

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Milagros Oliver (Respondent) was employed as a Registered Nurse (RN) by the California Department of Corrections and Rehabilitation (CDCR). By virtue of her employment, Respondent was a state safety member of CalPERS. Respondent submitted an application for Service Retirement pending Industrial Disability Retirement (IDR). The stated basis for the claimed disability was a skin infection in her right middle finger, although in the application Respondent also claimed that she experienced pain and a loss of strength and flexion in her right arm and hand.

CalPERS staff reviewed relevant medical reports and a written description of Respondent's usual and customary job duties. Sahniah Siciarz-Lambert, M.D., a board-certified Internist, reviewed applicable medical records, a written job description and performed an Independent Medical Examination (IME) of Respondent. Dr. Siciarz-Lambert prepared a written report which included her observations, findings, conclusions and opinion that Respondent was not substantially incapacitated from performing the usual and customary duties of an RN for CDCR. CalPERS staff denied Respondent's application for IDR. Respondent appealed CalPERS determination and a hearing was held on September 18, 2012 and May 9, 2013.

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 for the claimed disability must be permanent or of an extended and uncertain duration.

Respondent did not call a physician witness to testify on her behalf at the hearing. Respondent did submit numerous medical records and reports, which the Administrative Law Judge (ALJ) received into evidence and considered. Respondent testified that she cannot and does not use either her left or right hand because of ongoing pain, loss of motion and loss of strength. Respondent testified that she could not perform the duties of an RN for CDCR.

The ALJ noted that entries from medical reports submitted by Respondent contradicted her claims. In a report prepared by Gary K. Frykman, M.D., an Orthopedic Surgeon who examined Respondent as part of her companion claim for workers' compensation benefits, the ALJ noted that Dr. Frykman felt that Respondent did not make a full, honest effort when asked to test hand grip strength (Jamar Dynamometer) and concluded:

“...the considerable pain that she complains of now, the hypersensitivity, the lack of motion and grip strength do not fit with the discreet nerve injury from a needle stick into a nerve.”

Dr. Frykman examined Respondent a second time and in a subsequent report confirmed, "In my opinion the patient is probably not making full effort on gripping the Jamar Dynamometer."

Another examining physician, Daniel W. Wilson, M.D., wrote in his report:

"Good effort was not made, demonstrated by lack of forearm contraction on the right side. This testing cannot be used to demonstrate disability, as it is very subjective and relies entirely on the patient's effort."

The IME, Dr. Siciarz-Lambert made similar observations and findings. Dr. Siciarz-Lambert stated, in relevant part, in her report:

"Right middle finger MRSA infection – resolved without significant evidence of decreased range of motion, albeit [Respondent] alleges that she does not use her hand for any activity. On examination, one notes that there is no disuse atrophy, no swelling, and no significant tenderness, but there is voluntary guarding and no effort demonstrated when she is asked to perform Jamar testing....There is no effort demonstrated when she is asked to perform hand gripping to the examiner and this is evidenced by the lack of contracture of the tendons and musculature of the forearms.

With regard to the left hand, she has no sign evidence of deformity and no significant tenderness to palpation, but there is voluntary guarding."

At the hearing, Dr. Siciarz-Lambert testified consistently with her previous statements, contained in her written report. The ALJ found Dr. Siciarz-Lambert to be credible and that her opinion that Respondent was exaggerating her complaints was corroborated by the similar findings of other physicians.

After considering all of the evidence and testimony, the ALJ found that "Respondent's claims of disability are not credible." The ALJ concluded that Respondent had not demonstrated, on the basis of competent medical evidence, that she was entitled to disability retirement.

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.

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