

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Joy D. Jordan (Respondent) was employed by Department of State Hospitals, Napa (Respondent DSH) as a Pharmacy Technician. By virtue of her employment, Respondent was a state miscellaneous member of CalPERS. On February 18, 2020, Respondent submitted an application for disability retirement on the basis of orthopedic (left and right upper extremity problems caused by dystonia) conditions. Respondent's application was approved by CalPERS and Respondent retired for disability effective December 4, 2019.

On September 27, 2021, CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that she would be reevaluated for purposes of determining whether she remains substantially incapacitated and is entitled to continue to receive disability retirement.

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 or her 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 conditions, Respondent was sent to Harry A. Khasigian, M.D. for an Independent Medical Examination (IME). Dr. Khasigian interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed medical records. Dr. Khasigian also performed a comprehensive IME. Dr. Khasigian opined that the condition of Respondent's extremities no longer met the CalPERS disability standard.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated and should therefore be reinstated to her former position as a Pharmacy Technician.

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 hearing was held on October 4, 2023. Respondent represented herself at the hearing. Respondent DSH did not appear at the hearing. The ALJ found that the matter could proceed as a default against Respondent DSH, pursuant to Government Code section 11520.

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.

At the hearing, Dr. Khasigian testified in a manner consistent with his examination of Respondent and his reports. Dr. Khasigian's medical opinion is that Respondent can perform the duties of her position and is therefore no longer substantially incapacitated. Specifically, he found that Respondent did not display the muscle spasms, twitches, or jerking which are the hallmarks of dystonia. Dr. Khasigian also found that Respondent's subjective complaints could not be reconciled with the objective test results.

Dr. Khasigian had reviewed CalPERS and SCIF surveillance which showed Respondent using her left arm and hand to perform a number of tasks, including picking up heavy objects. Dr. Khasigian cited this video evidence as important to reaching his conclusions and testified that he could not reconcile Respondent's activities on surveillance with her claimed degree of incapacity.

Respondent testified on her own behalf. Respondent testified that she continued to have poor use of her upper extremities. Respondent was emphatic that she was unable to perform certain job-related tasks. Respondent did not call any physicians or other medical professionals to testify. Respondent testified that her conditions had not improved in the last few years, so her treating physician was encouraging her to do physical therapy which she had yet to begin. Respondent further testified that she disagreed with the results of Dr. Khasigian's examination and report. Respondent submitted medical records from her treating physicians to support her appeal, which were admitted as administrative hearsay. Administrative hearsay may be used to supplement or explain other evidence but cannot be used in itself to support a finding.

The ALJ found that CalPERS met its burden of proving by competent medical evidence that Respondent was no longer substantially incapacitated. The ALJ found that the only competent medical evidence was presented by Dr. Khasigian, and his testimony was comprehensive and persuasive. Respondent did not present any competent medical evidence to the contrary. As a result, the ALJ held that Respondent is not substantially incapacitated from performing her usual duties. After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent's appeal.

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

January 16, 2024

Mehron Assadi
Staff Attorney