

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Bryan L. Meyer (Respondent) was employed by Respondent Ventura Youth Correctional Facility, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Youth Correctional Officer. By virtue of his employment, Respondent was a state safety member of CalPERS. On or about July 01, 2013 Respondent signed an application for industrial disability retirement on the basis of an orthopedic (lumbar spine) condition. CalPERS approved Respondent's application and he retired effective February 25, 2014, at the age of 29.

On October 30, 2019, CalPERS notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that he would be reevaluated for purposes of determining whether he remains substantially incapacitated and is entitled to continue to receive an industrial disability retirement.

In order to remain eligible for disability retirement, competent medical evidence must demonstrate that the individual remains substantially incapacitated from performing the usual and customary duties of his former position. The injury or condition which is the basis of the claimed disability must be permanent or of an extended duration which is expected to last at least 12 consecutive months or will result in death.

As part of CalPERS' review of Respondent's medical condition, Respondent was sent for an Independent Medical Examination (IME) to Robert K. Henrichsen, M.D. Dr. Henrichsen interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records and surveillance footage obtained of Respondent. Dr. Henrichsen also performed a comprehensive IME.

In his IME report, Dr. Henrichsen outlined the Respondent's work history, including his current work as a receiving supervisor in the shipping and receiving area at Home Depot. Dr. Henrichsen noted that Respondent had some pain daily and tended to have additional stiffness in the morning. Dr. Henrichsen also noted that Respondent currently treats his back pain with aspirin and medical cannabis. Upon physical exam, Dr. Henrichsen found that Respondent can squat at 100% of normal and has normal range of motion in his lower back. He found that Respondent walked with a normal gait. He found no spasms, trigger points, or nodules in Respondent's lower back. He also found no muscle atrophy, and noted that in the surveillance footage, Respondent was functioning normally without favoritism and without using lumbar support. Dr. Henrichsen concluded that Respondent did not have a substantial incapacity based on all the information available for review.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for industrial disability retirement, and should therefore be reinstated to his former position as a Youth Correctional Officer.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on February 24, 2021. Respondent represented himself at the hearing. Respondent CDCR did not appear at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

At the hearing, Dr. Henrichsen testified in a manner consistent with his examination of Respondent and the report prepared after the IME. Dr. Henrichsen's medical opinion was that Respondent can perform the duties of his position and is therefore no longer substantially incapacitated. He described Respondent's range of motion in his lumbar spine as "normal," even though he walked with a gait. Dr. Henrichsen also testified that Respondent is able to perform all duties and responsibilities of his position but acknowledged that he would have difficulty performing some of his duties due to pain, such as running up to several hundred yards or lifting heavy weight. Dr. Henrichsen opined that Respondent was no longer substantially incapacitated and could return to work.

A CalPERS investigator also testified regarding video surveillance he conducted at Home Depot over four days. Surveillance footage obtained showed Respondent moving various store products, bending at the waist to clean product displays, moving and lifting lumber, carrying a refrigerator with assistance, carrying a large bag of concrete dry mix and loading multiple large bags of dry mix into a customer's vehicle without assistance. The investigator testified that from his vantage point during surveillance, he could not determine the exact brand and weight of the concrete mix he saw Respondent carrying. He testified that approximately three hours later, he went to the loading area from which Respondent was retrieving the concrete dry mix bags and photographed the three different brands of concrete mix stored on the pallets. He testified that two of the brands came in 50-pound bags, and the third brand came in a 60-pound bag. He explained that he was unable to immediately photograph the concrete dry mix bags because he was recording video and did not want to reveal himself. He also acknowledged that he did not continuously observe the pallets containing the concrete dry mix bags from the time he saw Respondent retrieving the bags to the time of photographing.

In his IME Report, Dr. Henrichsen discussed the activities observed in the surveillance footage. He noted that he observed Respondent appeared to be lifting cement bags.

Dr. Henrichsen estimated each of these cement bags to be “somewhere in the range of 45 to 60 pounds of weight each.” The Physical Requirements of Position/ Occupational Title states that only “occasionally” (up to three hours) would Respondent be expected to lift any weights in excess of 25 pounds. The job analysis for Respondent’s former position states that “lifting is not routinely a part of the job duties, however the employee may be involved in lifting weights in excess of 125 lb [sic] when moving injured wards or handling emergency situations.” Dr. Henrichsen stated that he would prophylactically limit Respondent to lifting no more than 75 pounds based upon his examination and review of Respondent’s medical records.

