ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Angelica Toralba (Respondent) was employed by the Delano District Skilled Nursing Facility, North Kern – South Tulare Hospital (District) as an Office Clerk/Senior Accounts Receivable. The District is a local contracting agency with CalPERS. By virtue of her employment with the District, Respondent is a local miscellaneous member of CalPERS. Respondent submitted an application for disability retirement on the basis of claimed conditions of fibromyalgia, chronic pain and fatigue. CalPERS staff reviewed relevant medical records and a written description of Respondent's usual and customary job duties. Respondent was examined and evaluated by Mark Borigini, M.D., a board-certified Internist and Rheumatologist, who also reviewed relevant medical records and a description of Respondent's usual and customary job duties. Dr. Borigini prepared a written report which included his findings, observations and conclusions regarding Respondent's condition. Dr. Borgini expressed his opinion that Respondent was not substantially incapacitated from performing the usual and customary duties of her position as an Office Clerk with the District. CalPERS staff denied Respondent's application for disability retirement. Respondent appealed this determination and a hearing was held on August 29, 2012. The record was held open for the submission of additional medical records.

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

The District provides services similar to a skilled nursing facility. Respondent worked as the District's Office Manager, performing largely administrative, support and information technology tasks. Respondent worked in an office, at a desk, with a telephone and computer.

Respondent testified at the hearing, describing her usual and customary job duties. Respondent stated that she began to experience diffuse pain, which got progressively worse, causing her to stop working. Respondent offered into evidence, and the Administrative Law Judge (ALJ) considered, extensive medical records. The medical records contained references to various complaints and/or diagnoses, including fibromyalgia, positional vertigo, carpal tunnel syndrome, temporal mandibular joint disorder (TMJ), irritable bowel syndrome (IBS) and insomnia.

The ALJ found that Respondent's medical records failed to "document a consistent diagnosis of any of those conditions...." The ALJ also found that the medical records did not demonstrate that "Respondent would suffer from any of those conditions indefinitely...." In addition, the ALJ found that none of the claimed conditions "incapacitated Respondent physically or mentally for the performance of her duties."

The ALJ reviewed and considered the Independent Medical Examination (IME) report prepared by Dr. Borigini. In that report, Dr. Borigini noted that Respondent had full range of motion in her cervical and lumbar spine, that she had full range of motion in her joints, and that there was no evidence of muscle atrophy (wasting), which he would have expected to see if Respondent had not been able to walk because of pain, as claimed. Dr. Borigini found no objective evidence to demonstrate or support Respondent's claim of functional limitation.

After considering all of the testimony and evidence, the ALJ concluded that competent medical evidence did not demonstrate that Respondent is substantially incapacitated from performing her usual and customary job duties because of either fibromyalgia or depression (which Respondent did not list as a disabling condition in her application, but which she testified to at the hearing). The ALJ concluded that, "The subjective nature of fibromyalgia and depression mean that Respondent's testimony alone is not sufficient, and that it must be corroborated by persuasive, competent medical evidence." While the ALJ considered the information contained in the medical reports offered by Respondent, such evidence was found to not be sufficient to rebut the findings, conclusions and opinion of the IME, Dr. Borigini.

The ALJ concluded that Respondent's appeal should be denied. The 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 Writ Petition in Superior Court seeking to overturn the Decision of the Board.

February 21, 2013

Rory J. Coffey

RORY J. COFFEY
Senior Staff Attorney