

ATTACHMENT B
STAFF'S ARGUMENT

**STAFF'S ARGUMENT TO ADOPT THE AMENDED PROPOSED
DECISION AFTER HEARING ON REMAND**

Lynn Moller (Respondent) was employed by the California Department of Corrections and Rehabilitation, RJ Donovan Correctional Facility (CDCR), as a Clinical Social Worker. By virtue of her employment, Respondent was a state safety member of CalPERS. Respondent submitted an application for industrial disability retirement (IDR) on the basis of claimed orthopedic (back and neck) conditions. CalPERS staff reviewed applicable medical reports and a written description of the usual and customary job duties of Respondent's position as a Clinical Social Worker for CDCR. Paul Milling, M.D., a board-certified Orthopedic Surgeon, evaluated Respondent and reviewed medical reports and a written job description. Dr. Milling prepared a written report which contained his observations, findings, and ultimate opinion regarding Respondent's condition. Dr. Milling stated in his report that Respondent was not substantially incapacitated from performing the usual and customary duties of her position. CalPERS denied Respondent's application for IDR. Respondent appealed CalPERS' determination. A hearing on Respondent's appeal was held on September 15, 2011 and January 6, 2012. Post-Hearing Briefs were submitted by the parties. The matter was submitted to the Administrative Law Judge (ALJ) on March 16, 2012.

The ALJ issued a Proposed Decision (Initial Proposed Decision) in which she denied Respondent's appeal. The Initial Proposed Decision was adopted by the Board on September 12, 2012. On January 3, 2013, Respondent filed a Petition for Writ of Mandamus in Superior Court, challenging the Board's Decision, pursuant to Code of Civil Procedure section 1094.5. CalPERS filed its Answer to the Petition for Writ of Mandate. The matter remained pending in the Superior Court.

In October 2013, Respondent filed an Ex Parte Application to File an Amendment to the Petition for Writ of Mandamus. CalPERS did not oppose this request and on October 24, 2013, the Superior Court granted Respondent's Application to File an Amendment to the Petition for Writ of Mandate. Shortly thereafter, in December 2013, Respondent and CalPERS stipulated that the administrative record before the court could include additional medical records. Respondent and CalPERS further stipulated that since the additional medical records had not been reviewed or considered by CalPERS staff with respect to its determination regarding Respondent's application for IDR, the matter would be remanded to CalPERS for such review and determination.

CalPERS staff reviewed the additional medical records and again determined that the competent medical evidence did not demonstrate that Respondent was substantially incapacitated from performing her usual and customary duties. Part of the Order from the Superior Court directed CalPERS "to conduct and to take whatever other steps are necessary to make a final decision based upon a re-evaluation of the evidence in the administrative record." Accordingly, following the review by CalPERS staff of the additional medical records and the determination by CalPERS staff that such review did not change the denial of Respondent's application for IDR, the matter was remanded to the ALJ for her consideration of the additional medical records. The matter was heard

on remand by the Office of Administrative Hearings on September 2, 2014, by the same ALJ who had previously heard testimony from witnesses, considered documentary evidence and issued the Initial Proposed Decision.

In order to be eligible for disability retirement benefits, competent medical evidence must demonstrate that an individual is substantially incapacitated from performing the usual and customary duties of his or her position. The injury or condition that is the basis for the claimed disability must be permanent or of an extended and uncertain duration.

Respondent testified at the initial hearing, describing her usual and customary job duties. She worked a 40 hour week at the RJ Donovan Facility, interviewing and counseling prison inmates. Respondent was required to walk, stand, and attend meetings. Respondent described injuring her knee, which led to complaints of pain in her low back and neck. Respondent offered into evidence copies of medical records, describing her course of treatment. Respondent called Craig L Dillman, D.C. to testify on her behalf at the initial hearing. Dr. Dillman offered his opinion that the condition of Respondent's cervical spine prevented her from performing the usual and customary duties of a Clinical Social Worker for CDCR.

Dr. Milling's report was received into evidence and he testified at the initial hearing. After reviewing medical records, a written job description and clinically evaluating Respondent, Dr. Milling expressed his opinion that Respondent was not substantially incapacitated from performing the usual and customary duties of a Clinical Social Worker for CDCR.

Dr. Milling's opinion was supported by the conclusions of Gregory Schwab, M.D., who also was an Orthopedist and who additionally examined Respondent, although in the context of Respondent's claim for Workers' Compensation benefits. In his written report, which the ALJ considered as administrative hearsay evidence, Dr. Schwab stated, in relevant part, as follows:

With regard to work restrictions, I believe that [Respondent] is capable of standing or walking for a total of two hours in a workday. ...She notes that she is able to perform most of her usual duties, as most of her clients are prisoners in a low security risk area, and she is able to get to them.

At the Hearing on Remand the ALJ reviewed and considered all of the additional medical evidence that Respondent offered. The ALJ then stated, in Legal Conclusions No. 3:

Having considered the actual and usual duties of Clinical Social Worker, the position held by Respondent Moller, the physical requirements of the position, and the medical evidence (including evaluation notes between January and September 2013 as well as the report from the

acupuncturist), insufficient competent medical evidence was offered to establish that her orthopedic back and neck condition prevented Respondent Moller from performing the usual duties of a Clinical Social Worker employed by Respondent CDCR, albeit with pain or discomfort.

After considering all of the evidence and testimony in the Initial Proposed Decision, the ALJ found that Dr. Milling's conclusions and opinion were well supported by the available objective medical evidence, including various diagnostic studies, such as MRIs of Respondent's cervical and lumbar spine. In making this finding, the ALJ referred to Dr. Milling's report, wherein he noted:

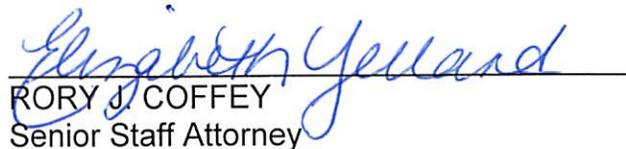
I did feel there was exaggeration of her complaints since she was tender to palpation even to very light touch throughout the cervical spine, lumbar spine, and trapezius muscle areas. In addition, her physical findings do not correlate with her subjective complaints nor do her MRI findings correlate with subjective complaints, but in particular the tenderness to even just very light touch is suspect and not appropriate.

The ALJ concluded that Respondent's appeal should be denied.

The Amended Proposed Decision After Hearing On Remand is supported by the law and the facts. Pursuant to Government Code section 11517 (c)(2)(C), the Board is authorized to "make technical or other minor changes" in the Amended Proposed Decision After Hearing On Remand. In order to avoid ambiguity, staff recommends that the word "industrial" be inserted before the words "disability retirement" on pages two and ten of the Amended Proposed Decision After Hearing On Remand. Staff argues that the Board adopt the Amended Proposed Decision After Hearing On Remand as modified.

Because the Amended Proposed Decision After Hearing On Remand, as modified, applies the law to the salient facts of this case, the risks of adopting the Amended Proposed Decision after Hearing on Remand, as modified, are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

March 18, 2015


RORY J. COFFEY
Senior Staff Attorney