

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Michelle Boyer (Respondent) applied for Service Pending Disability Retirement based on chronic back pain. By virtue of her employment as an Associate Governmental Program Analyst (AGPA) for Respondent California Public Employees' Retirement System (Respondent CalPERS), she was a local miscellaneous member of CalPERS. CalPERS determined that Respondent was not disabled and Respondent appealed. A hearing was completed on July 8 and 9, 2015.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her case with witnesses and documents. CalPERS gave Respondent a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

Respondent was involved in a car accident in approximately 1983 when the car she was driving was rear-ended. No specific medical treatment was provided, and no x-rays were taken. Respondent claimed that she suffered intermittent low back pain since the accident, but the pain did not interfere with her work performance until 2009.

Respondent did not seek any medical treatment for her alleged pain for two years. In 2011, Respondent underwent "conservative" treatment for low back pain with her treating physician, consisting of physical therapy and pain medication.

In May 2012, Respondent underwent spinal fusion surgery. The spinal fusion was successful, and in November 2012, Respondent reported that her back pain and leg pain were "completely gone." Nevertheless, Respondent did not return to work after her surgery until January 2013, when she was released to full duty.

On July 22, 2013, Respondent submitted an Application for Service Pending Disability Retirement. As part of CalPERS' review of her medical condition, Respondent was sent for an Independent Medical Examination (IME) to Orthopedic Surgeon Dr. Joseph Serra. Dr. Serra interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her accident, past and present complaints, and reviewed medical records provided by Kaiser Permanente. He also performed a comprehensive IME examination of Respondent's back and legs.

Upon physical examination, Dr. Serra found that Respondent had some decrease in range of motion in her lumbosacral spine, but explained that such a decrease is not unusual for patients who have undergone spinal fusion of a portion of their lumbar spine. He explained there are "a lot of reasons" for decreased range of motion, many of which have to do with a lack of a regular exercise routine.

Dr. Serra's neurological exam of Respondent's lower extremities was unremarkable. He did several tests to determine whether Respondent's sciatic nerve in either leg was damaged, but those tests were negative. At the hearing, Dr. Serra testified to his examination and reports. Her ability to raise either leg to 90 degrees while sitting on an

exam table was persuasive evidence of a lack of damage to her sciatic nerve. While she claimed she was unable to do the same while lying on her back, Dr. Serra explained that those two tests were designed to test for the same problem – a problem with Respondent's sciatic nerve – and the results should be consistent. Dr. Serra's medical opinion is that Respondent is not substantially disabled.

Respondent testified on her own behalf, and also called her husband to the stand as a witness. She did not call any physicians or other medical professionals to testify.

The Administrative Law Judge (ALJ) found that Respondent bears the burden to show by a preponderance of evidence (based on competent medical evidence) that her symptomology renders her unable to perform her usual job duties. The ALJ found that Respondent failed to carry her burden of proof. Respondent did not establish by competent, objective medical opinion, that, at the time of application, she was permanently disabled or incapacitated from performing her usual duties of an AGPA for Respondent CalPERS.

The ALJ found that the uncontroverted medical evidence showed that Respondent was not substantially incapacitated for the performance of her usual duties as an AGPA. The fact that the results of the two tests performed by Dr. Serra were inconsistent, when considered in conjunction with Respondent's inconsistent reports of pain, and her performance on other tests raised concerns about Respondent's efforts in the ALJ's mind. Moreover, the ALJ found that while Respondent claimed she was taking several prescription medications for back pain, there was no medical evidence that such medication prevented her from performing her usual duties.

When all of the evidence was considered, the ALJ found that the persuasive medical evidence did not establish that Respondent was permanently and substantially incapacitated for the performance of her usual duties as an AGPA with Respondent CalPERS as a result of chronic low back pain.

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, 2015


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