

ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)

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VIA FIRST CLASS MAIL

Cheree Swendensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701

**Re: Respondent's Argument, Ref. No. 2017-1173**

Dear Ms. Swendensky:

Respondent urges the CalPERS Board to adopt the Proposed Decision issued by Administrative Judge Erlinda Shrenger on January 23, 2020.

Relevant Facts

Respondent worked as a Psychiatric Technician ("PT") for the California Department of State Hospitals - Atascadero from 2006 to 2012. On March 21, 2012, while performing her duties as a PT, a patient had symptoms of a seizure necessitating Respondent to grab and lower him to the floor to avoid injury. The patient was quite heavy (300 pounds) and, in the process, fell on Respondent, causing severe injury to her back, shoulder, and neck. Respondent immediately sought medical treatment for her injuries.

On January 23, 2015, Respondent submitted an application for industrial disability retirement based on the orthopedic injuries she sustained from the 2012 work incident. CalPERS approved Respondent's application on June 24, 2015, and Respondent retired for disability effective November 8, 2013, on the basis of her orthopedic (back) condition. (Ex. 1, p. 2.) In July 2017, Respondent's file was re-evaluated by CalPERS to determine if Respondent continued to qualify for industrial disability retirement.

To aid in this determination, CalPERS arranged for Respondent to attend an orthopedic independent medical examination by Dr. Ernest Miller. Dr. Miller concluded in his report that Respondent was no longer substantially incapacitated, and as such was no longer eligible for disability retirement benefits. (Ex. 12, p. 17.) By letter dated September 7, 2017, CalPERS notified Respondent of its determination and informed her of her appeal rights. (Ex. 1, p. 5.) Respondent appealed CalPERS's re-evaluation decision and an administrative hearing was held on December 13, 2019 to determine whether Respondent remains substantially incapacitated.

Dr. Mohlenbrock and Respondent testified on behalf of Respondent, while Dr. Miller testified for CalPERS. Respondent testified about the events giving rise to her disability claim, and the back injuries she suffered as a result. She explained that before the March 2012 incident,

she could perform all the duties and essential functions required of a PT. Now, she struggles with daily activities and is dependent upon others for menial tasks such as loading dishes and pushing a shopping cart. Dr. Mohlenbrock, an orthopedic surgeon who evaluated Respondent back in May 2019, corroborated Respondent's testimony and confirmed that she was substantially incapacitated. Dr. Mohlenbrock's opinion was based on his personal evaluation of Respondent and his review of her medical records and other documents pertaining to her back condition.

Dr. Mohlenbrock performed an independent medical examination of Respondent, in the field of orthopedics, in May 2019. Dr. Mohlenbrock reviewed medical records and other records and documents provided by Respondent and prepared a written report dated May 4, 2019. (Ex. A.) Dr. Mohlenbrock found that Respondent suffers from chronic lumbar strain with evidence of degenerative changes in the lumbar spine and chronic cervical strain. (Ex. A, p. 9.) These diagnoses, along with Respondent's physical examination results, led him to conclude that Respondent is substantially unable to perform the duties of a PT.

Although Dr. Miller and Dr. Mohlenbrock agreed as to Respondent's MRI findings, they disagreed as to the effects of such findings. Dr. Mohlenbrock denounced Dr. Miller's assertion that the lack of a herniated disc on Respondent's MRI cannot lead to a disability finding. Dr. Mohlenbrock criticized such a narrow perspective and explained that the lack of a herniated disc does not preclude a positive disability determination, nor does it mean Respondent does not have severe pain. In fact, Respondent's MRI from June 2012 documents a disc protrusion that, as Dr. Mohlenbrock confirmed on the stand, can cause nerve root irritation resulting in pain and disability. Dr. Mohlenbrock further clarified that Respondent also suffers from pathology in the small joints in the lower lumbar area, which contribute to her severe pain and preclude her from performing her duties.

Furthermore, Dr. Mohlenbrock critiqued Dr. Miller's assessment that Respondent's complaints are limited to back pain. Indeed, Dr. Mohlenbrock acknowledged during the Hearing that Respondent's back pain was a major symptom, but clarified that such pain constitutes only a *part* of Respondent's medical problems. When CalPERS attempted to narrow Dr. Mohlenbrock's definition of disability to conform to Dr. Miller's disability definition during cross examination (i.e. that no herniated disc means no disability finding) Dr. Mohlenbrock refused to do so, urging that a patient's back problem cannot be separated from the person. Rather, a doctor must look at the entire situation that the patient presents.

On January 23, 2020, Judge Shrenger issued a Proposed Decision granting Respondent's appeal and prohibiting CalPERS from cancelling her disability benefits.

Argument

CalPERS failed to prove by a preponderance of the evidence that Respondent's industrial disability benefits should be cancelled because it was unable to show that Respondent was no longer substantially incapacitated from the performance of her duties as a psychiatric technician. Judge Shrenger's opinion is well-reasoned, logical, and comports with the law. Judge Shrenger correctly concluded that Respondent's evidence was more persuasive than CalPERS's evidence, pointing to CalPERS's approval of Respondent's disability application back in June 2015 as a "significant factor" in favor of Respondent. Indeed, in approving Respondent's application CalPERS relied on many of the same medical records that Dr. Miller reviewed prior to his evaluation in August 2017. Further, the medical records relating to Respondent's orthopedic condition between CalPERS's approval in June 2015 and Dr. Miller's evaluation in August 2017

show no change in Respondent's condition. Dr. Miller did not testify that Respondent has experienced marked improvement since her evaluations back in 2012. In fact, the records reflect the same diagnoses and complaints Respondent has alleged since the March 12, 2012 incident and do not show any marked improvement. Since CalPERS approved Respondent's disability application in 2015 based on an orthopedic condition that has not changed, it has no basis to conclude that she is no longer entitled to benefits.

Moreover, Dr. Mohlenbrock's testimony was more credible than Dr. Miller's. First, Dr. Mohlenbrock conducted his examination of Respondent according to the issue at hand: whether Respondent is substantially unable to perform the duties of a psychiatric technician. Dr. Mohlenbrock confirmed during his testimony that a psychiatric technician has to work and interact with inmate-patients in a highly volatile environment, which requires the technician to be fully capable to physically respond to situations as they arise, including responding to alarms and assisting other PTs as needed. Dr. Mohlenbrock provided reliable evidence that Respondent does **not** possess the physical readiness to adequately respond to such situations and the back condition for which she was placed on disability still continues to this day. Out of the two orthopedic doctors, Dr. Mohlenbrock was the only one who cross referenced Respondent's pain with her job duties. Dr. Miller, on the other hand, failed to reference Respondent's job duties or even explain how, despite her condition, she is able to perform the duties required of a PT.

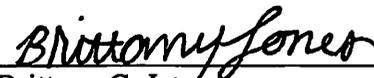
Second, Dr. Mohlenbrock successfully disputed Dr. Miller's findings during his testimony when he explained that the lack of a herniated disc is not the only indicator of disability. Dr. Miller testified that Respondent is not disabled because her MRIs did not show evidence of a herniated disk. This conclusion was directly contradicted by Dr. Mohlenbrock, who confirmed that a normal MRI does not preclude a disability finding.

Conclusion

For the reasons set forth above, Respondent respectfully requests that the Board adopt the Proposed Decision which finds Respondent incapacitated from her customary duties as a Psychiatric Technician and allows her disability retirement. Lastly, Respondent advocates for designation of this decision as precedential.

Very truly yours,

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Brittany C. Jones