

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Michelle Montano (Respondent) was employed by Valley State Prison, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Certified Nursing Assistant (CNA). By virtue of her employment, Respondent was a state safety member of CalPERS. On January 12, 2018, Respondent applied for Industrial Disability Retirement (IDR) on the basis of an orthopedic (right shoulder) condition. Respondent's IDR application was approved by CalPERS, and she retired with a backdated effective date of July 8, 2015.

The Public Employees' Retirement Law (PERL) authorizes the CalPERS Board of Administration (Board) to audit disability retirement cases which require disability recipients to undergo medical evaluations at any time prior to reaching the minimum age for voluntary service retirement. These audits are administered to determine whether disability retirement recipients still meet the qualifications necessary to continue to receive disability retirement benefits. When a disability retiree is no longer substantially incapacitated from the performance of their usual duties, and is still under the minimum age for retirement, the retiree shall be reinstated to their former position.

On July 1, 2021, CalPERS notified Respondent that she would be reevaluated for the purposes of determining whether she remains continuously substantially incapacitated to be eligible to receive an IDR. As part of CalPERS' review of Respondent's medical condition, Respondent was sent for an Independent Medical Examination (IME) with Don Williams, M.D., a board-certified Orthopedic Surgeon. Dr. Williams interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed medical records. Dr. Williams also performed a comprehensive IME, which included a thorough physical examination. Dr. Williams opined that Respondent was no longer substantially incapacitated, and that she could perform the usual duties of her former position as a CNA.

After reviewing all medical documentation and the IME report, CalPERS determined that Respondent was no longer substantially incapacitated, no longer eligible for IDR, and should therefore be reinstated to her former position as a CNA. Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH).

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

A remote hearing was held on October 11, 2022. Respondent represented herself at the hearing. At the hearing, Dr. Williams testified in a manner consistent with his examination of Respondent and his reports. Dr. Williams testified that while Respondent does have some residual loss of motion, she maintains a functional range of motion and can perform her usual job duties. In his medical opinion, Respondent is not disabled.

Respondent testified that she suffers from persistent right shoulder pain that has not resolved, decreased, or improved since she was granted IDR. Respondent did not call any physicians or other medical professionals to provide expert medical testimony at hearing to support her claims.

The ALJ found that CalPERS bears the burden of proving that the member is no longer substantially incapacitated from performing the usual duties of her position and that CalPERS met its burden. The ALJ found Dr. Williams to be persuasive and his competent medical opinion was unchallenged. The ALJ held that while Respondent may suffer from pain or believe she cannot perform her job without prophylactic restrictions in place to prevent further injury to her right shoulder, neither of these conditions prevent Respondent from performing the usual duties of her job. After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent's appeal.

Respondent petitions the Board of Administration to reconsider its decision to adopt the Proposed Decision. Respondent raises the same arguments that were considered and rejected by the ALJ after hearing. Respondent states she has lifetime care through Workers' Compensation and permanent restrictions because of the injury sustained to her right shoulder. She further argues that even with two surgeries on her right shoulder, there has been little to no change in her ability to use her right arm. Respondent includes various medical reports with her Petition, all of which were previously submitted for review and consideration by the ALJ.

No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the January 17, 2023, meeting was well reasoned and correctly decided.

For all the above reasons discussed, staff argues that the Board should deny Respondent's Petition for Reconsideration.

March 15, 2023

NHUNG DAO
Attorney