

ATTACHMENT C

RESPONDENT'S ARGUMENT

Attachment C

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8 BOARD OF ADMINISTRATION
 9 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

10	In the Matter of Application for Industrial Disability Retirement of:)	OAH NO. 2020030058
11	MARIAN HUSTED,)	AGENCY CASE NO. 2019-1193
12	Respondent,)	
13	AND)	RESPONDENT'S ARGUMENT
14	DEPARTMENT OF STATE HOSPITALS,)	AGAINST PROPOSED DECISION
15	COALINGA SECURE TREATMENT FACILITY)	Hearing Dates: 04/15/2021 & 05/26/2021
16	Respondent.)	
17)	

18
19 Respondent Marian Husted objects to the Proposed Decision of the Administrative Law
20 Judge (ALJ). The ALJ overstates case law and fails to consider other pertinent cases which may
21 support for a finding of incapacity.

22 In Legal Conclusions 7, the ALJ states categorically that, "Findings issued for the purposes
 23 of workers' compensation are not evidence that respondent's injuries are substantially
 24 incapacitating for the purposes of disability retirement." That is not correct. The ALJ cites the case
 25 of Bianchi v City of San Diego (1989) 214 Cal.App.3d 563. However, the Bianchi Court also finds,
 26 "Under limited circumstances, a WCAB award to an employee may collaterally estop the
 27 employee's retirement board from relitigating issues previously decided in the WCAB proceeding."
 28 (Bianchi, supra, at 566-567.) The ALJ is required to address all issues and law pertaining to the

1 issue.

2 FAILURE TO CONSIDER THE WOLFMAN CASE

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4 The Proposed Decision is partially based upon the notion that there is no evidence to
5 support a finding that Husted is incapable of performing her past job as a Supervising
6 Rehabilitation Therapist. Husted firmly disagrees. It seems apparent that the ALJ believed that the
7 only arguments supporting incapacity are based upon prophylactic work restrictions or restrictions
8 without merit because there are no objective findings to support the restrictions. Both contentions
9 are unfounded.

10 It is true that the general rule prohibits prophylactic work restrictions as a basis to grant a
11 disability retirement. However, as is often the case, there is an exception to the rule. In our case, the
12 exception is found in Wolfman v. Board of Trustees (1983) 148 Cal.App.3d 787.

13 Wolfman was a teacher who was found incapable of performing her job duties because of a
14 prophylactic work restriction preventing work in the classroom. The restriction was imposed
15 because a return would result in the reoccurrence of severe and disabling bronchial asthma. This
16 was not a case of speculative future disability. The return to the classroom would trigger the
17 disabling symptoms again. Further injury would occur if she returned to her duties.

18 Wolfman has facts very similar to ours. The ALJ specifically mentions the physical duties
19 of a Supervising Rehabilitation Therapist. Some of these duties Husted could presently perform
20 keeping in mind that her symptoms are presently under control due to her residency in the State of
21 Washington, a locale not known for harboring Valley Fever spores. The ALJ fails to address this
22 variable. The record is filled with mention of the medical status quo being preserved due to
23 Husted's residency in the Pacific Northwest. If a prophylactic work restriction is needed to prevent
24 the revival of the severe symptoms from Valley Fever, then it is a proper basis for granting the
25 Disability Retirement. The ALJ may weigh the evidence and determine that such is not the case, but
26 she must at least address the issue and discuss the basis for her conclusion. To this point, the matter
27 has not been alluded to, despite its being the crux of Husted's argument.

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1 Respondent Husted discussed the applicability of Wolfman in her Reply brief. That is
2 neither noted in the Proposed Decision nor is Wolfman discussed. This is a glaring error. Of impor-
3 tance is the fact that Applicant suffered from flare-ups even while living in the State of
4 Washington. This is pointed out by treating doctor Simmons (TP pg. 24, lines 18-23.) If it is
5 accepted that Applicant had Valley Fever and is predisposed to flare-ups, then the imposition of the
6 prophylactic restrictions is appropriate to prevent the foreseeable return of the severe
7 symptomatology. Wolfman would then apply, and the Applicant should be granted the disability
8 retirement.

9 The ALJ never broaches the subject. A Decision based upon this Proposed Decision would
10 not be based upon substantial evidence and would likely be reversed by the Courts. It is the ALJ's
11 duty to at least discuss the matter.

12 CREDIBILITY

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15 In all cases, the issue of credibility is of profound significance. In this case, it works in
16 Husted's favor. All the doctors, including Dr. Leonard, the CalPERS IME, find Husted to be
17 sincere and credible. If so, her statements regarding symptoms should be given great weight. Yet
18 the ALJ does not discuss the issue of credibility. Instead, the ALJ points out that disabling
19 symptoms such as fatigue are merely subjective and should not be the basis of a favorable decision.
20 This conclusion was made without noting that even Dr. Leonard found Husted to be credible. It
21 cannot possibly be that she is credible and sincere and yet misstating her symptoms. This is a fatal
22 error in the Proposed Decision. If her statements are credible, then she cannot work in the central
23 valley due to the return of the severe symptoms.

24 The ALJ places importance on a perception that Husted had no objective findings (Finding
25 50), leaving one to presume that all symptoms were in fact subjective; but that is not the case. The
26 ALJ's own summary of medical findings shows the presence of objective findings. The following
27 objective findings are noted:

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PROOF OF SERVICE BY MAIL AND FACSIMILE

Re: Marian Husted – Application for CalPERS Industrial Disability Retirement
OAH No. 2020030058
Agency Case No. 2019-1193

I am employed at CANTRELL, GREEN, 444 W OCEAN BLVD SUITE 1750, LONG BEACH, CA 90802, in the County of Los Angeles. I am over the age of 18 years and not a party to this cause. I am readily familiar with the law office's practice for collection and processing of correspondence for mailing with the United States Postal Service. I am also familiar on how to operate this law office's fax machine.

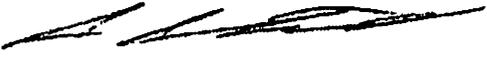
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RESPONDENT'S ARGUMENT AGAINST PROPOSED DECISION

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The correspondence will be placed for deposit in the United States Postal Service in a sealed envelope placed for collection and mailing today following ordinary business practices at the above place of business. The correspondence will also be faxed today to the above listed party and fax number. I declare under penalty of perjury that the above is true and correct. Executed on October 28, 2021, at Long Beach, California.



ANDREW CANTRELL