

ATTACHMENT C

**RESPONDENT'S ARGUMENT REGARDING THE PETITION FOR
RECONSIDERATION**

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Date:

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

Respondent Argument

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 by ALJ Ed Washington was wrong

The Haywood court and its progeny spell out exceptions that protect my right to industrial disability retirement.

- a. The Haywood court noted two caveats. So long as the dismissal "is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement." *Haywood v. American River Fire Protection Dist.*, 67 Cal.App.4th 1292, 1307 (Cal. Ct. App. 1998)
- b. 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)

Therefore, whether or not I was substantially incapacitated at the time of my IDR application and whether or not I continue to be substantially incapacitated is integral to whether or not Haywood and its progeny bar me from applying for IDR. My case should not have been bifurcated.

2. Substantial incapacity from orthopedic and internal conditions

I was placed on restrictions that could not be accommodated on June 31, 2020; CalPERS did not dispute this. On April 8, 2021, I was placed on one-year restrictions by my treating orthopedic surgeon and physician assistant from May 1, 2021, through May 1, 2022¹.

¹ Exhibit Q pages 135-138

Podiatrist Dr. Kirby DPM, my treating provider, on November 29, 2021, supplied a Physician's Report on Disability indicating that I was permanently substantially incapacitated as of May 12, 2020. Dr. Kirby included a detailed addendum to justify his assessment².

Multiple business records from Dr. Cantu from February 1, 2022, through August 8, 2022, indicate that I had multiple orthopedic injuries and ongoing restrictions³. Dr. Cantu wrote,

Work-related restrictions as indicated DWC-73 form. Based off symptoms and clinical findings, I believe the injury sustained while on the job and subsequent exacerbation of his left ankle and right hip condition substantially incapacitate Dr. Montejo and performing some required activities while working in a prison environment⁴.

CalPERS's IME expert, Dr. McHenry, also indicated that I was substantially incapacitated by my orthopedic injuries as of May 12, 2020, and remained incapacitated on the date of his examination on June 13, 2022. In addition, Dr. McHenry, IME, reported that I was substantially incapacitated for my internal condition sometime in 2020 and remained substantially incapacitated as of his exam date.

3. Factual errors in ALJ Ed Washington's decision

A. 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. No evidence was supplied that justified this statement. In fact, because of the COVID-19 pandemic and recommendations from the CDC, movement in prison was restricted to decrease the risk of transferring the infection. ALJ Ed Washington did not explain how he arrived at his conclusion.

B. On page 6, paragraph 10, ALJ Ed Washington noted that CalPERS filed a statement of 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 Issue⁵ to include internal conditions and my additional orthopedic conditions. ALJ Ed Washington was not complete when listing the facts about the Statement of Issue.

C. ALJ Ed Washington did not consider the documents **Essential Function List** and **Physical Requirements of Position/Occupation Title** (a CalPERS document) that report 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 stairs⁶.

² Exhibit Q pages 117-120

³ Exhibit Q pages 164-174

⁴ Exhibit Q page 174, plan, number 5.

⁵ Exhibit J First Amended Statement of Issue

⁶ Exhibit AC Physician and Surgeon, CF (9269) Essential Functions List

When on call, a physician works alone, and the clinic is closed. Walking is required, sometimes up to 4-5 miles, and multiple flights of stairs are used to attend to various areas of the prison.

ALJ Ed Washington did not explain why he did not include these official documents in his analysis.

- D. Ms. Kelly Mack, RTWC and not a medical expert, decided that I would return to work based on the November 17, 2021, worker's compensation PQME report by Dr. Kolondenker. Ms. Mack could not interpret the PQME report, nor could the colleagues she claimed to have consulted. 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. This fact is currently being litigated in Worker's Compensation Court.

ALJ Ed Washington did not explain why he relied on testimony from Ms. Mack as factual in her interpretation of a medical document while at the same time dismissing my opinion despite me being a physician.

- E. 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 interpreted the statement in the PQME report that MMI means that I am recovered. MMI means that further intervention will not result in further recovery in the next 12 months. MMI does not translate to the patient is fully recovered.
- F. 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.

4. ALJ Ed Washington prevented me from presenting critical evidence

At the hearing, at his own discretion, ALJ Ed Washington did not allow multiple forms of evidence to be admitted as evidence⁷.

- a. I was not allowed to have Dr. Hernandez, an expert witness (properly declared), testify on my behalf. Dr. Hernandez would have offered testimony that would refute the PQME report by Dr. Kolondenker. Dr. Hernandez's expert testimony would have rendered the PQME report as not substantial medical evidence and, therefore, could not be relied upon. Dr. Hernandez would have offered expert testimony that my orthopedic conditions substantially incapacitated me as of May 12, 2020. He would have offered testimony that I am permanently incapacitated from performing my duties at CMF based on the physical requirements of a physician and surgeon at CMF.

