

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

California Department of Corrections and Rehabilitation (CDCR) employed Suzanne Lowe (Respondent) as a Registered Nurse at Central California Women's Facility. By virtue of her employment, Respondent is a state safety member of CalPERS subject to Government Code section 21151.

Respondent initially claimed orthopedic injuries in her Industrial Disability Retirement application filed at age 45. CalPERS arranged for Respondent to be examined by an Independent Medical Examiner, Dr. Kenneth Baldwin, a Board-certified Orthopedic Surgeon. Dr. Baldwin found that Respondent was not substantially incapacitated from the usual and customary duties of a Registered Nurse.

CalPERS conducted a sub-rosa investigation of Respondent. The video showed Ms. Lowe pushing heavy carts of food and texting for very extended periods of time. It did not show someone who was having difficulty moving and experiencing pain as she described to the doctors.

After reviewing Dr. Baldwin's reports, sub-rosa film and other medical evidence, CalPERS staff denied Respondent's application for Industrial Disability Retirement. Respondent Lowe appealed and amended her claim to include fibromyalgia.

CalPERS then arranged to have Dr. JaHann Scalapino, a Board-certified Rheumatologist, examine Respondent. At Dr. Scalapino's office, and just prior to her scheduled examination, an elevator fell a floor or more with Respondent in it and she was injured. Dr. Scalapino conducted the examination anyway. As a result, CalPERS staff did not believe Dr. Scalapino's findings were objective and arranged for a second examination of Respondent for the fibromyalgia claim. Respondent refused to attend a second examination. CalPERS explained to Respondent that it would not accept the amendment to her application because of her failure to cooperate.

Under the applicable court rulings construing disability under the California Public Employees' Retirement Law (PERL), Respondent has the burden of showing that she is substantially incapacitated from performing the usual and customary duties in her position as a Registered Nurse. 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 was represented by counsel at the hearing. Prior to the hearing, evidence was exchanged and the parties discussed the introduction of documents.

During the first day of the hearing, the parties litigated the issue of whether Respondent could amend her complaint to add the fibromyalgia claim given the fact she had failed to cooperate with CalPERS. The Administrative Law Judge (ALJ) found that CalPERS

was on notice of the possible claim for fibromyalgia and allowed the amendment. The parties agreed to a second day of hearing to present evidence on the fibromyalgia claim.

Also on the first hearing day, Dr. Baldwin testified about the orthopedic injuries claimed by Respondent. The claims involved pain in the joints of her upper extremities, headaches and her claim of an inability to use her extremities. Dr. Baldwin testified that Respondent exhibited significant pain amplification and that her examination (including carpal tunnel) was essentially normal. She exhibited a normal range of motion as is also demonstrated in the sub-rosa films. He testified that she was not substantially incapacitated from her usual and customary duties as a Registered Nurse at the time she applied for Industrial Disability Retirement. Respondent Lowe did not have any doctors testify as to her orthopedic conditions.

Respondent testified extensively about difficulty with her hands which she believed prevented her from being able to perform her job duties and was the reason she quit working. Respondent had carpal tunnel surgery since she left work and it was reported as successful.

On the second hearing day, Dr. Scalapino testified that she had no objective evidence as to what Respondent's condition was before the elevator accident. Dr. Scalapino admitted the elevator accident could have contributed to neck and upper back pain on that particular day and she did nothing to determine what was attributed to the elevator accident. Dr. Scalapino testified that Respondent was disabled under the statute and cited orthopedic limitations that Respondent claimed during her testimony.

CalPERS also called Dr. Hazelwood, a Board-certified Rheumatologist, to testify at the hearing. Dr. Hazelwood performed a medical records review at CalPERS' request because Respondent would not agree to an examination. Dr. Hazelwood explained fibromyalgia is a "diagnosis of exclusion" and in this case, Respondent was not so limited in her abilities that she could not perform the usual and customary duties of a Registered Nurse based on the medical records.

The ALJ found that Respondent's complaints and descriptions of her limitations were not persuasive and were not supported by other evidence. The ALJ also opined that Dr. Scalapino's opinion was not persuasive as there were no objective findings of pain, nor limitation of cognitive dysfunction, and that Dr. Scalapino had relied completely on Respondent's subjective comments.

The ALJ found that Respondent failed to meet her burden of proof and 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.

October 15, 2014



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