

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Peyton A. Smith (Respondent) was employed as a Rehabilitation Therapist by the Department of Mental Health. By virtue of her employment, Respondent became a state safety member of CalPERS subject to Government Code section 21151. Respondent applied for disability retirement, claiming disability on the basis of psychological, orthopedic (back), and internal (high blood pressure) conditions. CalPERS retained Stephen Prover, M.D., Psychiatrist, Craig Joseph, M.D., Internist, and Peter Borden, M.D., Orthopedist, as its Independent Medical Examiners. Doctors Prover, Joseph, and Borden examined Respondent, reviewed her medical records and description of her job duties, and prepared reports documenting their respective findings and conclusions. Doctors Prover, Joseph, and Borden concluded that Respondent was not substantially incapacitated from performing the usual and customary duties of her position. Accordingly, CalPERS denied Respondent's application for disability retirement. She appealed, and a hearing was held on December 20, 2012, by an Administrative Law Judge (ALJ) from the Office of Administrative Hearings.

In order to be eligible for disability retirement, an individual must demonstrate, through competent medical evidence, that he or she is substantially incapacitated from performing the usual and customary duties of his or her position. The injury or condition that is the basis for the claimed disability must be permanent or of an uncertain and extended duration.

Despite proper service on Respondent of the Statement of Issues and Notice of Hearing, Respondent did not appear at the hearing, and the matter was submitted for decision. The ALJ received and considered evidence demonstrating that Respondent had received proper and adequate notice of the hearing. Since CalPERS established that satisfactory service had been effectuated on Respondent, the matter proceeded as a default.

The ALJ noted that after Respondent had failed to attend additional independent medical examination appointments, CalPERS had attempted to contact Respondent regarding her verbal request to withdraw her appeal, but Respondent did not confirm her request in writing. Thus, the hearing in this matter ensued as scheduled.

The ALJ found that Doctors Prover, Joseph, and Borden each prepared their reports based on their medical evaluations or examinations of Respondent, reviewed Respondent's history and medical records, and reviewed the job description of a Rehabilitation Therapist. Although the doctors made mention of other conditions, each doctor had focused on the medical condition for which he was retained to evaluate.

In the Proposed Decision, the ALJ opined that Evidence Code section 664 creates the general presumption that a public agency or office has performed its official duty. Since CalPERS has fulfilled its duty to determine Respondent's eligibility for disability retirement, the burden falls on Respondent to rebut this presumption by proving

incapacitating disability. Although Respondent contended that she was disabled, no documentary evidence or testimony was presented to support her contention that she was substantially incapacitated from the performance of her duties. Therefore, Respondent failed to meet her burden of rebutting the evidence presented by CalPERS. Accordingly, the ALJ concluded Respondent was not substantially incapacitated from performing the usual duties of a Rehabilitation Therapist employed by the Department of Mental Health on the basis of psychological, internal, or orthopedic conditions.

The ALJ's Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a motion with the Board under Government Code section 11520(c), requesting that, for good cause shown, the Decision be vacated and a new hearing be granted. The member may also file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

February 21, 2013



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