

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Lynn R. Dane (Respondent) applied for disability retirement, based on orthopedic conditions (neck, shoulder, upper back, bilateral arm pain/muscle spasm and myofascial pain syndrome). By virtue of her employment as a Team Leader I for Respondent Metropolitan Water District (Respondent MWD), she was a local miscellaneous member of CalPERS.

As part of CalPERS' review of her medical condition, Respondent was sent for an Independent Medical Examination (IME) to Orthopedic Surgeon Dr. Mark Mikulics. Dr. Mikulics interviewed Respondent, and obtained Respondent's summary of her medical history, treatment, work history, recreational activities, and present complaints. Dr. Mikulics also reviewed Respondent's prior medical records. Dr. Mikulics concluded that Respondent is not substantially incapacitated for the performance of her duties. After a timely appeal, a hearing was completed over two days on June 26, 2013 and October 1, 2013.

Prior to hearing, CalPERS explained the hearing process to Respondent and the need to support her case with witnesses and documents. CalPERS provided her with a copy of the administrative hearing process handbook. CalPERS answered her questions and provided her with information to obtain further information.

Dr. Mikulics took an oral history from Respondent, and performed a comprehensive physical examination. He testified that Respondent's subjective complaints were not supported by objective findings on exam. Respondent's claims of diffuse tenderness and diminished muscle strength were unsupported. Dr. Mikulics found no spasms, full range of motion, and normal reflexes. Dr. Mikulics acknowledged that Respondent may have some Myofascial Pain Syndrome, but concluded she is able to work without restrictions. He cited from Respondent's medical history and prior medical examiners, who opined that Respondent is able to perform her usual job duties without restrictions.

Of note, Dr. Mikulics questioned whether Respondent put forth her best effort during testing. Examination revealed abnormally low findings on grip strength testing, without any evidence of serious injury to her ability to squeeze. Dr. Mikulics concluded the abnormally low result suggests lack of effort and exaggeration of symptoms. Dr. Mikulics was unable to identify any serious injury which might account for these results.

Dr. Mikulics believes that there are no specific job duties that Respondent is unable to perform because of her physical condition. His medical opinion is shared by the other physicians Respondent has consulted over the years. Dr. Mikulics believes Respondent may experience some discomfort, but Respondent is not substantially incapacitated for the performance of her duties.

Respondent presented evidence from Dr. E. Franklin Livingstone, a board-certified Psychiatrist (physical medicine and rehabilitation). Dr. Livingstone evaluated

Respondent in connection with her insurance disability claim. Dr. Livingstone diagnosed Myofascial Pain Syndrome, recommended physical therapy and opined that she should improve over 3-4 weeks of appropriate therapy. Dr. Livingstone opined that Respondent was physically capable of sedentary level work activities on a full-time basis. Dr. Livingstone noted that Respondent was not following her recommended treatment, including daily cold pack therapy and stretching, to lessen muscle tension and increase blood flow.

The Administrative Law Judge (ALJ) held that there is a clear consensus among evaluating physicians that Respondent suffers from some degree of Myofascial Pain Syndrome. However, all the physicians that evaluated Respondent have concluded that she is able to perform her usual duties. The ALJ noted that Respondent, MWD agreed to accommodate work restrictions recommended by one physician, but Respondent declined the offer of modified or alternative work. Thus, as a factual matter, respondent was not substantially incapacitated for the performance of her usual duties of her job as a Team Leader I at the time she filed for disability retirement.

The ALJ concluded that Respondent failed to establish that she was substantially unable to perform her usual job duties, and therefore, was not 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.

December 18, 2013


ELIZABETH YELLAND
Senior Staff Attorney