

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Joni Forsht (Respondent) worked for the California Department of Corrections and Rehabilitation (CDCR), Pelican Bay State Prison as a Correctional Officer. Due to her employment, Respondent is a state safety member of CalPERS. She filed an application for industrial disability retirement claiming disability on the basis of an orthopedic injury sustained to her lower back, as well as psyche. On her application, Respondent indicated that her injuries limited her ability to lift heavy objects, precluded her from stairs and standing or sitting for long periods, as well as from having physical contact with inmates.

Staff reviewed medical reports regarding Respondent's lower back condition, psyche condition and a written description of her usual and customary job duties. CalPERS retained Independent Medical Examiner (IME) Baer Rambach, M.D., an Orthopedic Surgeon, to conduct a medical examination. Doctor Rambach examined Respondent and reviewed medical records and a written job description. Based on his examination and record review, Dr. Rambach issued a report indicating that there are not any specific duties that Respondent would be unable to perform due to her physical condition. According to Dr. Rambach, Respondent had been working with back problems for ten years, which were cumulative injuries she sustained while working for CDCR. In his medical opinion, Respondent was not substantially incapacitated for the performance of the usual duties of her current position. Thus, Dr. Rambach opined that she is not disabled for CalPERS retirement purposes.

With respect to Respondent's psyche condition, CalPERS retained IME Herbert Perliss, M.D., a board-certified Psychiatrist, to perform a psychiatric examination. Doctor Perliss examined Respondent and reviewed medical records and a written job description. Pursuant to Dr. Perliss' examination and record review, he found that Respondent has a mild anxiety disorder, but concluded that it would not interfere with her job duties. Therefore, Dr. Perliss does not consider Respondent to be substantially incapacitated from performing her usual and customary duties as a Correctional Officer. As a result, staff denied Respondent's application for industrial disability retirement related to her back and psyche conditions. In response, Respondent submitted a timely appeal of staff's determination and a hearing was set to determine whether Respondent was substantially incapacitated from performance of her duties as a Correctional Officer.

Prior to the administrative hearing, Dr. Rambach re-evaluated Respondent and issued an updated medical report in which he indicated that Respondent is presently substantially incapacitated for performance of her usual duties. Doctor Rambach explained that there had been a progression of changes at the time of his current examination as compared to his previous examination. Specifically, he changed his opinion based on a progression of degenerative arthritis and degenerative disc disease in Respondent's lumbar spine. However, with respect to the date Respondent's incapacity began, Dr. Rambach opined that the onset of her incapacity would be at the time of his re-evaluation, February 13, 2012. However, Respondent stopped working at

CDCR in May 2005 and filed her disability application in 2006. Because Respondent must show that she was incapacitated at the time she applied for disability retirement and her disability has continued to the present, Dr. Rambach's updated opinion did not change staff's denial. Consequently, a hearing was held to determine whether Respondent was substantially incapacitated from performance of her duties as a Correctional Officer.

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 his or her position. The injury or condition which is the claimed basis for the disability must be permanent or of an extended and uncertain duration.

At the hearing, Respondent was represented by counsel, both of whom appeared by telephone. Respondent testified about her work history with CDCR, and the usual job duties she performed in her position in the control booth, which is the position she held at the time she applied for industrial disability retirement. Respondent described her usual duties in the control booth as manipulating toggle switches on a control panel that open and close all of the doors, sound the alarm and secure the doors if an emergency occurs. Additionally, Respondent testified that she had to be prepared to pick up a firearm, which is located under the control panel, to aim and fire it, if necessary, but she could not leave the control booth unless ordered to respond to an emergency, which she stated never occurred while she worked in the control booth.

Respondent provided medical reports from workers' compensation doctors Donald R. Schwartz, M.D., and Robert T. Levine, M.D., both of whom testified at the hearing via telephone on her behalf. Doctor Schwartz first evaluated Respondent four years after she submitted her claim for industrial disability retirement. In his reports, Dr. Schwartz indicated that Respondent is incapable of returning to her employment at CDCR, particularly with respect to the work activities involving alarm responses. During his testimony at the hearing, Dr. Schwartz stated that his opinion regarding Respondent's inability to return to work at CDCR is based on a duty statement that lists all of the physical duties of a Correctional Officer, including running to respond to alarms, crawling or crouching while involved in cell searches, disarming, subduing and applying restraints to an inmate, as well as lifting and carrying an inmate.

The medical report from Dr. Levine indicated Respondent's psychiatric disability precluded her from returning to employment at CDCR, and determined that if she returned, her psychiatric symptomatology would resurface. Just as Dr. Schwartz, Dr. Levine based his opinions about Respondent's ability to return to work on a duty statement encompassing all of the duties of a Correctional Officer. At the hearing, Dr. Levine reiterated his opinions regarding Respondent's psychiatric condition and, on cross examination, acknowledged that he wrote his report based on the standards of the workers' compensation system, not pursuant to disability retirement standards.

CalPERS' IMEs testified at the hearing about Respondent's orthopedic and psychiatric conditions. During his testimony, Dr. Rambach explained that his initial opinion

regarding Respondent's orthopedic condition had changed due to the progression of her degenerative arthritis and intervertebral disc disease. Despite his updated opinion, Dr. Rambach confirmed that, at the time he initially evaluated Respondent, she was not substantially incapacitated. Relative to Respondent's psychiatric condition, Dr. Perliss testified about his bases for concluding that Respondent has no psychological condition that disables her from performing the duties of a Correctional Officer. Additionally, Dr. Perliss testified that none of the testimony he heard from Respondent, or her doctors, over the course of the hearing caused him to change his opinion regarding Respondent's psychiatric condition.

Based on the testimony presented at the hearing, as well as the medical reports submitted by the parties, the Administrative Law Judge (ALJ) found that Respondent has not demonstrated through competent medical evidence that she was permanently incapacitated from performance of her duties as a Correctional Officer at the time she retired. The ALJ concluded that the duty statements relied upon by Respondent's medical evaluators were not representative of the usual duties performed by Respondent. Instead, the evidence established that during her last two years of employment at CDCR, Respondent was never called upon to perform the physically demanding tasks of running, subduing or disarming a prisoner, or conducting a cell extraction. Under well-established case law, Respondent's application for industrial disability retirement must be measured against her usual duties as a Correctional Officer assigned to the control booth, not all physical duties of a Correctional Officer. Accordingly, the ALJ determined Respondent was not substantially incapacitated from performing her duties as a Correctional Officer at the time she submitted her application for industrial disability retirement. As a result, Respondent's application for industrial disability retirement was denied.

The Proposed Decision is supported by the law and the facts. For the reasons stated above, staff argues that the Board should 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 Writ petition in superior court seeking to overturn the decision of the Board.

February 21, 2013

  
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RENEE SALAZAR  
Senior Staff Attorney