

**ATTACHMENT A**

**RESPONDENT'S PETITION FOR RECONSIDERATION**

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### Petition for Reconsideration

Date: February 1, 2023

Re: Appeal Regarding the Application for Industrial Disability Retirement of EUSEBIO M. MONTEJO, Respondent, and CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, CALIFORNIA MEDICAL FACILITY, Respondent. Hearing Date: October 31 through November 2, 2022; OAH No. 2021110530; Case No. 2021-0565

Via Facsimile and email

Dear CalPERS Board Members:

I am making my final appeal to the board and request for reconsideration in adopting ALJ Ed Washington's decision to deny my application for Industrial Disability Retirement. I want the board to consider the entire administrative record to base their decisions on the case.

**I contend that ALJ Ed Washington's decision was not based on facts and did not apply the law correctly. That judge Ed Washington must manipulate the hearing, ignore and suppress evidence to arrive at his conclusion.**

#### 1. The bifurcation of my case was wrong

Whether or not I was substantially incapacitated at the time I applied for IDR is integral to whether or not Haywood and its progeny apply to me. ALJ Ed Washington was wrong to bifurcate my case. CalPERS did not supply any evidence that refuted my claim that I was not substantially incapacitated. CalPERS did not submit evidence that I was not substantially incapacitated when I applied for IDR.

#### Ongoing substantial incapacity from orthopedic and internal conditions

CalPERS IME expert opinion by Dr. McHenry, a cardiologist, substantiated my claim that I was substantially incapacitated at the time of my IDR application and continue to be substantially incapacitated for orthopedic and internal conditions into the present.

In the expert opinion of Dr. McHenry, I was substantially incapacitated on May 12, 2020, for my right ankle orthopedic injury. In addition, I was substantially incapacitated by my internal conditions sometime in 2020.

CalPERS did not present evidence that refuted Dr. McHenry's conclusions about my ongoing substantial incapacity for my internal conditions.

#### 2. Factual errors in ALJ Ed Washington's decision

A.

Page 5, paragraph 8. ALJ Ed Washington noted that I submitted with my disability application a Physician's Report on Disability prepared by Pauline Perez, MD. This is factually not true. I submitted multiple Physician Report on disability. Dr. McCormick, a Ph.D. psychologist, prepared these; Dr. Kou, orthopedic surgeon; Dr. Kirby, podiatrist; Dr. Cantu, Urgent Care/Worker's Compensation physician; Dr. Marx, orthopedic surgeon foot and ankle specialist, and Dr. Whaley, an orthopedic surgeon.

ALJ did not explain why he ignored these documents when he decided on my case.

**B.**

On pg. 7, paragraph 13, ALJ Ed Washington states that during COVID-19, Pandemic, physicians at CMF were required to walk to the patient-inmates' cells to provide medical consultation. First, CalPERS did not supply any evidence to support that this is a factual statement. Second, even if workflows were different because of the Covid Pandemic, CalPERS did not supply any evidence that the Covid Pandemic had ended and the workflows in prison were now back to a pre-pandemic state.

In fact, because of the COVID-19 pandemic, per the CDC guidelines, movement within the prison was decreased to prevent the spread of COVID-19. Judge Ed Washington needs to provide how he arrived at this conclusion. Witnesses Dr. Aguilera and Dr. Shute, physicians and surgeons, and colleagues at CMF can testify that walking was required before Covid and during Covid. Also, the physical expectation and essential functions documents list that walking is a requirement of a physician and surgeon.

**C.**

On page 6, paragraph 10, ALJ Ed Washington noted that CalPERS filed a statement of the issue on November 9, 2021.

*"The sole issue for determination was whether respondent was substantially incapacitated from the performance of his usual and customary duties as a Physician and Surgeon for CDCR when he applied for disability retirement."*

On September 14, 2022, CalPERS filed an Amended Statement of Issue to include internal conditions. ALJ Ed Washington was not complete when he listed the facts about the statement of issue. He did not explain why he failed to list the Amended statement of the issue, which included my internal conditions and my complete orthopedic claims of my right and left ankle and my right hip.