Respondent testified on his own behalf. Respondent testified that he initially began working at Home Depot as a sales associate in May 2019 and has since become a receiving supervisor. Respondent asserted that he “could not recall” whether he ever loaded bags of concrete mix for a customer but would not deny doing so. Respondent offered no witnesses or direct medical evidence on his own behalf. He offered x-ray images, which were admitted as evidence for all purposes. Respondent also sought to introduce as evidence two prior CalPERS IME reports. The first report was a 2014 Re-evaluation IME written by Brenden McAdams, M.D. The second report was a 2018 Re-evaluation IME written by Donald Pompan, M.D. The ALJ admitted both reports as administrative hearsay only and not as direct evidence. Neither Dr. McAdams nor Dr. Pompan were present to testify or authenticate their prior IME reports, nor were they present for cross examination.

The ALJ summarized the findings and conclusions of Dr. McAdams’ 2014 report and Dr. Pompan’s 2018 report in the Proposed Decision. The ALJ also quoted from this hearsay evidence, stating that “Dr. McAdams concluded Mr. Meyer was ‘unable to perform the required running of 400 yards, being involved in a combative situation, lifting and carrying excessive weights over 20 pounds, crawling, climbing, and subduing an assailant.’” The ALJ also quoted Dr. Pompan’s findings that “Mr. Meyer could not ‘subdue an assailant or adequately defend himself against an attacker.’” The ALJ then found that the more recent direct medical evidence offered by CalPERS to the contrary was inadequate to overcome Respondent’s hearsay evidence. The ALJ concluded:

Dr. Henrichsen’s opinion was not persuasive because he did not address whether Mr. Meyer was capable of protecting himself during a physical altercation with an inmate or physically subduing a combative inmate. Dr. McAdams and Dr. Pompan, on the other hand, concluded he could not perform either task. Additionally, Dr. Henrichsen concluded “lifting is not a routine part of the occupational duties.” However, the Physical Requirements of Position/Occupational Title for a Youth Correctional Counselor established otherwise. Dr. McAdams and Dr. Pompan concluded Mr. Meyer cannot lift greater than 20 pounds.

The ALJ found the surveillance video of Respondent’s physical activities while working at Home Depot did not contradict the opinions of Drs. MacAdams or Pompan. The ALJ also found:

There was no evidence of the weight of the items Mr. Meyer was seen lifting or moving, the video of Mr. Meyer supposedly loading concrete mix into a customer's truck was taken from too far away to accurately determine it was in fact concrete mix he was loading, and there was insufficient evidence that he loaded the bags of concrete mix Mr. Barba photographed three hours later.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ granted Respondent's appeal. The ALJ held that CalPERS did not establish that, based on competent medical evidence, Mr. Meyer is no longer substantially incapacitated from performing the usual job duties of a Youth Correctional Counselor with CDCR due to an orthopedic (lumbar spine) condition.

CalPERS staff has reservations about the ALJ's reliance on administrative hearsay in the Proposed Decision because under the Administrative Procedure Act, hearsay statements can only be used to supplement or explain direct evidence such as sworn testimony. (Government Code §11513). Here, Respondent testified about his symptoms, but such testimony is not medical opinion. The reports of Drs. McAdams and Pompan were specifically designated as administrative hearsay by the ALJ when admitting that evidence and neither doctor testified. Moreover, they were prepared at earlier points in time than the reinstatement evaluation at issue here. In contrast, Dr. Henrichsen presented direct evidence through his testimony about his medical evaluation of Respondent. Dr. Henrichsen testified clearly and coherently regarding Respondent's ability to perform all required duties and responsibilities of a Youth Correctional Counselor. While Dr. Henrichsen may not have specifically addressed the myriad individual tasks required of a Youth Correctional Counselor, he did testify in general as to Respondent's abilities to perform all duties and responsibilities of his position.

Although CalPERS does not agree with the reasoning of the ALJ, based on all the facts and circumstances of this case, Staff does not oppose adoption of the Proposed Decision.

June 16, 2021

Dustin Ingraham
Staff Attorney