

**ATTACHMENT B**

**STAFF'S ARGUMENT**

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

Marshun D. Lewis (Respondent) was employed as an Office Assistant (Typing), with California Department of State Hospitals - Metropolitan Los Angeles (Respondent DSH). By virtue of her employment, Respondent was a state miscellaneous member of CalPERS. Respondent was employed as an Office Assistant (Typing) for Respondent DSH until October 10, 2017.

On January 11, 2022, Respondent submitted a disability retirement (DR) application based on alleged conditions concerning nerve damage, knees, back pain, cervical radiculopathy, and chronic neck pain. She requested an effective retirement date "upon expiration of benefits." Because Respondent's leave benefits had expired four years earlier, her application was dated January 1, 2022 (the first day of the month in which her application was received). CalPERS deemed her application to also include a request for an earlier effective retirement date.

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.

CalPERS requested and reviewed medical records and documentation concerning Respondent's claimed conditions. As part of CalPERS' review of Respondent's medical condition, Stephen P. Suzuki, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Suzuki 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. Suzuki opined that Respondent does not have an orthopedic condition that arises to the level of substantial incapacity to perform her job duties.

After reviewing the facts and medical information received, and after considering the applicable Government Code sections, CalPERS determined that (1) Respondent was not substantially incapacitated to perform her usual work duties as an Office Assistant (Typing); and (2) Respondent did not meet the criteria under Government Code section 20160 that allows for the correction of a mistake to receive an earlier effective retirement date.

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 July 11, 2023. No appearance was made by or on behalf of Respondent Lewis or Respondent DSH despite receiving timely and appropriate notices of the hearing. The matter proceeded as a default against both parties pursuant to Government Code section 11520, subdivision (a).

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. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

At the hearing, Dr. Suzuki testified in a manner consistent with his examination of Respondent and his IME report. Dr. Suzuki testified that Respondent does not have a present orthopedic impairment that arises to the level of substantial incapacity to perform her job duties. Respondent's primary duty is typing. Dr. Suzuki does not believe any of Respondent's conditions would prevent her from performing that duty. Dr. Suzuki saw no objective findings which would result in any incapacity to perform her usual job duties. Dr. Suzuki also found Respondent's subjective complaints to be out of proportion to the mechanism of injury, diagnostic study findings, and his clinical evaluation. For example, Dr. Suzuki found no evidence of muscle wasting or atrophy, and observed that Respondent exhibited normal motor strength.

After considering all of the evidence introduced, as well as arguments made by CalPERS, the ALJ denied Respondent's appeal and affirmed CalPERS' denial of Respondent's DR application. The ALJ found that the weight of the competent medical opinions presented in this case establish that Respondent is not incapacitated for performance of her duties as an Office Assistant (Typing). Those medical opinions were provided primarily by Dr. Suzuki, as well as opinions from various physicians who evaluated Respondent in other legal proceedings. Since this hearing proceeded by default, no competing evidence was presented by Respondent. Thus, Respondent failed to meet her burden of proof to show that she was substantially incapacitated to perform her usual job duties. Since Respondent failed to meet her burden of proof, the ALJ further found her request for an earlier effective retirement date to be moot.

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 "March 2, 2005" to "March 2, 2015" in paragraph 3, under the Factual Findings section, on page 3 of the Proposed Decision.

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

September 20, 2023

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Nhung Dao  
Attorney