

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

At its February 20, 2014 meeting, the Board adopted the Proposed Decision of the Administrative Law Judge (ALJ) denying Respondent Carla Ivory's ("Respondent Ivory") application for disability retirement.

Respondent Ivory had notice and opportunity to fully present her case and did present her case. The ALJ found that Respondent Ivory failed to meet her burden of proof on appeal and that she was not substantially incapacitated from the usual and customary duties of her position as a "Program Technician."

These findings were based on the extensive medical records admitted at hearing, Respondent Ivory's testimony and testimony of the Independent Medical Examiners (IME) Mohinder Nijjar (Orthopedic Surgeon), and Dr. Oluwafami Adeyemo (Psychiatrist).

Dr. Nijjar testified that while Respondent Ivory has limitations, she still was able to perform the usual and customary duties for the sedentary position of Program Technician at the California Department of Corrections and Rehabilitation.

Dr. Adeyemo testified that Respondent Ivory suffered from depression and anxiety. He explained her depression and anxiety were "of mild intensity" at the time he examined her and not significant enough to incapacitate her from her usual and customary duties as a Program Technician.

Respondent Ivory failed to present medical evidence at hearing. Respondent Ivory represented herself with the assistance of her sister.¹ Weeks prior to the hearing, CalPERS sent all exhibits to Respondent Ivory.

Over the six-month period before the hearing, CalPERS staff had multiple discussions with Respondent Ivory about the procedure and her need to present medical reports at the hearing. In addition, staff assisted Respondent Ivory by providing subpoena documents so she could subpoena her doctor to testify at hearing. However, Respondent Ivory did not have a doctor testify and provided no medical reports at the hearing. CalPERS agreed to hold the record open until November 14, 2013, to allow Respondent Ivory to submit medical records. Still she did not submit any medical records.

Respondent Ivory's argument in her petition for reconsideration is unclear as to whether she is arguing she should be allowed to introduce additional medical records, or that because she was judged to be permanent and stationary for workers' compensation, that she qualifies for disability retirement.

¹ The Department of Corrections did not appear at the hearing.

With respect to the introduction of additional medical records, Respondent Ivory has been given the opportunity to introduce medical records and has failed to do so as the proposed decision reflects.

Respondent argues that because she is “permanent and stationary” with certain work restrictions in the workers’ compensation system, she should automatically qualify for CalPERS disability retirement. This assertion is not a correct statement of the law. As explained by the court in *Smith v. Napa*, a workers’ compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties are different. (*Smith v. Napa* (2004) 120 Cal.App.4th 194, 207.) The two systems serve different purposes, and the definition of disability is different.

In the workers’ compensation process, the law is designed to pay workers for on-the-job injuries and with many of the injuries the worker returns to work. In fact, Respondent Ivory was judged to be permanent and stationary on February 18, 2004, and then went back to work.

Disability retirement is granted when a person can no longer work because of a disability. The standard is quite high. To qualify for disability retirement, the individual must be “substantially incapacitated from the usual and customary duties of his or her position as determined by competent medical evidence.” (Government Code section 20026, and *Mansperger v. Pub. Employees’ Ret. System* (1970) 6 Cal.App.3d 873; *Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854.) In this case, Respondent Ivory’s position as a Program Technician is a very sedentary position.

The ALJ determined that Respondent Ivory did not present evidence at hearing to support her claim that she meets the requirement for disability retirement.

For all of the reasons stated above, staff recommends the Board deny the Petition for Reconsideration and uphold its decision.

Because the Decision applies the law to the salient facts of this case, the risks of denying the Petition for Reconsideration are minimal. The Respondents may file a writ petition in superior court seeking to overturn the decision of the Board.

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