

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO REMAND THE PROPOSED DECISION

Robert L. Brookshire, III (Respondent) worked as a Utilities Service Worker III for Respondent City of Modesto (Respondent City). By virtue of his employment, Respondent was a local miscellaneous member of CalPERS.

Respondent applied for disability retirement based on orthopedic (lumbar spine, lumbar radiculopathy and bilateral lower extremities) conditions on November 20, 2019.

As part of CalPERS' review of Respondent's medical condition, Robert Henrichsen, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Henrichsen interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Henrichsen opined that Respondent is not substantially incapacitated from performing his job duties.

In order 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 his or her 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.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of his position.

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 March 18, 2021. Respondent represented himself at the hearing. Respondent City 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 IME reports. Dr. Henrichsen described Respondent as standing five feet, eight inches tall and weighing 350 pounds. As part of his physical examination, Dr. Henrichsen watched Respondent walk and asked him to stand on his toes, then his heels. Respondent had a normal heel to toe gait. Dr. Henrichsen did not observe any abnormal indicators.

Dr. Henrichsen also tested Respondent's hip strength and found it was normal, though the test caused some back pain. Dr. Henrichsen testified that Respondent did not have femoral nerve pain or a related issue. When he performed a "nerve stress examination," Respondent held his leg at 30 degrees whereas 60 degrees is normal. Dr. Henrichsen testified that Respondent's "significant low back trouble" causes decreased hip strength. Further testing showed Respondent's back and trunk mobility was within normal limits, though on the lower end of the spectrum. Respondent's low back motion was reduced as was the range of motion in his hips. Respondent cannot squat.

Dr. Henrichsen testified that he did not identify objective support for Respondent's claimed leg numbness or radiating pain. Respondent's symptoms were "significantly greater" than Dr. Henrichsen's findings. Dr. Henrichsen also opined that Respondent has more treatment options he has not yet explored. Dr. Henrichsen testified that Respondent was morbidly obese, which was a primary factor in his symptomology.

Based on his findings, Dr. Henrichsen opined Respondent was substantially incapacitated from performing his job duties, but the incapacity was temporary because if Respondent were to lose weight, his symptoms would decrease. Dr. Henrichsen stated that unless he was able to view the x-ray film and MRI scans, he could not be more precise. Thereafter, Dr. Henrichsen was provided additional records and after reviewing the MRI, he opined in supplemental reports that Respondent does not have permanent substantial incapacity and does have pain greater than supported by his examination and imaging findings.

At hearing, Dr. Henrichsen explained that while Respondent does have physical limitations, those limitations are based on his "weight to power" ratio, meaning Respondent's weight is too great for his frame strength. Dr. Henrichsen opined that if Respondent were to lose 115 to 120 pounds, his ability would not be as restricted. He further opined that if Respondent were "persistent and cooperative," he could lose that amount of weight within 12 months. Dr. Henrichsen concluded that Respondent does not have temporary impairment or incapacity and identified no specific job duties that he was unable to accomplish.

Respondent testified on his own behalf at the hearing. Respondent was in the army for a year and a half when he injured his back. Respondent now has an 80 percent disability rating from the VA based on his "degenerative discs and radiculopathy." Respondent claims his back injury was exacerbated over years of heavy manual labor with the City, which culminated on December 26, 2018, when he experienced excruciating pain. Respondent attempted to return to work but given the amount of heavy labor and unsafe conditions, he became a liability to his coworkers and stopped working. Respondent testified that he enjoyed his Job with the City for nearly 20 years and he tried to keep working, despite his pain.

Respondent testified that over the years, the pain decreased the amount of exercise he was able to do, and he began to gain weight. He stated, "if there were something [he] could do, [he] would do it." He is ashamed and embarrassed when doctors talk to him about his weight because he feels he is unable to lose weight given the pain he is in. He has been told there is "no way to lose the amount of weight" necessary "without a life-

altering surgery." Respondent is unsure whether he is willing to submit to such a procedure.

Respondent did not call any physicians or other medical professionals to testify. Respondent submitted medical records from his treating physicians to support his appeal. Respondent also submitted a medical report from Dr. Harry A. Khasigian who had performed a fitness for duty examination for the City. Dr. Khasigian's report was admitted as administrative hearsay. Dr. Khasigian took an oral history, performed a physical evaluation, and reviewed Respondent's available medical records. His evaluation was similar to Dr. Henrichsen's with similar results. Dr. Khasigian found Respondent had back pain, degenerative disc disease, and limited mobility in his low back. Dr. Khasigian wrote Respondent's "unfavorable power to weight ratio makes the situation severely worse." Like Dr. Henrichsen, Dr. Khasigian found Respondent's x-rays and MRI showed degenerative changes, but no "extraordinary findings which would be consistent with his level of pain and complaints." Dr. Khasigian opined Respondent was "not able to perform heavy manual labor, work in confined spaces, bend and squat frequently, or lift 100 pounds, and he cannot operate backhoes, heavy-duty machines, or a jackhammer currently." Were Respondent to undergo bariatric weight loss surgery, however, within one year he would be able to return to perform the essential functions of his job.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ granted Respondent's appeal. The ALJ found that Dr. Henrichsen, Dr. Khasigian, and Respondent all agree Respondent is unable to perform several of the duties of a Utilities Service Worker III. No evidence was presented regarding Dr. Henrichsen's or Dr. Khasigian's expertise allowing either to opine on the time it would take for Respondent to lose over 100 pounds. The ALJ concluded that at the time of his application, Respondent was substantially incapacitated from performing the heavy manual labor required of a Utilities Service Worker III, and the incapacity is of an unknown duration.

The ALJ concluded that Respondent is eligible for disability retirement.

Staff argues that the Proposed Decision should be remanded by the Board for two reasons: (1) to determine whether Respondent is disabled due to his obesity condition, and (2) to take additional evidence concerning the duration of disability due to Respondent's obesity condition.

First, Respondent applied for disability retirement based on his alleged orthopedic (lumbar spine, lumbar radiculopathy and bilateral lower extremities) conditions and not based on his obesity condition. The evidence presented at the hearing was limited to medical witnesses and reports addressing Respondent's alleged orthopedic condition. The ALJ found that the orthopedic specialists, Dr. Henrichsen and Dr. Khasigian, did not have expertise concerning Respondent's obesity condition. The Board should remand the Proposed Decision to take further evidence on Respondent's obesity condition.

Second, the ALJ found that Respondent's disability due to his excessive weight is of an "unknown duration." The ALJ appears to have arrived at this conclusion because she questioned Dr. Henrichsen's and Dr. Khasigian's expertise to opine on the time it would take for Respondent to lose over 100 pounds. In order to be granted lifetime pension benefits, Government Code section 20026 explicitly defines disability to 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 . . . based on competent medical opinion." Thus, a finding that an incapacity is of an "unknown duration" does not satisfy the eligibility requirement necessary under section 20026. Further, Respondent has the burden of proof and must provide competent medical opinion to prove he met the required definition of disability under Public Employees' Retirement Law.

Accordingly, Staff argues that the matter should be remanded for the taking of additional evidence pertaining to Respondent's disability due to his obesity condition and the expected duration of Respondent's disability due to his obesity condition.

June 16, 2021

Austa Wakily
Senior Attorney