

ATTACHMENT C

RESPONDENT(S) ARGUMENT

June 28, 2023

SENT VIA EMAIL AND CERTIFIED MAIL

Board Services Unit Coordinator
California Public Employees' Retirement System
P.O. Box 942701
Sacramento, CA 94229-2701

RE: **ARGUMENT** in the Matter of the Reinstatement from Disability of AMY M. EDELEN, Respondent, and the DEPARTMENT OF CONSUMER AFFAIRS, Respondent

Dear CalPERS Board Members:

As background, Ms. Edelen is a long-time recipient of a disability retirement allowance, not an applicant for disability nor an applicant for reinstatement from retirement. Her original application for state disability retirement was reviewed and approved more than a decade ago in 2010 at the same time she was granted **permanent disability** by the Social Security Administration (SSA) based on her treating specialty practice physician's reports and records, plus rigorous review of her medical records, plus an independent psychiatric evaluation required by the SSA. Ms. Edelen has not worked in any employment situation nor been able to work since. Her disability retirement status was reviewed and approved by CalPERS at least in 2013, 2017 and most recently on April(?) 10, 2020 just months before notification of "re-evaluation."

The disability retirement reviews of a few years ago are a much different process than the more recent "re-evaluation of medical condition" approach. In the past, reviews confirmed that recipients of disability retirement allowances were not violating any of the rules against working while receiving a disability retirement allowance and treating physicians were directly contacted to find out if the recipient was still ill or injured and if disability was expected to be temporary or permanent. It is unknown why this changed. Review of Case Law did not justify the change.

ISSUE: No Jurisdictional Basis for Hearing

Assertion

At hearing, Ms. Andrade stated "Today the issue before the Court is whether Ms. Edelen qualifies for disability under the definition of Government Code section 20026."

Response

Government Code Section 20026 states: "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion." Ms. Edelen's original application for disability retirement was reviewed and approved in 2010 in accordance with Government Code Sections 21150 through 21156.

It was already determined long ago that Ms. Edelen met the Government Code Section 20026 requirements.

Ms. Edelen has been a "recipient of a disability allowance" ever since.

ISSUE: No Statutory Authority to Require Re-Evaluation of Ms. Edelen's "Original" Medical ConditionAssertion

Ms. Andrade stated "On December 28, 2020, CalPERS requested that Ms. Edelen be re-evaluated pursuant to Government Code 21192."

Ms. Andrade also stated "...there is also compulsory reinstatement under 21192 which specifically allows the board, and gives statutory authority to the board, to re-evaluate anybody that is receiving disability as long as it is before the age of retirement."

Response

Government Code Section 21192 *allows* the board to require medical examinations when a recipient of a disability retirement allowance **submits an application** for reinstatement to the board.

Ms. Edelen did NOT apply for reinstatement from retirement thus there was NO statutory authority for the board to require her to undergo medical examination to "re-evaluate" her "original" disabling medical condition(s).

Doing otherwise makes no logical sense. Hypothetically, George disability retired with cancer which he later recovered from. However, since the time of his original application, George had a stroke rendering him unable to move and he also became afflicted with advanced Alzheimers. According to the process currently in use by staff, only his cancer would be allowed to be considered in his "re-evaluation" thus George would be determined to be no longer disabled due to cancer and required to reinstate from retirement to his former position. That idea, frankly, is absurd.

This new approach being used seems to warp what was legislatively intended to be an assistive process to a coercive process.

Government Code Section 21192 states in part:

"The board may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination... **for the duties of the position with regard to which he or she has applied for reinstatement from retirement.**"

(Added by Stats. 1995, Ch. 379, Sec. 2. Effective January 1, 1996.)

Opinion in *California Department of Justice v. Bd. of Administration* (2015 242 Cal.App. 4th) specifically stated: "Under the provisions of section 21192, **when a recipient of disability retirement applies for reinstatement**, the board causes a medical examination to be conducted by a physician or surgeon appointed by the board."

Without an application for reinstatement, there was no statutory authority to require re-evaluation of Ms. Edelen's medical condition.

Regardless, Ms. Edelen did undergo medical examination as requested and her treating primary care physician, submitted the required Physician's Report on Disability, along with supporting medical records satisfying the Government Code Section 20026 requirement of "competent medical opinion."

