

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Respondent Susan Hale (Respondent) petitions the Board to reconsider its adoption of the Proposed Decision of the Administrative Law Judge (ALJ) dated June 23, 2014. Staff argues that the Petition for Reconsideration should be denied. Respondent, a Motor Vehicle Field Representative, employed by the California Department of Motor Vehicles (DMV), applied for disability retirement. On her application, Respondent claimed disability on the basis of an orthopedic condition related to her bilateral upper extremities. Pursuant to her application, Respondent's orthopedic condition limits her ability to write, type, reach and use her hands for long periods of time.

To be eligible for disability retirement, an individual must demonstrate, through competent medical evidence, that she is substantially incapacitated from performing the usual and customary duties of her position at the time the disability retirement application is submitted. The injury or condition that is the basis for the claimed disability must be permanent or of an uncertain and extended duration. As the applicant, Respondent has the burden of proving her entitlement to disability retirement. In *Harmon v. Board of Retirement of San Mateo County*, (1976) 62 Cal.App.3d 689, 691, and *Rau v. Sacramento County Retirement Board*, (1966) 247 Cal.App.2d 234, 238, the Courts held that the applicant has the burden of proof.

In her Petition for Reconsideration, Respondent indicates that she was not allowed to return to work due to the restrictions imposed by her workers' compensation treating physician, Dr. Behrman. At hearing, Respondent presented the reports of Dr. Behrman in support of her disability retirement application. However, as a workers' compensation evaluator, Dr. Behrman's medical opinions were written to address Respondent's eligibility for workers' compensation benefits, not eligibility for disability retirement. Moreover, at the time Respondent applied for disability retirement, the work restrictions imposed by Dr. Behrman precluded repetitive or heavy gripping or squeezing with either hand; limited rapid repetitive activity such as keyboard activity; writing for no more than 4 hours a day with breaks every 30 minutes; and precluded repetitive elbow flexion activities. Those work restrictions were consistent with the physical duties of the Motor Vehicle Field Representative, as described in the duty statement for Respondent's position. Thus, Respondent's own medical evidence does not support a finding that she is substantially incapacitated.

Respondent additionally contends in her Petition for Reconsideration that Rheumatologist Hans Barthel, M.D., was the only medical expert retained by CalPERS to evaluate her orthopedic condition. In reality, CalPERS also retained Alice Martinson, M.D., a board-certified Orthopedic Surgeon, to conduct an Independent Medical Examination. Both Dr. Barthel and Dr. Martinson examined Respondent and reviewed medical records as well as the written job description and duty statement for Respondent's position. Based on their examinations and records review, both doctors issued reports indicating that Respondent was not substantially incapacitated for performing the usual and customary duties of a Motor Vehicle Field Representative.

Due to a scheduling conflict, Dr. Martinson was unable to attend the hearing to testify, so Dr. Barthel was the only medical expert who testified at the hearing. Despite Dr. Barthel being the only medical expert to testify, the ALJ reviewed all of the medical reports submitted by the parties at the hearing and found that Dr. Barthel's testimony was fully corroborated by the opinions expressed in Dr. Martinson's report. The ALJ also found Dr. Barthel's testimony consistent with Dr. Behrman's opinions—at least with respect to the work restrictions described by Dr. Behrman, which were consistent with the duties performed in Respondent's position as a Motor Vehicle Field Representative. As a result, the ALJ determined that Respondent's disability retirement application could not be approved because competent medical evidence did not exist to establish that her orthopedic condition was substantially incapacitating. Therefore, the ALJ issued a Proposed Decision denying Respondent's appeal. The Board adopted the ALJ's Proposed Decision at its August 20, 2014, meeting.

Respondent's Petition for Reconsideration requests that the Board rely upon her medical evidence from the workers' compensation forum. However, findings made under the workers' compensation laws and regulations, an entirely separate system with different disability criteria and procedures, are not binding in the CalPERS' disability retirement forum. In workers' compensation, eligibility for benefits is determined under its own insular and detailed criteria. (*Winn v. Board of Pension Commissioners of the City of Los Angeles* (1983) 149 Cal.App.3d 532; *English v. Board of Administration* (1983) 148 Cal.App. 3d 839.) The determination of whether Respondent qualifies under the California Public Employees' Retirement Law (PERL) for disability retirement has been delegated to the exclusive authority of the CalPERS Board of Administration, subject only to judicial review. (Gov't. Code § 20026.) Thus, any workers' compensation finding, ruling, stipulation or determination does not entitle Respondent to a disability retirement from CalPERS.

To base the determination of Respondent's permanent incapacity on medical evidence from the workers' compensation forum, as Respondent requests, would essentially yield that authority to the Workers' Compensation Appeals Board. As explained by the ALJ, Respondent's medical evidence did not establish that she is incapacitated from the performance of duty within the meaning of Government Code section 20026. Instead, the ALJ found that the competent medical evidence presented at the hearing supported that, at the time she filed her disability retirement application, Respondent was not incapacitated for the performance of her duties as a result of her upper extremity orthopedic condition. Therefore, the ALJ concluded, Respondent's disability retirement application must be denied.

The ALJ's Proposed Decision is consistent with the law and the facts presented at hearing, particularly in the absence of competent medical evidence to establish that Respondent is permanently and substantially incapacitated from performing her duties as a Motor Vehicle Field Representative for DMV. Accordingly, staff argues that the Board deny the Petition for Reconsideration.

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.

October 15, 2014

A handwritten signature in blue ink, appearing to read "Renee Salazar", with a long horizontal flourish extending to the right.

RENEE SALAZAR
Senior Staff Counsel