**D.**

CalPERS did not dispute the **Essential Function List** that reports the physical requirements of a physician and surgeon at CMF. For example but not limited to;

- Ability to Respond quickly and appropriately during an emergency. Ability to maneuver or respond quickly over varying surfaces, including uneven ground, dirt areas, pavement, cement, etc, sometimes inclement weather, conditions.  
Responding/maneuvering can also include stairs or several flights of stairs.

When on call, a physician works alone, and the clinic is not open. The physician must walk long distances, sometimes up to 4-5 miles, when on call to attend to various areas of the prison.

CalPERS did not provide evidence that the document **Physical Requirements of Position/Occupation Title**, dated October 27, 2020, was specific to COVID Pandemic workflows. Nor did CalPERS supply evidence that the COVID pandemic had ended when I was made AWOL and subsequently dismissed.

**E.**

Ms. Kelly Mack, RTWC, decided that I return to work based on November 17, 2021, worker's compensation PQME report by Dr. Kolondenker. Ms. Mack was not a medical expert and could not interpret the PQME report, nor could the colleagues she claimed to have consulted with. Ms. Mack did not clarify who the colleagues were.

My worker's compensation claim has yet to be adjudicated. There are competing medical opinions about my right ankle. Ms. Mack did not clarify why she chose the PQME report above that of my orthopedic treating providers. ALJ Ed Washington did not explain why he relied on testimony from Ms. Mack as factual while at the same time dismissing my opinion despite me being a physician.

**F.**

ALJ Ed Washington noted that, in part, Ms. Mack decided because I was at MMI. ALJ Ed Washington also cited the PQME report and clarified that MMI meant Maximum Medical Improvement.

Judge Ed Washington, during the hearing, stated that he was not an expert and could not interpret the PQME report. Ms. Mack and ALJ Ed Washington interpret statements in the PQME report. In this case, that MMI means that I am recovered.

MMI means that further intervention will not result in further recovery in the next 12 months.

Example: A cervical spine injury that leaves a patient paralyzed from the neck is considered at MMI if all appropriate interventions have been rendered. No further surgery or therapy or medication will result in a change in the next 12 months. So, a person can be at MMI and still be paralyzed.

Judge Ed Washington did not explain why he seemingly accepted MMI to mean recovered. Unfortunately, the medical record shows that I have a peroneal tear recurrence and require further surgery.

**G.**

On page 13, paragraph 31, ALJ Ed Washington wrote, "Respondent testified that in addition to his right ankle injury, he suffered from other ailments not specified in his application that he experienced before his separation from employment with CDCR."

This is factually incorrect; in my application in section 3, I wrote that I was a new type 2 diabetic with sleep apnea. In addition, my internal condition of fast heart rate was part of my application for IDR, and CalPERS had supporting medical evidence for this. Further, I often communicated with CalPERS and supplied abundant medical evidence of my other orthopedic injuries and internal conditions.

ALJ Ed Washington must ignore the available evidence to make such a statement.

**3. Suppression of evidence**

Throughout the process, ALJ Ed Washington indicated that he had a low threshold to allow for evidence to be admitted. That he would decide on the value of the evidence.

At the hearing, ALJ Ed Washington did not allow my hearsay exception business record evidence to be admitted. The medical record that was not allowed refutes CMF's assertion that I was no longer substantially incapacitated and, therefore, could return to work.

ALJ Ed Washington did not allow for expert testimony by Dr. Hernandez on my behalf, which further refuted CMF's assertion that I was no longer incapacitated.

ALJ Ed Washington did not allow for hearsay medical evidence, my medical record, that substantiated my claim of ongoing substantial incapacity.

Had ALJ ED Washington allowed for the above, he would have had no choice but to arrive at a different conclusion.

#### **4. False testimony by Ms. Mack, the return-to-work coordinator**

Ms. Mack testified under oath that the decision to have me return to work was solely based on Dr. Kolondenker PQME report dated November 17, 2021. Ms. Mack testified under oath that Dr. Kolondenker examined me and provided an opinion on all my accepted orthopedic conditions. This is false; Dr. Kolondenker is a podiatrist and could not provide an opinion on my right hip. Attached is a supplemental from Dr. Kolondenker, evidence not available at the hearing<sup>1</sup>. In the supplemental, Dr. Kolondenker clearly states that he did not offer an opinion about impairment or disability regarding my right hip. ALJ Ed Washington did not accept my objection, despite me being a physician.