ISSUE: A medical examiner should be required to “believe” in the medical condition in questionAssertion

On page 109 of the hearing transcript, Dr. Anderson stated, “I’m not convinced there is an entity called fibromyalgia that specifically causes pain, rather it’s a description of a syndrome which sometimes leads to a diagnosis.

Response

Dr. Anderson’s personal belief has no basis in reality. Fibromyalgia is recognized in the ICD-10 with its own diagnostic code of M79.7.

Dr. Anderson does not have an up to date understanding of fibromyalgia, nor qualification to review many of the symptoms of fibromyalgia which require a multidisciplinary approach. He used outdated/obsolete diagnostic criteria and gave false testimony at hearing. There is documentary evidence of this with witnesses.

Dr. Anderson also had a false preconceived notion about Ms. Edelen before her exam that she was not aware of nor given opportunity to address. At hearing he did not deny that Ms. Edelen has numerous symptoms but failed to comprehend they are part and parcel to fibromyalgia.

ISSUE: Health Care Records Submitted to CalPERS are Missing and Weren’t Reviewed by the IMEs

The following health care records were submitted to CalPERS by certified mail but do not appear in the file that was sent to Ms. Edelen or her former counsel and were not reviewed by the IMEs. The records include results of labs, tests and other objective evidence as well as records of additional treatment of fibromyalgia symptoms. The records missing include, but are not limited to:

- Physician’s Report on Disability completed by Dr. Anne Priest, DO on May 5, 2022 with medical records and labs
- Physician’s Report on Disability completed by Maryann Simpson, NP on January 18, 2022 with medical records and labs
- Informational letter to CalPERS on Amy's behalf by Melissa DeKellis dated May 23, 2022
- Treatment records and labs and medications prescribed by Dr. Michelle Raithel (Wilkerson), ND, Revolutions Naturopathic for fibromyalgia and ME/CFS, gut/brain axis, nervous system, IV therapy (June 2021-2022)
- Treatment records and labs and medications prescribed by MaryAnn Simpson, NP, Embody Wellness for hormone therapy, fibromyalgia, chronic fatigue, autoimmune disease (back to 2018)
- Letter confirming weekly treatment by Dr. Grace Fernandez, DC, Chiroworks (back to 2016)
- Treatment and diagnosis by Athena Papadakos, Ph.D., Psychologist, Pacific Trauma and Counseling Center (2019)
- Treatment and labs by Get Wellness/MPL Wellness, chronic illness therapies (2015-2019)
- Emails documenting attempted cost prohibitive appointment with Nancy Mullan, M.D., specialist in chronic disease and genetics (2015)
- Tonya Barger King, Nuskin Nutraceuticals and Nature’s Own Way to Ultimate Health, nutritional support, colon hydrotherapy, energy healing, detoxification support (back to 2014)

Dr. Priest, Ms. Edelen's Primary Care Physician, completed and submitted a "Physician's Re-evaluation of Current Disability" on 1/12/2021 certifying that Ms. Edelen has fibromyalgia, is substantially incapacitated from performing her usual duties as an associate governmental program analyst based on her fibromyalgia, and incapacity is permanent satisfying the requirements of Government Code Section 20026 (please see Attachment A).

Unless Dr. Priest was proven at hearing to be incompetent, there was no justification for subjecting Ms. Edelen to the additional medical examinations required under threat of discontinuance of her disability retirement allowance and no reason or cause to hear from additional medical examiners.

The law does not appear to provide wiggle room for decision as to which competing medical opinions may be most believable within the confines of an administrative hearing. That process is especially inadequate when relevant documentary evidence and present day reality is excluded from being considered. High costs plus insurance and health system rules prohibit many treating physicians and specialists from both completing disability paperwork and participating in hearings.

No objective evidence was offered at hearing to discount Dr. Priest's physician report and testimony. Her opinion was not deemed incompetent. In fact, both Dr. Anderson and Dr. Gupta both noted and confirmed existence of many symptoms of fibromyalgia and headaches though neither IME seemed to be aware those symptoms are part of fibromyalgia.

ISSUE: No Statutory Authority to Require Ms. Edelen to Reinstate from Retirement

Assertion

Ms. Andrade stated {Government Code Section} "21193 specifically says that if the board determines that somebody is no longer incapacitated that they must be reinstated to their former position."

