

ATTACHMENT B

STAFF'S ARGUMENT

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

Michelle Montano (Respondent) was employed by Respondent 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 an effective date of July 8, 2015.

The CalPERS Board of Administration has authority 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 recipients still meet the qualifications necessary to continue to receive disability retirement benefits. Where a disability retiree is no longer substantially incapacitated from the performance of their usual duties, and are still under the minimum age for retirement, the retiree shall be reinstated back to work in their former position.

The analysis of whether a disability retirement recipient is still incapacitated from the performance of their usual job duties under Government Code section 21192 is limited to determining whether the conditions for which disability retirement was granted continue to exist. 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.

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 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) with Don T. 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. 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, was 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). A hearing was held on October 11, 2022. Respondent represented herself at the hearing. Respondent CDCR did not appear. The ALJ found that the matter could proceed as a default against Respondent CDCR, 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. Williams testified in a manner consistent with his examination of Respondent and his reports. Dr. Williams found that the member's upper extremity range of motion to be within normal limits. He found the member exaggerated her symptoms, showed poor effort during the physical examination, and actively resisted range of motion testing. Dr. Williams made his findings based on his years of experience with treating people with biceps tendonitis without rotator cuff tears and found the normal time period to recover had expired in Respondent's case. Dr. Williams explained the member is not incapacitated to perform her usual duties as a CNA because she had a second surgery which removed additional spurring and impingement upon the rotator cuff, and her motion improved. The MRI shows that her rotator cuff is intact and there is no atrophy of her rotator cuff muscle. While Respondent does have some residual loss of motion, Dr. Williams found that she maintains a functional range of motion.

Respondent testified that she suffers from persistent right shoulder pain following an on-the-job injury to her right shoulder that has not resolved, decreased, or improved since she was granted IDR. According to Respondent, CDCR will not allow her to return to her CNA position because she is unable to complete the essential functions of the job due to her limitations. She states she cannot reach above the shoulder, repetitively use her hands, and lift or carry up to 50 pounds, all of which are essential functions for a CNA. Respondent did not offer any expert medical testimony at hearing to support her claims. She also called her husband to testify on her behalf.

Respondent did not call any physicians or other medical professionals to testify. Respondent submitted prior medical records from her treating physicians to support her appeal, which were admitted as administrative hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

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. In this case, CalPERS met its burden of proof and presented sufficient competent medical evidence to establish that Respondent is no longer substantially and permanently incapacitated

from performing the usual duties of a CNA. Respondent did not introduce any competent medical opinion to support her claim of continuous incapacity, and she did not provide any reliable evidence to refute Dr. Williams' competent medical opinion following IME. The ALJ found Dr. Williams to be persuasive and unchallenged.

Although Respondent presented her 2017 Qualified Medical Examination (QME) to support a continued finding of substantial incapacity, the ALJ found that the QME Report is not considered competent medical evidence for the purpose of determining substantial incapacity under the CalPERS standard. A QME is written in conjunction with a workers compensation claim to determine the financial liability of an employer for an on-the-job injury. An IME evaluates objective medical findings and considers them in light of the essential functions of a job in conjunction with the CalPERS standard for disability. The ALJ held that findings issued for the purposes of workers compensation are not evidence that Respondent's injuries are substantially incapacitating for the purposes of CalPERS disability retirement.

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 essential functions of her job. Discomfort alone, even if it makes performance of one's duties more difficult, is insufficient to establish a substantial incapacity. After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent's appeal.

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 "disability of permanent or extended and uncertain duration" to "disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death" in section 3 under the Legal Conclusions section, on page 12 of the Proposed Decision.

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

January 17, 2023

Nhung Dao
Attorney