Ms. Mack testified that I was made AWOL on December 19, 2021. This needs to be corrected; I was made AWOL on May 11, 2022.

Regarding the ankle, Ms. Mack did not indicate why CMF did not consider Dr. Kou/Meghan Smith, PA, my Orthopedic surgeon and Physician Assistant's restriction recommendations. Ms. Mack did not provide evidence to support the statement pg. 10, paragraph 19 (ALJ Ed Washington's decision), that "she must rely on information provided and substantiated by the doctors assigned to [my] case."

By dismissing me via AWOL, despite the presence of orthopedic and internal conditions, CMF violated the Americans with Disabilities Act. This is currently being litigated in the state superior court.

#### **5. Haywood does not apply**

Haywood spells out an exception that protects my right to IDR in that I am eligible for IDR as long as the dismissal is unrelated to my disability.

Dr. Kolondenker's PQME report does not provide a sound rationale for his medical opinion. He did not explain how or why he arrived at his conclusions. Also, as I explained at the hearing, he did not comment on my right hip injury since he is a podiatrist.

CMF should have explained why they accepted and acted on the PQME (obviously erroneous) report despite my treating provider supplying a competing medical opinion, with restrictions lasting from May 1, 2021, to May 1, 2022.

Therefore, the accepted medical evidence showed that I had not returned to work because of orthopedic restrictions. Therefore, I was made AWOL because I had not returned to work and was subsequently dismissed by AWOL statutes. Therefore, my dismissal is related to my ongoing disability.

CalPERS did not present any evidence that refuted my claim that Dr. Kolondenker did not examine me or express a written opinion about my right hip.

ALJ Ed Washington did not explain why he dismissed my opinion because I am a physician. More importantly, his conclusion that I did not have a disability that was substantially incapacitating was based solely on Dr. Kolondenker's PQME report. ALJ Ed Washington did not explain why he found merit in Dr. Kolondenker's PQME report, a worker's compensation opinion, above that of CalPERS' IME expert, Dr. McHenry.

#### **6. The Smith court added an exception of "principles of equity."**

The Smith court said, "Conceivably, there may be facts under which a court, applying principles of equity, will deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause." *Smith v. City of Napa*, 120 Cal.App.4th 194, 206-7 (Cal. Ct. App. 2004)

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<sup>1</sup> Dr. Kolondenker Supplemental 1/12/23

**Example 1**

My application for IDR was accepted on October 15, 2020. My application for IDR was denied on June 7, 2021, for my orthopedic and psych conditions. Pending was my hearing to rule on my orthopedic and psych claims. The Smith court cited the example that would meet the criteria of principles of equity: "if the plaintiff had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal." *Smith v. City of Napa*, 120 Cal.App.4th 194, 207 (Cal. Ct. App. 2004) Through no fault, the hearing for my appeal was scheduled two years after I applied for IDR.

**Example 2**

The Smith court gave a second example, "is their undisputed evidence that the plaintiff was eligible for a CalPERS disability retirement, such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb)." *Smith v. City of Napa*, 120 Cal.App.4th 194, 207 (Cal. Ct. App. 2004)

The medical evidence I have provided is unequivocal for my internal conditions; my treating provider Dr. Pauline Perez PCP, Dr. Khan, Sleep Specialist, and CalPERS's Dr. McHenry Cardiologist, IME, all concluded that Sleep Apnea is substantially incapacitating and was at the time of my application and preceded the AWOL dismissal.

**7. The Smith court further expanded on Haywood and noted that a matured claim for disability could not be extinguished by adverse action dismissal for cause**

"Even if an agency dismisses an employee solely for a cause unrelated to a disabling medical condition, this cannot result in the forfeiture of a matured right to a pension absent express legislative direction to that effect." *Smith v. City of Napa*, 120 Cal.App.4th 194, 206 (Cal. Ct. App. 2004)

For my orthopedic conditions, the medical evidence demonstrates that I was substantially incapacitated at the time of my application for IDR. The medical evidence demonstrates that I continue to be substantially incapacitated by my orthopedic conditions.

