

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Appeals before the Board are conducted pursuant to the Administrative Procedure Act (APA), Government Code, section 11370, et. seq. Section 11521 (Reconsideration) provides, in relevant part, as follows:

"The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge." (Emphasis added.)

The hearing in this matter occurred on September 11, 2013, and November 27, 2013. The Proposed Decision, denying Celia Kastner's (Respondent) appeal, was issued on December 20, 2013. The Board voted to adopt the Proposed Decision on February 20, 2014. Ms. Kastner submitted a Petition for Reconsideration on March 13, 2014.

Respondent Celia L. Kastner was employed as a Custodian by the Department of State Hospitals, Atascadero State Hospital (ASH). By virtue of her employment, Respondent was a state miscellaneous member of CalPERS. Respondent submitted an application for disability retirement on the basis of claimed orthopedic (cervical radiculopathy and hand) conditions. CalPERS staff reviewed relevant medical reports regarding Respondent's condition and a written description of her usual and customary job duties. Brendan McAdams, M.D., a board-certified Orthopedic Surgeon, reviewed medical reports, a written job description and performed an Independent Medical Examination (IME) of Respondent. Dr. McAdams prepared a written report, which contained his observations, findings and conclusions concerning Respondent's ability to perform her usual and customary duties. Dr. McAdams offered an opinion that Respondent was not substantially incapacitated from performing the usual and customary duties of a Custodian at ASH because of claimed orthopedic conditions. CalPERS staff denied Respondent's application for disability retirement. Respondent appealed this determination and a hearing was held.

In order to be eligible for disability retirement, competent medical evidence must demonstrate that an 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 testified, describing the usual and customary duties of her position as a Custodian at ASH. A copy of the written job description was received into evidence. Respondent testified that she experienced pain in the neck and shoulder. She also stated that she developed pain in both of her wrists.

Respondent filed a companion claim for workers' compensation benefits. In that action, Respondent was examined by Elmore G. Smith, M.D., a board-certified Orthopedic Surgeon, who served in the capacity of an Agreed Medical Examiner (AME). Dr. Smith prepared a number of written reports and testified at the hearing. As he noted in his written reports, Dr. Smith testified that his examination of Respondent was essentially normal. Dr. Smith testified that Respondent presented with "profound" lack of sensation

in her arms and legs, a complaint that did not make sense and was not supported by other objective findings on examination. Dr. Smith testified that Respondent appeared to "self-limit" her movements and he therefore suspected that her range of motion testing was suspect.

An MRI study of Respondent's cervical spine was performed, with results of, "Small disc bulge at C5-6 Level is present, without significant central canal compromise. There is no central canal stenosis or neural foraminal narrowing." Dr. Smith testified that the MRI results demonstrated that there was no pathology present in Respondent's cervical spine which would cause neurological symptoms, such as pain or numbness, in her upper extremities. Dr. Smith admitted that there was no objective evidence to support a diagnosis of cervical radiculopathy.

With regard to Respondent's complaints of bilateral arm, wrist and hand pain, Dr. Smith testified that there was electrodiagnostic evidence to support a diagnosis of bilateral carpal tunnel syndrome. However, based upon his clinical examination, Dr. Smith's assessment of Respondent was that she could return to her position.

A report prepared by Kenneth Fryer, M.D., an Orthopedic Surgeon specializing in the treatment of injuries to and/or conditions of the hand, was admitted into evidence. Dr. Fryer noted that Respondent had full range of motion of the elbows, wrists and hands. Respondent had no tenderness at the elbow. Tinel's test was negative. Dr. Fryer concluded:

"The final impression is bilateral median nerve compression neuropathy at the wrist with bizarre presentation of sensory numbness and subjective complaints that cannot be substantiated with objective findings."

Eric W. Dunlop, D.O., is Respondent's primary care physician. Dr. Dunlop is a family practitioner and is not board certified. Dr. Dunlop testified, admitting that he was not familiar with the CalPERS standard for disability retirement. He admitted that the cervical MRI study provided results that were "pretty normal." He focused upon Respondent's subjective complaints of neck and shoulder pain and – unlike Dr. Smith and Dr. McAdams – stated that he was willing to make a diagnosis of cervical radiculopathy based entirely upon Respondent's subjective complaints, even with contrary evidence in the form of the MRI study. Dr. Dunlop testified that his opinion was that Respondent was disabled.

A copy of Dr. McAdams' IME report was received into evidence. Consistent with the contents of his report, Dr. McAdams testified that, on his physical examination of Respondent, he could not find objective evidence to support her complaints. Respondent demonstrated excellent muscular strength, her reflexes were intact and on his observation of her when she was not aware of his focus, she appeared to move fluidly or without restriction. Dr. McAdams felt that Respondent was purposefully limiting her movements when asked to perform range of motion testing. Like Dr. Smith, Dr. McAdams concluded that the cervical MRI showed no pathology sufficient to cause

the neurological symptoms in Respondent's arms. And like Dr. Smith, Dr. McAdams stated that it would be improper to make a diagnosis of cervical radiculopathy without objective findings. Dr. McAdams also found a lack of objective evidence on clinical examination to support a claim of bilateral carpal tunnel syndrome. Biceps, triceps and brachial radialis reflexes were equal and active. Respondent had excellent strength with dorsiflexion and volar flexion of the wrists. Tinel's sign and Phalen's sign (standard tests for the presence of carpal tunnel syndrome) were negative. Dr. McAdams testified that, in his opinion, Respondent was not substantially incapacitated from performing her usual and customary duties as a Custodian at ASH.

After considering all of the testimony and documentary evidence, the Administrative Law Judge (ALJ) found that the opinions of Dr. Dunlop were conclusory and not supported by objective evidence. The ALJ found that the testimony and opinions of Dr. Smith and Dr. McAdams were more reasoned, better supported by objective evidence and therefore more persuasive. The ALJ found that the credible medical evidence established that Respondent was not incapacitated from performing her usual and customary duties.

"As Drs. McAdams and Smith agree, with partial corroboration from Dr. Dunlop, the disc bulge in Respondent's back is small and unlikely to have caused the reported symptoms in her arms. Moreover, Drs. McAdams and Smith independently referred to Respondent controlling her movements to produce lower range of motion, which actions cast doubt on the validity of the reported symptoms."

Respondent has not provided any new or additional evidence in support of her appeal of the denial of her application for disability retirement. In essence, Respondent is simply disappointed with the Decision and wants a different Decision; i.e., one in her favor.

Respondent has failed to demonstrate why the Board should reconsider its decision to adopt the ALJ's Proposed Decision.

Respondent may file a Petition for Writ of Mandate in Superior Court seeking to overturn the Decision of the Board.

April 16, 2014



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