Response

The Administrative Law Judge's Decision cited *California Department of Justice v. Bd. of Administration (2015 242 Cal.App. 4th)* clarifying that Government Code Section 21193 requires former employers to reinstate a former employee **who applies for reinstatement** to the position previously unable to perform. Medical examination under 21192 **may be** conducted to allow them to do so.

In the specific case cited, there was an application for reinstatement to former position by the recipient of an industrial disability retirement allowance (different from the disability retirement allowance Ms. Edelen receives). The recipient's application is what allowed for medical examination as a basis to determine whether the recipient was still incapacitated for the duties of the position held prior to becoming disabled.

These Government Code Section 21193 mandatory reinstatement **rights** referred to in hearing as "compulsory reinstatement" are irrelevant to Ms. Edelen since she did not submit application for reinstatement from retirement.

Ms. Mendelson also cited Government Code section 21196 which states in part "The board may reinstate a person from retirement upon (a) his or her application to the board for reinstatement..." Like with section 21192, the application for reinstatement is what gives the board statutory authority under 21196.


CONCLUSION

It is repeated that Ms. Edelen continues to be unable to return to work due to the symptoms listed on her original application thus reinstatement from retirement is moot. This has been verified this week, within the past few months, and repeatedly since her original disability application by:

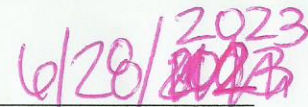
- Dr. Nelli Boykoff Perkins, M.D., Neurologist, Headache Specialist, Sutter Health (Please see Attachment B)
- Stanford Health Care's PACS and ME/CFS Center
- Dr. Anne Mahree Priest, Doctor of Osteopathic Medicine and Primary Care Physician
- Maryann Simpson, Nurse Practitioner, Embody Wellness, private practice specializing in women's health, autoimmune diseases, chronic illness, hormone therapy
- Dr. Michael Powell, DO and Rheumatologist (deceased 2022) was a Stanford Fellow and pioneering expert researching and treating fibromyalgia and chronic fatigue syndrome in his specialized private practice, the Fibromyalgia Treatment and Education Center. Dr. Powell was also a cellular microbiologist using a Functional/Integrative Medicine approach, genetics, epigenetics and nutrigenomics

The board's willingness and time in reviewing the Petition for Reconsideration, these "arguments" and the hearing transcript is greatly appreciated. It is respectfully requested that the contents of both Petitions for Reconsideration be considered as well. Treating physicians are willing to answer any questions that may arise about fibromyalgia, migraines and ME/CFS.

Again, please vote to decline to adopt the proposed decision and instead vote to approve continuation of Amy Edelen's disability retirement. Thank you.



Amy Edelen



Date



Physician's Re-evaluation of Current Disability

888 CalPERS (or 888-225-7377) • TTY: (877) 249-7442 • Fax: (916) 795-1280

Note to retiree: Your current treating physician must complete this form.

The following information is needed in connection with the retiree's continuing eligibility for disability retirement benefits under the California Public Employees' Retirement Law. Please complete all sections and do not leave any dates blank. Type or print clearly.

Section 1

Retiree Information

Amy M. Edelen [REDACTED]
 Name of Retiree (First Name, Middle Initial, Last Name) Social Security Number or CalPERS ID

 Position/Occupational Title Birth Date (mm/dd/yyyy)

 For Kaiser Patients, Medical Record Number

Section 2

Physician's Findings

Attach a separate sheet if there is not enough space to enter your diagnosis. Be sure to use a label, or clearly write the retiree's Social Security number or CalPERS ID on each page.

11/31/12/2009
Date of Last Exam (mm/dd/yyyy)

Fibromyalgia/migraine headaches
Diagnosis 1

Tenderpoints scattered over entire body
Objective Examination Findings 1

Muscles hypervoluntary, restricted

NO NEW TESTS - Dr Powell 2009
Diagnostic Test (X-ray, MRI, Laboratory, EKG, etc.) - Dates and Findings

Pain with sitting prolonged/difficulty concentration
Restrictions / Limitations - If so, specify: head & HA when on computer

CHRONIC FATIGUE
Diagnosis 2

Objective Examination Findings 2

NONE Dr Powell 2009
Diagnostic Test (X-ray, MRI, Laboratory, EKG, etc.) - Dates and Findings

Focus issues, difficulty concentration & function
Restrictions / Limitations - If so, specify: under stress

CHRONIC INTRACTABLE HEADACHES
Diagnosis 3

Objective Examination Findings 3

Dr Powell 2009
Diagnostic Test (X-ray, MRI, Laboratory, EKG, etc.) - Dates and Findings

Restrictions / Limitations - If so, specify.

