

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Kim Drago (Respondent) was approved for disability retirement on February 24, 2004, based on orthopedic conditions (hand, wrist and arm). On April 2, 2013, CalPERS found that Respondent was no longer disabled from the performance of her duties as an Executive Secretary I with Respondent Department of Social Services, and that she should be reinstated. Respondent appealed. The hearing was completed on December 17, 2013.

As part of CalPERS' review of her medical condition, Respondent was sent for an Independent Medical Examination (IME) to Orthopedic Surgeon Dr. Robert Henrichsen. Dr. Henrichsen interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed medical records. He also performed a comprehensive IME examination.

Dr. Henrichsen examined Respondent's neck, spine, shoulders, elbows, arms, wrists, hands, and upper and lower extremities. The only thing Dr. Henrichsen found was some pain and numbness in her upper extremities (primarily elbows and forearms.) Dr. Henrichsen does not believe that either of those findings rises to the level of substantial incapacity to perform her duties as an Executive Secretary.

Dr. Henrichsen also viewed over two hours of investigative video of Respondent, showing her walking her dog on a leash, putting items in a shopping cart, carrying shopping bags, using a cell phone, driving her vehicle and putting gas in it, and moving her belongings by lifting and carrying boxes and placing them in the back of her SUV and closing the hatch. Dr. Henrichsen testified that when she was moving from her apartment to a new home, he observed Respondent using repetitive motion of her arms and upper extremities including her hands. At no time on the CDs did Dr. Henrichsen observe any difficulty or evidence of pain.

Following his examination and review of all documentation, Dr. Henrichsen opined that Respondent is not substantially incapacitated from performance of her usual job duties. He believes that there are no job duties Respondent is unable to perform because of her physical condition.

At the hearing, Dr. Henrichsen testified to his examination and reports. Dr. Henrichsen's medical opinion is that Respondent is not substantially disabled, even if she is experiencing some pain and numbness in her upper extremities.

Respondent testified on her own behalf. She did not call any physicians or other medical professionals to testify.

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

information on the process.

The Administrative Law Judge (ALJ) found that CalPERS bears the burden to show by a preponderance of the evidence (based on competent medical evidence) that Respondent was no longer substantially incapacitated and should be involuntarily reinstated to her former position (Gov. Code sections 21191 and 21192). The ALJ found that CalPERS met its burden of proof, based on Dr. Henrichsen's testimony and Respondent's activities as shown on the surveillance CDs. The ALJ further found that Respondent provided no objective, competent medical evidence to support her claim of continued disability.

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 continue on disability retirement.

The ALJ concluded that Respondent's appeal should be denied and that she should be reinstated to her former usual job duties as an Executive Secretary I. 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 20, 2014


ELIZABETH YELLAND
Senior Staff Attorney