

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

The hearing on this case was completed on January 30, 2014. Despite Respondent Maria Rosa Rivera ("Respondent") being represented during the initial stages of this case and receiving proper service of all notices, neither Respondent nor her counsel of record appeared at the hearing. Due to the failure to appear at the hearing, the defaults of both Respondent Rivera and Los Angeles Unified School District (LAUSD) were taken by the Administrative Law Judge (ALJ) pursuant to Government Code section 11520. CalPERS made arguments and introduced documentary evidence, including four medical reports, at the hearing.

Following the hearing, a Proposed Decision was issued on February 3, 2014. The Proposed Decision was in favor of CalPERS (denial of Respondent's application for disability retirement). The Board voted to adopt the Proposed Decision on March 19, 2014. Respondent submitted this Petition for Reconsideration on April 22, 2014.

Respondent applied for disability retirement on the basis of orthopedic and/or neurologic conditions. By virtue of her employment as a Special Education Assistant with Respondent LAUSD, Respondent Rivera was a state miscellaneous member of CalPERS.

As part of CalPERS' review of her medical condition, Respondent Rivera was examined by two Independent Medical Examiners (IMEs). Independent Medical Examiner H. Harlen Bleeker, M.D., a board-certified Orthopedic Surgeon, examined Respondent Rivera. Dr. Bleeker interviewed Respondent Rivera and obtained a summary of her medical history, treatment, work history, recreational activities and present complaints. Dr. Bleeker also reviewed Respondent Rivera's prior medical records and performed a comprehensive physical exam. At the time of the examination, Dr. Bleeker noted that there was "not much in the way of abnormality as far as her x-rays or CAT scan is concerned. I feel that there is a significant amount of exaggeration in her complaints.... I feel the applicant is able to perform her work within the job requirements as specified."

Subsequent to the IME examination and report, CalPERS provided Dr. Bleeker with additional medical records (that were approximately two inches thick). Dr. Bleeker issued a supplemental IME report on December 5, 2012, and noted that he did not find anything in the subsequent records that changed his opinion that Respondent Rivera is able to continue her regular work without any restrictions.

Independent Medical Examiner Robert Moore, M.D., a board-certified Neurologist performed a neurologic exam of Respondent Rivera and also issued an IME report. Dr. Moore reviewed Respondent Rivera's medical records, a written description of her medical history and injuries, and a job description. Dr. Moore noted no objective findings to support a disc herniation and believed that Respondent Rivera could perform her specific job duties.

Subsequent to Dr. Moore's initial examination and report, CalPERS provided him with additional medical records. Dr. Moore issued a supplemental IME report dated January 22, 2013. Dr. Moore noted that he did not find anything in the subsequent records that changed his opinion. Dr. Moore noted that Respondent Rivera does possess functional limitations, but the limitations are such that they would not preclude Respondent Rivera from performing her usual and customary job duties as a Special Education Assistant.

The ALJ found Dr. Bleeker and Dr. Moore qualified to render expert opinions as set forth in their respective reports, by virtue of their training and experience. The ALJ further determined that the weight of the evidence supported the conclusions of Dr. Bleeker and Dr. Moore that Respondent Rivera is not incapacitated for the performance of her duties as a Special Education Assistant and that Respondent Rivera did not meet her burden of establishing that she is substantially incapacitated for the performance of her regular duties as required under Government Code sections 21154 and 21156.

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.

Respondent's grounds for reconsideration in her petition are based on disagreement with the IME doctors' opinions, the fact that she qualified for Social Security Disability, Workers' Compensation approved her claim, and the lack of representation and attendance at the hearing.

CalPERS staff addresses the arguments below:

With respect to Respondent's disagreement with the IME doctors' opinions, Respondent did not, and currently does not, support her disagreement with competent medical evidence. Government Code section 20026 provides that "disability" and "incapacity for performance of duty" as a basis of retirement, mean "disability of permanent or extended and uncertain duration, as determined by the board... on the basis of competent medical opinion." The only medical evidence introduced at the hearing was that of IME doctors Bleeker and Moore.

As to Respondent's assertion that since she qualifies for Social Security Disability and that her Workers' Compensation claim was approved, that she should also be eligible for CalPERS disability retirement, those systems use different standards and final determinations made in them are not relevant to CalPERS disability retirement determinations.

Finally, as to Respondent's assertion that she was first told by her counsel in December, 2013, that she did not have any court hearing, and that prior to the CalPERS Board of Administration meeting in March, 2014, that the attorney is no longer representing Respondent, CalPERS cannot assist Respondent in prosecuting her

appeal any more than it did. CalPERS timely notified Respondent and her counsel of record of all required hearing dates and provided timely information on the appeal process and Office of Administrative Hearing ("OAH") procedures. Comparatively, the OAH is a friendly venue for members representing themselves and many members choose to do so.

While it is unfortunate that Respondent may have received poor or inaccurate advice from her counsel, competent medical evidence was introduced at hearing and the ALJ found Dr. Bleeker and Dr. Moore qualified to render expert opinions.

Lastly, there is a procedural issue that precludes Respondent's Petition for Reconsideration from consideration by the Board. Due to the failure to appear at the hearing, Respondent's default was taken by the ALJ pursuant to Government Code section 11520(a). Government Code section 11520(c) provides, "[w]ithin seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. ..." Here, the Board voted to adopt the Proposed Decision on March 19, 2014. Respondent was served with notice of the Board decision on March 24, 2014. Respondent submitted this Petition for Reconsideration on April 22, 2014, well after the seven day limitation contained in section 11520(c). Thus, Respondent has failed to meet the statutory requirements necessary to properly submit her Petition for Reconsideration before the Board.

For all of the reasons stated above, staff argues 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. Respondent may file a writ petition in superior court seeking to overturn the decision of the Board.

May 21, 2014



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