

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Mario R. Velasquez (Respondent) was employed by the California Department of Corrections and Rehabilitation as a Stationary Engineer. By virtue of his employment, Respondent is a state safety member of CalPERS subject to Government Code section 21151.

Respondent first applied for industrial disability retirement on July 18, 2007. That application was denied. He appealed but at hearing withdrew his appeal. At the hearing, CalPERS presented considerable evidence that showed his return to work was likely to defeat his claim.

Respondent submitted a second application for industrial disability retirement. In his application, Respondent claimed "Back pain, severe headaches, leg pain, tingling feeling in small finger and next to it. Pain between shoulder blades. Able to squat, but unable to get back up easily, headaches, unable to continuously work without stopping, unable to work in awkward positions and carry 40 pounds." Respondent also described a back injury which is the same injury claimed on the first application for disability retirement.

CalPERS arranged for Respondent to be examined by Independent Medical Examiners, Dr. Ernest Miller, a Board-Certified Orthopedic Surgeon, Steven McIntire a Board-Certified Neurologist (2008), and Dr. Joseph Serra, a Board-Certified Orthopedic Surgeon (2008). All three doctors found that Respondent was not substantially incapacitated from the usual and customary duties of a Stationary Engineer.

After reviewing the reports of Dr. Serra, Dr. McIntire and Dr. Miller, as well as other medical evidence, CalPERS staff denied Respondent's application for industrial disability retirement. Respondent appealed the decision and a hearing was held May 22, 2014.

Under the applicable court rulings construing disability under the California Public Employees' Retirement Law (PERL), Respondent has the burden of showing that he is substantially incapacitated from performing the usual and customary duties in his position as a Stationary Engineer. Prophylactic restrictions and risk of possible future injury cannot support a finding of disability. (*Mansperger v. Pub. Employees' Ret. System* (1970) 6 Cal. App.3d 873; *Hosford v. Bd. of Administration* (1978) 77 Cal. App.3d 854.)

Respondent represented himself with the help of his cousin. This hearing was his second on an application for industrial disability retirement so he knew the procedure. Prior to the hearing, CalPERS sent all exhibits to Respondent.

Only Dr. Miller testified as a medical expert at the hearing. Dr. Miller's Independent Medical Evaluation (IME) was the most recent of the medical evaluations and diagnostics studies in the record. Dr. Miller testified that while Respondent reported chronic lower back pain, Dr. Miller could find no evidence of orthopedic, physical or neurological abnormalities, either upon his physical and neurological examination or

evident in the several MRI studies that were obtained of Respondent's cervical spine, thoracic spine, and lumbar spine. He concluded that there was no objective evidence of a lower back injury, a cervical or lumbar spine disability or of any herniated discs in Respondent's back. In short, Dr. Miller found Respondent's upper back "unremarkable," and opined that the MRI studies and his physical examination show a "totally normal" low back for a man of the age of 50-55 years.

Dr. Miller was also critical of the conclusions of Dr. Silver, Dr. Kent and particularly, Dr. Fishman, from the reports Dr. Miller reviewed. He noted that Dr. Fishman's conclusion that Respondent had four herniated discs in his lumbar spine, and imposing work restrictions, without having conducted a physical examination; without any clinical findings in the medical records of radiculopathy; with no EMG findings or nerve conduction impairment, and with no findings of reflex diminution by Dr. Fishman or by any other physician, violated both workers' compensation and AMA guidelines for diagnosing and rendering medical opinions in an Agreed Medical Examiner (AME) or IME. In short, Dr. Miller stated his opinion that Dr. Fishman's opinions and conclusions were medically invalid. The Administrative Law Judge (ALJ) found Dr. Miller's testimony discrediting the opinions of Dr. Silver, Dr. Kent and Dr. Fishman to be credible and persuasive.

Respondent testified about his condition and his subjective pain. He acknowledged that after his injury in 2006 he returned to work. Respondent worked full time from 2008 until April 27, 2010. He service retired pending disability retirement on or about February 1, 2011.

In finding in favor of CalPERS, the ALJ explained Respondent failed to meet his burden of proof because the persuasive medical evidence established that Respondent was not substantially incapacitated from his usual duties as a Stationary Engineer. The ALJ denied Respondent's application for industrial 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.

September 17, 2014


JEANLAURIE AINSWORTH
Senior Staff Attorney