with Lumbar  
19 radiculopathy based on findings of limited ROM (range of motion) and abnormal MRI of her  
20 lumbar spine as of March 3, 2017. This evidence was uncontradicted.

### 21 III. CONCLUSION

22 The Administrative Law Judge erroneously excluded and did not consider Dr.  
23 Fernandez's treating records and Physician's Report on Disability. Dr. Fernandez's treating  
24 records clearly establish that Ms. Lipe was disabled from January 2016 through the date of her  
25 Disability Retirement Election Application. Dr. Fernandez's treating records and Physician's  
26 Report on Disability clearly establish that Ms. Lipe was disabled with edema associated with her  
27 heart or carotid stenosis as of March 3, 2017 that precludes her from being able to substantially  
28 perform the duties of a Health Aide. Further, Dr. Fernandez's treating records and Physician's  
Report on Disability clearly establish that Ms. Lipe was disabled with a back condition as of  
March 3, 2017 that precludes her from being able to substantially perform the duties of a Health

RESPONDENT'S ARGUMENT

*Lipe v. Salinas City Elementary School District*

Case No. 2019-0153

1 Aide.

2 The term "incapacitated for the performance of duty" is defined by the Public Employees'  
 3 Retirement Law to mean "disability of permanent or extended and uncertain duration, which is  
 4 expected to last at least 12 consecutive months or will result in death, ... on the basis of  
 5 competent medical opinion." (Gov. Code, § 20026). On or around May 23, 2015 Ms. Lipe  
 6 suffered a major heart attack. Ms. Lipe returned to work in November 2015, however after about  
 7 two hours on the job, she had swelling in both feet and both legs, and she limped when walking.  
 8 Dr. Fernandez precluded her from returning to work beginning January 2016 through the filing  
 9 of Ms. Lipe's Disability Retirement Election Application in January 2017. In Dr. Schmitz's  
 10 AME Report, he opines that Ms. Lipe was substantially disabled due to her heart attack in May  
 11 2015 and at least through January or February 2016. Dr. Schmitz testified that he had no  
 12 information or evidence that would contradict Dr. Spowert's findings or opinion that Ms. Lipe  
 13 was permanently disabled at the time the Disability Retirement Election Application was  
 14 submitted on January 1, 2017. Dr. Schmitz testimony did not contradict Dr. Fernandez's findings  
 15 or opinion that Ms. Lipe was permanently disabled between January 2016 and March 3, 2017.

16 Based on the undisputed evidence, Ms. Lipe was "incapacitated for the performance of  
 17 her duty" from May 23, 2015 through at least March 3, 2017, over 12 consecutive months. The  
 18 Administrative Law Judge's focus on opposing expert's opinions as to Ms. Lipe's condition in  
 19 May 2017 and thereafter is erroneous as a matter of law, because it does not contradict Ms.  
 20 Lipe's disability during the required 12 consecutive months period. To accept the Administrative  
 21 Law Judge's proposed decision would constitute error as a matter of law.

22 Further, the Administrative Law Judge was erroneous as a matter of law that Ms. Lipe  
 23 must be "substantially incapacitated for performance of duty physically or mentally as a Health  
 24 Aide when she retired by reason of a medical or psychological condition of an extended and  
 25 uncertain duration." (emphasis added).

26 Gov. Code Section 21154 states: The application shall be made only (a) while the  
 27 member is in state service, or (b) while the member for whom contributions will be made  
 28 under Section 20997, is absent on military service, or (c) within four months after the  
 discontinuance of the state service of the member, or while on an approved leave of absence, or  
 (d) while the member is physically or mentally incapacitated to perform duties from the date of

1 discontinuance of state service to the time of application or motion. On receipt of an application  
 2 for disability retirement of a member, other than a local safety member with the exception of a  
 3 school safety member, the board shall, or of its own motion it may, order a medical examination  
 4 of a member who is otherwise eligible to retire for disability to determine whether the member is  
 5 incapacitated for the performance of duty. On receipt of the application with respect to a local  
 6 safety member other than a school safety member, the board shall request the governing body of  
 7 the contracting agency employing the member to make the determination.

8 “Gov C § 21154 was not ambiguous and plainly stated four separate times, set off by  
 9 commas, when an application for disability retirement could be filed: while the applicant was (1)  
 10 working; (2) in military service; (3) filing within four months after the termination of service; or  
 11 (4) physically and mentally incapacitated. There was no conflict between these time periods, and  
 12 they each independently stated a time within which an application could be filed. Further,  
 13 disability was often of uncertain duration. If an employee was able to prove that he or she had  
 14 been continuously disabled from the date of discontinuance of state service to the time of the  
 15 application for disability retirement, the application was timely under clause (d) of §  
 16 21154.” Piscioneri v. City of Ontario (Cal. App. 4th Dist. Jan. 8, 2002), 95 Cal. App. 4th 1037,  
 17 116 Cal. Rptr. 2d 38. “Notably, § 21154 specifies that, when a timely application is filed, the  
 18 employee must be both otherwise eligible to retire for disability and incapacitated for  
 19 performance of duty to be granted a disability retirement. Haywood v. American River Fire  
 20 Protection Dist. (Cal. App. 3d Dist. Nov. 20, 1998), 67 Cal. App. 4th 1292, 79 Cal. Rptr. 2d 749.

21 Here, Ms. Lipe attempted to return to work in November 2015, however, she was unable  
 22 to continue to work beyond two hours. After a year of being unable to work due to continuous  
 23 disability, Ms. Lipe elected to retire. The date the twelve months begins to run is therefore the  
 24 date she became disabled (May 2015), not the date she submitted her Application.

25 Dated: November 6, 2019

MONCRIEF & HART, PC

26 

27 Paul Hart, Esq.  
 28 Attorney for Respondent  
 SHELLEY LIPE