

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Dawn M. Jones¹ (Respondent) was employed by the California Department of Corrections and Rehabilitation as a Correctional Officer at Pelican Bay Prison. By virtue of her employment, Respondent is a state safety member of CalPERS.

Respondent applied for disability retirement based on orthopedic injuries (back right leg, knee and associated migrating pain). She described her limitations as "*can't work most days due to back pain and duty belt increasing pain –also a feeling of my legs buckling under my own weight.*"

CalPERS arranged for Respondent to be examined by an Independent Medical Examiner, Dr. Baer Rambach, a Board-Certified Orthopedist. Dr. Rambach concluded that Respondent's condition did not substantially incapacitate her from performing the usual and customary duties of her position as a Correctional Officer. After reviewing Dr. Rambach's reports and other medical evidence, staff denied Respondent's application for disability retirement.

Respondent appealed the decision and a hearing was held on March 14, 2013.

Under the applicable court rulings construing disability under the California Public Employees' Retirement Law (PERL), Respondent has the burden of showing that she is substantially incapacitated from performing the usual duties in her position as a Correctional Officer. Prophylactic restrictions and risk of possible future injury cannot support a finding of disability. (*Mansperger v. Pub. Employees' Ret. System* (1970) 6 Cal.App.3d 873; *Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854.)

Although properly served with the Statement of Issues and Notice of Hearing, Respondent Dawn M. Jones did not appear and was not otherwise represented. The Department of Corrections and Rehabilitation did not appear at the hearing.

Dr. Rambach testified at the hearing and explained that an MRI was performed and the radiologist reported minor degenerative changes at L5-S1 with no significant abnormalities and the right knee was normal. He explained that he had conducted a complete orthopedic examination and apart from some tenderness, she appeared to be normal. Her range of motion and reflexes were all normal. He opined that Ms. Jones was not substantially incapacitated from her usual and customary duties as a Correctional Officer.

In the reports offered by Respondent, Dr. Smukler on May 4, 2010, authorized her to return to work with full duties. He also reauthorized her to return to work on August 23, 2010, April 28, 2011 and August 24, 2011. Respondent did return to work on a periodic basis during these time periods as explained during testimony at the hearing.

¹ She was formerly Dawn Costner and changed her name.

After review of the medical reports, the Administrative Law Judge (ALJ) concluded that Respondent's appeal should be denied.² The ALJ cites the testimony of Dr. Rambach as the basis for his finding that Respondent failed to establish that she was unable to perform because of her physical condition. Staff argues that the Board of Administration 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.

June 19, 2013



JEANLAURIE AINSWORTH
Senior Staff Attorney

² The Opinion in error cites CalPERS counsel as Carol McConnell. Jeanlaurie Ainsworth represented CalPERS at the hearing in this matter.