

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

## **STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION**

Respondent Brenda Stevenson (Respondent) petitions for reconsideration of the Board's December 12, 2012, adoption of the Proposed Decision on remand by an Administrative Law Judge (ALJ) of the Office of Administrative Hearings. Respondent requests that she be permitted to offer oral argument at a full Board hearing about: (1) the time limitations within our disability appeal process; (2) an allegation that CalPERS' attorney withheld information from the court; (3) an allegation that the Independent Medical Examiner (IME) utilized by CalPERS was not competent; (4) an allegation that the CalPERS' IME process is biased; and (5) argument concerning her physical condition. However, Respondent has had two hearings before two different ALJs, each of which reached the same conclusion, i.e., that medical evidence demonstrates that Respondent is not substantially incapacitated from the performance of her duties as a Parole Agent I.

Respondent's arguments lack merit and do not justify further reconsideration, remand, or a full Board hearing. The process in the case, and all notification given to Respondent concerning the case were within the time requirements under the Administrative Procedures Act and Public Employees' Retirement Law. As will be discussed, Respondent's contentions are self-serving.

Respondent previously argued that the initial CalPERS IME, John Lang, M.D., a board-certified Orthopedist, was biased against her. Dr. Lang found that Respondent had full range of cervical spine motion and negative findings on neurological tests that he performed. He concluded that her spine condition was stable and, that although Respondent might have some occasional discomfort while performing her duties, she was not substantially incapacitated from performing the duties of her position as a Parole Agent I.

The Board remanded the matter to CalPERS Benefit Services Division staff for consideration of whether a new IME evaluation should be granted. CalPERS staff sent Respondent to a second IME, J. Hearst Welborn, M.D., a board-certified Orthopedist. Dr. Welborn's findings during evaluation were very similar to those of Dr. Lang's. He determined that Respondent exhibited no neurologic loss or weakness in her cervical spine or any significant stenosis on her cervical spine MRI. As a result, he concluded that Respondent's cervical condition "only mildly interfered with her ability to use her neck," and that she was not incapacitated for the performance of her duties. Dr. Welborn was present to testify during the remand hearing.

Following the remand hearing, a second ALJ again concluded that Respondent's appeal should be denied. Respondent argues that the remand hearing was biased and unfair because the ALJ noted that Dr. Welborn's conclusions were consistent with those of the prior IME. This does not demonstrate bias, inasmuch as an ALJ is entitled to review all medical evidence when evaluating a member's claim and may assign weight to the various evidence as he or she deems appropriate.

Respondent alleges that she was prejudiced during the hearing because CalPERS' attorney arrived late, did not have all of the documents, and was given time to speak with the IME before the hearing commenced. She also claims that the IME was distracted by his cell phone during the proceedings, and that CalPERS' attorney was frustrated during questioning. Respondent's impressions about the proceeding, if believed, would not prejudice her, but would prejudice CalPERS in that the ALJ would thereby have an unfavorable impression of the IME and CalPERS' attorney. This was not the case.

The Proposed Decision includes specific mention by the ALJ that she considered Respondent's concerns about Dr. Welborn's distraction during his evaluation of her, as well as Respondent's concerns that Dr. Welborn did not accurately depict her injuries. However, the ALJ concluded that Dr. Welborn's testimony was, nevertheless, persuasive.

Lastly, Respondent argues that CalPERS' attorney is "taking this case personal and is withholding pertinent information for the benefit of her winning this case." This argument lacks merit as well. As noted in Respondent's argument, CalPERS' attorney openly stated her position concerning documents that Respondent sought to introduce into evidence. The ALJ agreed with CalPERS' attorney's position on the admissibility of the evidence. This is not withholding evidence, but an appropriate challenge to admission of evidence, the merits of which were ruled upon by the ALJ. Furthermore, although Respondent's case is understandably a personal matter of great importance to herself, each CalPERS' attorney handles many member cases and has no personal incentive or reason to hold bias against any member.

The Proposed Decision is supported by the law and the facts and was not the result of bias on the part of the ALJ, IME, or CalPERS' attorney. Accordingly, staff argues that the Board should affirm its adoption of the Proposed Decision on remand and deny Respondent's Petition for Reconsideration.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of denying further remand or hearing 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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