⁷ Exhibit Q

- b. Dr. Hernandez prepared a report, which was not allowed as hearsay evidence.
- c. Many medical reports from Dr. Marx, my current orthopedic surgeon, indicate I need surgery for my right ankle for the peroneal tendon tear recurrence. These medical records were not allowed as hearsay evidence.
- d. Medical reports by Dr. Cantu, properly declared and authenticated meeting business records exception to the hearsay rule, were not allowed to be admitted into evidence. These documents elaborate on my ongoing substantial incapacity regarding my multiple orthopedic injuries.
- e. The UC Davis medical records by Dr. Pauline Perez about my internal condition of Obstructive Sleep Apnea, diagnosed on November 12, 2019⁸, and Type 2 Diabetes, diagnosed on September 9, 2020⁹. Dr. Lindsey Malik a cardiologist, diagnosed me with Tachycardia on October 26, 2020¹⁰.

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

5. Ignored Evidence

ALJ Ed Washington Ignored evidence. The IME report by CalPERS expert Dr. McHenry, a cardiologist knowledgeable of the requirements and verbiage of industrial disability retirement, supplied a report that indicated that I was substantially incapacitated as of May 12, 2020, and remained so as of his exam on June 13, 2022. ALJ Ed Washington did not explain why he ignored this evidence and accepted Dr. Kolondenker's PQME report (a Worker's Compensation standard).

Dr. McHenry also supplied an opinion that I was substantially incapacitated by my internal conditions sometime in 2020 and remained so as of his exam on June 13, 2022. CalPERS did not supply any evidence to contradict this opinion.

A Sleep Specialist, Hakil A. Khan MD, supplied medical evidence that I was substantially incapacitated by Sleep Apnea based on my sleep study dated January 10, 2020. ALJ Ed Washington did not explain why he ignored this statement.

ALJ Ed Washington did not explain why he ignored Dr. McCormick's Ph.D. recommendation that I was temporarily partially disabled on an industrial basis and restricted from working at the California Department of Corrections Rehabilitation at the medical facility¹¹.

CalPERS did not offer any evidence that the above conditions were addressed and accommodated by my employer CMF. ALJ Ed Washington did not clarify why he did not consider the above evidence in his decision.

6. 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 hearing¹². 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.

⁸ Exhibit S

⁹ Exhibit R page 6, subjective

¹⁰ Exhibit R page 4, Assessment and plan

¹¹ Exhibit O page 1, Work Status

¹² Dr. Kolondenker Supplemental 1/12/23 – Not available at the time of hearing On October 31, 2022 – November 1, 2022.

Ms. Mack testified that I was made AWOL on December 19, 2021. This is factually false, I was made AWOL on May 11, 2021¹³.

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, 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. This is the venue I chose to dispute my AWOL dismissal and not via the administrative process of CalHR.

7. 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.

I was ordered back to work on May 12, 2021, and then again on November 17, 2021. I could not return to work both times because I had ongoing restrictions From May 1, 2021, through May 1, 2022. AWOL statutes subsequently dismissed me on December 23, 2021.

On April 8, 2021, I was given year-long restrictions from May 1, 2021, through May 1, 2022, by Dr. Kou orthopedic surgeon. Medical evidence shows that I have permanent, substantial incapacity for orthopedic injuries. I could not return to work because CMF did not accommodate the orthopedic restrictions. I was made AWOL and subsequently dismissed because I did not return to work.

Further, CMF did not consider my internal conditions or offer any accommodation for my internal conditions. I could not return to work because of my internal conditions. I was made AWOL and subsequently dismissed because I did not return to work.

Therefore, my dismissal is directly related to my orthopedic industrial disability and my internal conditions, an exception defined by the Haywood court.

8. 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)

Example 1

Dr. Kirby, the podiatrist, and primary treating physician, found me permanently incapacitated on December 29, 2021 for my injury that occurred on May 12, 2020. Dr. McHenry, IME, also found me incapacitated for my right ankle as of May 12, 2020, and continues to be present. The permanent incapacity predates the AWOL dismissal; therefore, my right to IDR matured before dismissal.

Example 2

The Smith court gave a second example, "is there 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

¹³ Exhibit X1 dispute AWOL

preceded the AWOL dismissal. Further, there is undisputed evidence that I am substantially incapacitated by Type 2 Diabetes and a heart condition, Sinus Tachycardia (fast heart rate).

Therefore, my right to IDR matured before AWOL dismissal for my internal conditions.

9. Conclusion

ALJ Ed Washington's decision is not based on factual evidence of the case. ALJ Ed Washington ignored 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.

ALJ Ed Washington was incorrect in considering Dr. Kolonkers's PQME report while at the same time dismissing Dr. McHenry's IME, CalPERS's own expert's report.

ALJ Ed Washington's decision rests solely on the PQME report by Dr. Kolondenker erroneously since CalPERS did not supply evidence that Dr. Kolondenker's PQME report rose to the level of substantial evidence and was not marred with errors, as I had pointed out. More importantly, as later clarified by Dr. Kolondenker in his supplemental report, he did not opine on my right hip. ALJ Ed Washington erred in relying on the PQME report.

Since the new evidence 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.

When the medical evidence is considered entirely, the conclusion is that I was made AWOL and dismissed due to my orthopedic and internal conditions. The medical evidence also shows that my substantial incapacity predated my dismissal. Therefore, Haywood and its progeny do not bar me from applying for IDR.

I appeal to the board to consider my entire record, the evidence sent to CalPERS, my multiple written briefs, and my 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 M. Montejo MD