For my internal conditions, the medical evidence demonstrates that I was substantially incapacitated when I applied if I continue to be substantially incapacitated by my internal conditions.

Dr. McHenry's IME expert's opinion was that I was substantially incapacitated in 2020 for my internal conditions, Type 2 Diabetes, heart condition, Sinus Tachycardia, and Obstructive Sleep Apnea. Dr. McHenry opined that I was incapacitated by these conditions when he examined me in March of 2022.

CalPERS had not accepted my claim for OSA as causing substantial incapacity when I was evaluated by Dr. McHenry. As a result, CalPERS had Dr. McHenry retract his opinion on my OSA diagnosis. However, the original IME report is valid since CalPERS accepted my OSA diagnosis in the amended issue statement.

All medical opinion regarding my internal condition is consistent and indicate that I was substantially incapacitated and continue to be substantially incapacitated by my internal conditions. There exists medical evidence that affirms my claim that my right IDR matured before dismissal by AWOL.

In not applying this exception that is spelled out in the Haywood court and its progeny, ALJ is wrong in his decision.

**Conclusion**

ALJ Ed Washington's decision is not based on factual evidence of the case. ALJ Ed Washington ignores the available evidence that he accepted at the hearing. Further, ALJ Ed Washington prevented me from having expert testimony on my behalf and prevented direct evidence from being admitted into evidence. ALJ Ed Washington also did not allow hearsay evidence to be admitted at the hearing.

CalPERS did not provide evidence that my claim to industrial disability retirement did not mature before my dismissal by AWOL.

Since my case is being litigated in superior court, CalPERS did not supply evidence that my dismissal was not related to my industrial disability for orthopedic conditions and that CMF was correct in dismissing me by AWOL statutes.

CalPERS did not supply evidence that CMF considered my internal conditions when I was dismissed by AWOL.

CalPERS did not supply evidence that Dr. Kolonkenker's PQME report rose to the level of substantial evidence and was not marred with errors, as I had pointed out.

Since the new evidence, a supplemental report by Dr. Kolondenker, supports my claim that he did not consider my right hip, Ms. Mack's testimony is false and under oath. Her entire testimony should be considered tainted and false and invalidates ALJ Ed Washington's reliance on her testimony.

I appeal to the board to consider my entire record, the evidence sent to CalPERS, and my many motions and associated evidence in considering my case. I appeal to the board to reject ALJ Ed Washington's decision and arrive at its own decision, which I believe should be to accept my IDR application for orthopedic and internal conditions.

Sincerely,

*eusebio montejo*

Eusebio M. Montejo MD

2/1/23

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**January 12, 2023**

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RE: Eusebio Montejo  
DOB: [REDACTED] 5  
EMP: California Medical Facility  
DOI: [REDACTED]  
[REDACTED]

**PANEL QUALIFIED MEDICAL EXAMINER SUPPLEMENTAL  
REPORT**

**Fee Disclosure: ML 203-95**

**ML PRR: Medical Records Review number of pages: 30 Less 50  
pages: 0**



1/12/23, 2:33 PM

Encounter - Office Visit Date of service: 01/12/23 Patient: Eusebio Montejo DOB: [REDACTED] [REDACTED]

**PATIENT**  
**Eusebio Montejo**

DOB [REDACTED]  
AGE 47 yrs  
SEX Male  
PRN [REDACTED]

**FACILITY**  
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**ENCOUNTER**

NOTE TYPE Case Review  
SEEN BY Gennady Kolodenker DPM  
DATE 01/12/2023  
AGE AT DOS 47 yrs  
Electronically signed by Gennady Kolodenker DPM at  
01/12/2023 02:25 pm

**Case Review**

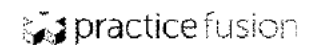
Letter sent from Mr. Adrian A. Ibarra  
Re: Eusebio Montejo vs. California Medical Facility

I evaluated Eusebio Montejo on 11/17/2021.

He is clear to return to all activities. He is cleared to return to work, with an ankle brace. He is clear to return to work at the prison environment with an ankle brace.

No other restrictions have been placed on his foot/ankle.

I do not have a comment on work restrictions in reference to his hip. That should be determined by the hip specialist.



02/01/2023 4:12PM (GMT-05:00)