

ATTACHMENT B

STAFF'S ARGUMENT

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

Maribeth Aragones (Respondent) applied for industrial disability retirement based on orthopedic (cervical and lumbar spine) conditions. By virtue of employment as a Licensed Vocational Nurse (LVN) for Respondent Pelican Bay State Prison, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

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 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 condition, Respondent was sent for an Independent Medical Examination (IME) to board-certified Orthopedic Surgeon Robert K. Henrichsen, M.D. Dr. Henrichsen interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Henrichsen opined that there were no specific LVN job duties or physical job requirements that Respondent was unable to perform. Accordingly, he concluded that Respondent was not substantially incapacitated from performing her usual and customary duties as an LVN for CDCR.

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 hearing was held on January 14, 2021. A Proposed Decision on Remand denying Respondent's appeal was issued on February 17, 2021.

On June 16, 2021, the CalPERS Board of Administration remanded this matter to the ALJ with instructions to receive and consider additional evidence regarding Respondent's condition after she underwent cervical spine surgery post-hearing. The hearing on remand was held on December 2, 2021. Respondent represented herself at both hearings. Respondent CDCR did not appear at either hearing.

Prior to both hearings, 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 first hearing, Dr. Henrichsen testified in a manner consistent with his examination of Respondent and the IME report. Dr. Henrichsen's medical opinion is that although there was evidence that Respondent has degenerative disc disease of the lumbar spine, there was no evidence of an existing significant pathology or traumatic injury to Respondent's lumbar or cervical spine that supported her claimed incapacity. Therefore, Respondent is not substantially incapacitated from performing her duties as an LVN for CDCR.

At the second hearing, Dr. Henrichsen testified that he reviewed additional records related to Respondent's April 8, 2021 neck surgery and that he prepared a Supplemental IME report based on the additional documents. Dr. Henrichsen opined that the condition of Respondent's cervical spine remained the same as it was during his initial examination. Dr. Henrichsen noted that Respondent may feel some discomfort when working or performing daily activities, due to age-related arthritic disease. However, nothing in the additional documents showed that Respondent is incapable of doing her job. Therefore, Dr. Henrichsen's opinion remains unchanged: Respondent is not substantially incapable of performing her usual job duties as an LVN for CDCR.

At the first hearing, Respondent testified on her own behalf that her condition affected her ability to perform her job because "pain affects [her] focus and concentration at work. Pain slows [her] down from accomplishing [her] tasks and most of the duties of an LVN aggravates [her] injury because [she is] injured. [She poses] a risk to [herself and her] co-workers also, and the chance to get another injury is high." She further testified that she cannot sit for over three hours, stand for three to six hours, run, climb stairs, reach above her shoulders, lift over 11 pounds, or twist at the neck because those activities cause her so much pain she is unable to work. Respondent did not call any physicians or other medical professionals to testify.

At the second hearing, Respondent again testified on her own behalf. She said she has been undergoing physical therapy which has improved her range of motion, but she still experiences pain. She testified that she cannot perform the essential functions of her job because she cannot run, lift, bend, or turn her neck. Further, if she is at work performing her duties, she cannot perform her physical therapy exercises, including completing back decompressions every 2-3 hours.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ again denied Respondent's appeal. The ALJ found that Respondent failed to submit sufficient competent medical evidence to establish that when she applied for industrial disability retirement, she was substantially incapacitated from performing the usual duties of an LVN for CDCR. The ALJ found that Respondent had the burden of proof, and she produced no competent medical evidence to support her claim of disability. The ALJ found Dr. Henrichsen to have testified in detail regarding his initial examination and evaluation of Respondent, plus his additional examination of her

medical records related to her April 2021 neck surgery. Upon review of surgical records, Dr. Henrichsen's opinion remained unchanged. Because Respondent failed to offer sufficient competent medical evidence at hearing or remand to establish that she was substantially incapacitated to perform her usual job duties as LVN for CDCR, the ALJ found that Respondent's IDR application was properly denied. The ALJ concluded that Respondent is not eligible for industrial disability retirement.

Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to "make technical or other minor changes in the proposed decision." In order to avoid ambiguity, staff recommends that "and uncertain duration" be removed from the quotation in the second line of paragraph two on the top of page 17.

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

February 15, 2022

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