

ATTACHMENT B

Staff Argument

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Michael D. Lemberger (Respondent) was employed by Respondent Antioch Unified School District (District) as a Custodian. By virtue of his employment, Respondent was a school miscellaneous member of CalPERS. On May 2, 2017, Respondent submitted an application for disability retirement on the basis of an orthopedic (knee) condition. Respondent's application was approved by CalPERS and he retired effective July 1, 2017. Upon approving his disability retirement, CalPERS informed Respondent that he may be examined periodically to verify his continued eligibility for disability.

On March 25, 2020, CalPERS' staff notified Respondent that it was reviewing his disability retirement benefits for continued eligibility, and that he would be reevaluated for purposes of determining whether he remains substantially incapacitated, and therefore entitled to continue receiving disability retirement benefits.

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 Henrichsen, M.D. On June 16, 2020, Dr. Henrichsen performed an IME of Respondent. As part of the IME, Dr. Henrichsen interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Henrichsen also conducted a comprehensive physical examination. Henrichsen found that Respondent gradually improved in his mobility and strength between the time he was injured, April 12, 2016, and the time he was evaluated, June 16, 2020. Dr. Henrichsen found that Respondent had normal strength in his lower extremities, had normal range of motion, and did not demonstrate atrophy due to lack of movement. Dr. Henrichsen concluded that Respondent was not substantially incapacitated from the performance of his job duties as a Custodian for the District.

After reviewing all medical documentation and Dr. Henrichsen's IME report, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for disability retirement, and should therefore be reinstated to his former position as a Custodian with the District.

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 May 9, 2022. Respondent represented himself at the hearing. Respondent District did not appear at the hearing, and a default was taken against Respondent District pursuant to Government Code section 11520.

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 IME Report. Dr. Henrichsen testified that Respondent may have some pain in performing his job; however, he found no objective evidence that Respondent could not perform his usual duties. For this reason, Dr. Henrichsen's medical opinion is that Respondent is capable of performing the duties of his position as a Custodian for the District and is therefore no longer substantially incapacitated.

Respondent testified that his knees hurt after standing for twenty minutes, and that he can no longer run or kneel. Respondent also testified that climbing a ladder is painful. Respondent does not believe he could push a cart uphill or downhill, nor could he lift heavy objects because his knees are too weak. Respondent is concerned that he would get reinjured if he returned to work. Respondent also disagrees with the results of Dr. Henrichsen's examination and IME Report.

Respondent called his mother Diana Lemberger to testify on his behalf. Ms. Lemberger testified that she used to garden with Respondent, but that he could no longer perform the work. Ms. Lemberger testified that Respondent is unsteady on his feet and does not have the stamina to perform the work as a Custodian with the District as a result of his weakness.

Respondent did not call any physicians or other medical professionals to testify and did not submit any medical records to support his appeal.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent's appeal. The ALJ found that CalPERS had the burden to establish that Respondent is no longer incapacitated from the performance of his normal duties as a Custodian for the District, and that CalPERS met its burden.

The ALJ found that to be substantially incapacitated, there must be competent medical evidence that Respondent cannot perform the usual and customary duties of a Custodian. The ALJ found that Dr. Henrichsen testified credibly that Respondent is

not substantially incapacitated from performing his job duties based upon his physical examination and his review of the medical records. The ALJ found that Respondent did not provide competent medical evidence that he remained substantially incapacitated.

When all the evidence was considered, the ALJ found Dr. Henrichsen's competent medical opinion that Respondent is no longer substantially incapacitated from performing the usual duties of a Custodian for the District to be persuasive. The ALJ found that Respondent's complaints of continued pain in his knees and fear of future injury were not supported by objective findings. Consequently, the ALJ found that Respondent should be reinstated from disability retirement.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." In order to avoid ambiguity, staff recommends deleting "and uncertain" between the words extended and duration and adding "which is expected to last at least 12 consecutive months or will result in death," after the word duration in paragraph 4 under the Legal Conclusions section, on page 12 of the Proposed Decision.

For all the above reasons, staff argues that the Proposed Decision should be adopted by the Board, as modified.

July 13, 2022

John Shipley
Senior Attorney