ATTACHMENT B

STAFF'S ARGUMENT

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

Therese Horton (Respondent) submitted a Service Pending Disability Retirement Election Application on August 16, 2021, based on a rheumatological condition (Chronic Fatigue Syndrome; CFS). By virtue of her employment as a Staff Services Manager I (SSM I) for the California Correctional Health Care Services, California Department of Corrections and Rehabilitation (Respondent CCHCS), Respondent was a state industrial member of CalPERS.

To be eligible for disability retirement, competent medical evidence must demonstrate that an individual is substantially incapacitated from performing the usual and customary duties of their 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, Scott T. Anderson, M.D., board-certified in Rheumatology and Internal Medicine, performed an Independent Medical Examination (IME) of Respondent on December 14, 2021. Dr. Anderson interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, reviewed her medical records, and performed a thorough physical examination. Dr. Anderson opined that Respondent was not substantially incapacitated from performing the usual duties of an SSM I when she filed her Disability Retirement (DR) application.

On September 19, 2022, Respondent amended her DR application to include Postural Orthostatic Tachycardia Syndrome (POTS). On January 20, 2023, CalPERS received additional information regarding Respondent's claimed POTS condition. Dr. Anderson reviewed the additional information, but he did not change his opinion that Respondent is not substantially incapacitated.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of her position. Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A remote hearing was held on March 20, 2023. Respondent was represented by counsel at the hearing. Respondent CCHCS did not appear at the hearing, and the matter proceeded as a default against it pursuant to Government Code section 11520, subdivision (a).

At the hearing, Dr. Anderson testified in a manner consistent with his examination of Respondent and the IME report. Dr. Anderson testified that Respondent does not have an actual or present rheumatological impairment that rises to the level of substantial incapacity. Dr. Anderson determined that Respondent's reported symptoms were out of proportion to his physical findings, as she had no muscle wasting, weakness, objective muscular weakness, joint deformity, muscle deformity, or any other pathology that would support that she is substantially incapacitated based on a rheumatological disease of any

type. Dr. Anderson found no history of encephalitis, meningitis, polymyositis, muscular dystrophy, or other specific diagnosis relative to neuromuscular function in Respondent's medical records. He noted that Respondent drove herself to her IME appointment and stated that she can bathe, toilet, and dress herself. She walked, sat, followed instructions, and communicated with Dr. Anderson during the evaluation without issue. When discussing the performance of her specific job duties, Respondent told Dr. Anderson "I can do it all," but added that performing those duties results in extreme fatigue. Dr. Anderson ultimately concluded that Respondent could perform all her relevant job duties, including walking, sitting, answering emails, typing memos, communicating with others, engaging in precision and power grasping, and performing necessary cognitive functions. Therefore, Respondent is not substantially incapacitated.

Respondent testified that standing, walking, and sitting make her feel lightheaded, weak, faint, and exhausted due to issues with blood flow to her brain. Respondent testified that her condition started around 2014, and that symptoms are lessened when she lies down. Respondent indicated after complaints of fatigue, her doctor recommended increased exercise, which was ineffective. Respondent stated her symptoms worsened with time and became unpredictable. She found it increasingly difficult to work, and believes working fewer hours would have helped, but she was not allowed to work part-time. Respondent experiences increased difficulty processing information and she can no longer effectively supervise. When she must stand, Respondent stated she has "about 15 minutes of usable energy" before she is must lie down. Respondent testified that she occasionally falls asleep while standing.

Respondent called Todd Davenport, DPT, to testify as her expert at hearing. Dr. Davenport is a licensed physical therapist but he is not a Medical Doctor (M.D.). Dr. Davenport is familiar with CFS and how one of its identifying symptoms is experiencing post-exertional malaise. He is aware that Respondent has been diagnosed with CFS and POTS and has treated her condition in conjunction with her doctors. Dr. Davenport testified that CFS and POTS are conditions that can be more disabling than multiple sclerosis, stroke, or cancer. In Respondent's case, she is exhausted after minimal exertion and is prevented from doing work when positioned with her head over her feet.

Respondent submitted various medical records which she claimed supported her disability. The records were admitted into evidence as administrative hearsay under Government Code section 11513, subdivision (d). Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

After considering all the evidence introduced, as well as arguments made by the parties, the ALJ denied Respondent's appeal. The ALJ found that Dr. Anderson's opinion was more persuasive because Dr. Anderson's IME reports were detailed and thorough, and his testimony at hearing was clear and comprehensive. Furthermore, the results of his physical examination, assessment of Respondent's medical records, and medical history supported his opinion.

Conversely, the ALJ found that Respondent testified to a collection of symptoms without supporting competent medical evidence as to the cause or even an effective treatment of her claimed conditions. Additionally, the ALJ found Dr. Davenport's observations and conclusions regarding CFS were largely outside of the scope of his practice as a physical therapist. The ALJ determined Respondent failed to present any reliable evidence from an expert more qualified than Dr. Anderson. The ALJ concluded that the burden was on Respondent to offer evidence at hearing to support her disability retirement application. When all the evidence is considered, Respondent failed to offer sufficient competent medical evidence to establish that, when she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual duties of an SSM I for Respondent CCHCS. Accordingly, her application for disability retirement must be denied.

Pursuant to Government Code section 11517, subdivision (c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." To avoid ambiguity, staff recommends correcting the language referenced in Government Code section 20026 to add the word "duration" in paragraph 3, after the word "extended" on page 18 of the Legal Conclusions section of the Proposed Decision.

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

June 20, 2023

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Nhung Dao
Attorney