

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

California Department of State Hospitals (formerly Department of Mental Health) (Respondent Agency), employed Nicolette Savacool (Respondent Savacool) as a Hospital Police Officer at Coalinga Secure Treatment Facility. By virtue of her employment, Respondent Savacool is a state safety member of CalPERS.

Respondent Savacool claimed orthopedic injuries (back and knees) in her Industrial Disability Retirement application filed at age 38. CalPERS arranged for Respondent Savacool to be examined by an Independent Medical Examiner, Dr. Mohinder Nijjar, a Board-Certified Orthopedic Surgeon. Dr. Nijjar found that Respondent Savacool was not substantially incapacitated from the usual and customary duties of a Hospital Police Officer.

CalPERS conducted a sub-rosa investigation of Respondent Savacool. The video showed Respondent Savacool walking to and from her vehicle with no difficulty walking or getting in and out of her vehicle.

After reviewing Dr. Nijjar's report, the sub-rosa film and other medical evidence, CalPERS staff denied Respondent Savacool's application for Industrial Disability Retirement. Respondent Savacool appealed.

Under the applicable court rulings construing disability under the California Public Employees' Retirement Law (PERL), Respondent Savacool has the burden of showing that she is substantially incapacitated from performing the usual and customary duties in her position as a Hospital Police Officer. 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 Savacool represented herself at the hearing. Prior to the hearing, evidence was exchanged and the parties discussed the introduction of documents. CalPERS staff explained the process and provided forms to Respondent Savacool and she produced medical records that were admitted at hearing. Respondent Agency had a fitness for duty examination performed on Respondent Savacool by Dr. Marjorie Oda, a Board-Certified Orthopedic Surgeon. Dr. Oda did not find any evidence of lumbar radiation to her right leg. Dr. Oda also found that Respondent Savacool could perform the usual and customary duties of a Hospital Police Officer.

During the first hearing day, Dr. Nijjar testified about the orthopedic injuries claimed by Respondent Savacool. Respondent Savacool described her condition as "pain and pressure builds up on the lower right side of my back and increasing pressure limits mobility in my right leg."

Dr. Nijjar testified that Respondent Savacool exhibited mild exaggeration of her complaints and that he did not find any evidence of lumbar radiation to her right leg. On physical examination she ambulated without a limp and was essentially normal. He testified that she was not substantially incapacitated from her usual and customary duties as a Hospital Police Officer at the time she applied for Industrial Disability Retirement.

Respondent Savacool testified she began work as a Hospital Police Officer in 2005, was injured on July 23, 2009, and then went off work. She returned to work with light duty in 2012. She also described the duties of her position as a Hospital Police Officer. Respondent Savacool did not have any doctors testify as to her orthopedic conditions.

The ALJ found that Respondent Savacool failed to show that at the time she applied for industrial disability retirement, she was substantially unable to perform the usual and customary duties of a Hospital Police Officer. The ALJ found that Respondent Savacool failed to meet her burden of proof and concluded that Respondent Savacool'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.

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