Continues to have severe HA, Fatigue, widespread
Comments

body aches & pain - exacerbated by stress, prolonged

sitting, computer work - physical

emotional, mental



Put retiree's name and Social Security number or CalPERS ID at the top of every page

Amy M. Edelen
Retiree Name

[Redacted]
Social Security Number or CalPERS ID

Section 3

Retiree Incapacity

Review the attached duty statement and physical requirements prior to your determination of disability.

To remain eligible for a disability retirement, the CalPERS retiree must continue to be substantially incapacitated from the performance of the usual duties of his or her position with his or her former employer. This "substantial incapacity" must be due to a medical condition of permanent or extended duration as defined as one that is expected to last at least 12 consecutive months or will result in death as determined by the CalPERS Board, or in the case of a local safety member, by the governing body of the contracting agency employing the member, on the basis of competent medical opinion. Disability is not necessarily an inability to perform fully every function of a given position. Rather, the courts have concluded that the test is whether the member has a substantial inability to perform the usual and customary duties of the position. Prophylactic restrictions are not a basis for a disability retirement (limitations based on "high risk of injury" do not meet the statutory requirements).

1. Is the retiree current substantially incapacitated from performing the usual duties of the position from which he or she retired on disability? Yes No

2. If yes, how long is the incapacity expected to continue?
 <1 year >1 year >2 years Permanent (with no improvement anticipated)

3. If yes, please describe the specific job duties/physical requirements that the retiree is unable to perform due to his or her incapacity.
Computer work/working under fluorescent lights
sitting for prolonged times/ stress

4. Did you review the job duty statement and physical requirements to make your medical opinion?
 Yes No

Section 4

Treatment Records

- 1. Please provide a copy of all the retiree's medical records and referenced diagnostic testing during the past 12 months.
- 2. I have not provided any medical care for this retiree's ongoing disability during the past 12 months. Please initial: _____

Section 5

Physician's Signature

Mail completed report directly to CalPERS. Do not give to the retiree. Original physician signature is required.

I hereby certify that the above information is true, complete, and correct to the best of my knowledge.

CalPERS has my permission to release a photocopy of the report to the retiree, upon written request.
 Yes No

Dr. Anne Priest, DO (916) 817-3700 (916) 817-3701
Print Physician Name Phone Number Fax number

2575 E. Bidwell Street
Address

Folsom CA 95630
City State ZIP

[Signature]
Original Signature of Physician Title

Medical Specialty Date (mm/dd/yyyy) 01/11/2021

Mail to: CalPERS Benefit Services Division - P.O. Box 2796, Sacramento, California 95812-2796



ATTACHMENTS

Name: Amy Michele Edelen | DOB: [REDACTED] Legal Name: Amy Michele Edelen

Letter Details



Sutter Neurology, San Francisco
Nelli Perkins, MD
1100 VAN NESS AVE FL 6
SAN FRANCISCO CA 94109-6978
Phone: 415-600-7886
Fax: 415-369-1386

Patient: Amy Michele Edelen
Date of Birth: [REDACTED]

To Whom It May Concern:

I serve as the neurologist for Amy Edelen and I am writing this letter on her behalf. I have diagnosed my patient with a disabling neurological condition: chronic migraine. It leaves her unable to function physically and mentally. During her migraine attacks, she is typically bedridden with severe headache, dizziness, and blurred vision. Additionally, she is unable to tolerate bright lights, environmental noises, and smells. She cannot concentrate/think or be active during these attacks, which precludes her from doing her daily life activities or maintaining a job. I expect this disability to continue for greater than 12 months based on the severity of her headaches and their refractory nature as she has failed many migraine preventive drugs.

If you have any questions, please feel free to contact my office at (415) 600-7886.

Sincerely,

Nelli Boykoff Perkins, MD
Diplomate in Headache Medicine
1100 Van Ness Avenue, 6th Floor
San Francisco, CA 94109

This letter was initially viewed by Amy Michele Edelen at 6/26/2023 9:15 AM.