ATTACHMENT C

RESPONDENT’S ARGUMENT
FAX COVER LETTER

TO: Cheree Swedensky, Assistant to the Board

FIRM: CalPERS Executive Office

CITY: Sacramento, California

FAX No (916) 795-3972 PHONE NO. (916) 795-3675

Total Number of Pages (including Cover Letter): 5

FROM: Andrew Cantrell

CANTRELL • GREEN, A PROFESSIONAL CORPORATION


Dear Ms. Swedensky,

Attached please find Respondents’ Arguments Against Proposed Decision to be presented to the Board for its upcoming July 15, 2020 meeting. A hard copy is also being mailed to you today.

Thank you.

I served the following documents to the fax number listed above:

Sincerely,

Signed: ___________________________ Date: 06/24/20 Time: 11:00 A.M.

IF YOU DID NOT RECEIVE ALL PAGES OR RECEIVED THIS FAX IN ERROR, PLEASE NOTIFY US AS SOON AS POSSIBLE @ (562) 432-8421.

STATE OF California, County of Los Angeles

I am employed in the aforesaid county, State of California. I am over the age of 18 years and not a party to the within action. My business address is 444 W. Ocean Blvd., Suite 1750, Long Beach, CA 90802

I served the following documents to the fax number listed above:

Sincerely,

Signed: ___________________________ Date: 06/24/20 Time: 11:00 A.M.

IF YOU DID NOT RECEIVE ALL PAGES OR RECEIVED THIS FAX IN ERROR, PLEASE NOTIFY US AS SOON AS POSSIBLE @ (562) 432-8421.
In all but the rarest of occasions, if the opinion from the CalPERS medical expert is deserving of little weight, then the Applicant will be found entitled to a disability retirement. We have a case where the Administrative Law Judge (ALJ) has found that CalPERS’ medical expert, Dr. Warrick, acted as an advocate rather than as an independent expert. (Proposed Decision pg. 224, 44C.) In 44D of the Proposed Decision, the ALJ states the following:

Given the foregoing, Dr. Warrick’s testimony took on the tenor of an advocate, rather than an impartial witness, and this diminished his general credibility as an expert.
The ALJ goes on to cite examples of Dr. Warrick dodging questions and offering what can only be described as confounding or perplexing testimony. For example, the doctor was steadfast that all the other doctors that diagnosed Post Traumatic Stress Disorder (PTSD) were “confused about PTSD.” (Proposed Decision, pg. 24, 44C.) Dr. Warrick has diagnosed Adjustment Disorder rather than PTSD. At some point, both treating physicians, Dr. Thomas and Dr. Ryles, have diagnosed PTSD and Adjustment Disorder. The impartial physician in this case is Dr. Zarrin, who served as a Qualified Medical Examiner (QME) on the Applicant’s workers’ compensation case. Dr. Zarrin also diagnosed both PTSD and Adjustment Disorder but found that the PTSD subsided after an extended period of time and that, by 2019, Applicant was manifesting the symptoms of an Adjustment Disorder. The ALJ has adopted the opinion of Dr. Zarrin.

Dr. Warrick also stood pat on some outlandish opinions, including his pronouncement that all patients who suffer from PTSD will actually use the word “trauma” when describing their condition. The ALJ has commented on this exchange in her Decision:

Q: When you talked to her, did she not discuss with you the incident where the individual attempted suicide?
A: But she didn’t use the word “trauma”.
Q: Does every person who suffers from PTSD come to you and say “I have trauma”?
A: Yes.
Q: Really?
A: Yes.
Q: So I want to make sure I understand what you’re saying. You’re saying that in all cases, an individual uses the word “trauma” if they have PTSD?
A: Yes.

Obviously, that statement is preposterous. For good reason, the ALJ has not relied upon Dr. Warrick. However, she does not support her Decision with the conclusions from treating physician, Dr. Thomas, either. Instead, the ALJ bases her Decision on the opinion and reasoning proffered by QME Dr. Zarrin.

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An expert medical opinion is normally required when a medical issue is involved, since the opinion of a layman on a medical issue will not be reliable. Peter Kiewit Sons v. Industrial Accident Commission. (1965) 234 Cal.App.2d 831, 838.

The problem is that the ALJ has, Applicant believes inadvertently, mischaracterized the conclusions reached by Dr. Zarrin, who in fact provides an opinion finding that Applicant cannot perform her job duties due to the residual symptomatology resulting from the Adjustment Disorder.

REPORTING FROM DR ZARRIN

The ALJ relies upon the opinion of Dr. Zarrin in concluding that O'Donnell is capable of returning to her usual and customary job as a Dispatcher with City of Ventura. However, a couple of statements from Dr. Zarrin need to be looked at more closely. Dr Zarrin states that Applicant may return to her job, not now, but in the future. Note the doctor’s language:

It is anticipated that with even further time and further mental health treatment she should have a good prognosis and there is anticipated further improvement in her emotional condition. As such it would be expected that she would be able to handle and maintain her duties and responsibilities as a public safety dispatcher.

(Proposed decision, Page 12)

This report from Dr Zarrin was issued years after O'Donnell stopped working. The report is from 2019; O'Donnell last worked on September 30, 2017. As of Dr. Zarrin’s reporting, Applicant had been disabled, and continued to be disabled, from performing her job duties as a Dispatcher for the City of Ventura. Dr. Zarrin’s opinions reflect an estimation as to a future condition. They are prospective and do not indicate a present capacity. The doctor is not saying that, at this time, Applicant can perform her job duties. Dr. Zarrin states that at that point in the future she would require a shorter work schedule and breaks throughout her shift. No evidence was presented to show that the Applicant could be accommodated with such restrictions.

If the ALJ is relying upon the opinion from Dr. Zarrin, then the conclusion must be that the Respondent (Applicant) is incapable of substantially performing her job duties.

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Whether the condition is PTSD or an Adjustment disorder is immaterial, even to the ALJ. The issue is whether Applicant is incapable of substantially performing her job duties due to an accepted psychiatric impairment. All the doctors, including Dr. Warrick, found Respondent to be credible and sincere. The SIMS test requested by Dr. Warrick shows that O'Donnell is not malingering or exaggerating. Her symptoms are credible, and Dr. Warrick accepted them as such. Therefore, whether caused by the PTSD or Adjustment Disorder, they are real and they inhibit her ability to perform certain activities.

CONCLUSION

The Respondent, Kimberly O'Donnell, should be granted a Disability Retirement.

Date: June 24, 2020

CANTRELL • GREEN
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DANNY POLHAMUS, (Signed Electronically)
Attorney for Kimberly O'Donnell