

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Annie Acheta (Respondent Acheta) was employed by the California Department of Developmental Services at Fairview Developmental Center (Agency) as a Senior Psychiatric Technician. By virtue of her employment, she is a state miscellaneous member of CalPERS, subject to Government Code section 21150.

Respondent Acheta submitted an application for service pending disability retirement, wherein she claimed her disability was on the basis of orthopedic conditions involving her neck, bilateral shoulders, left arm and bilateral wrist/carpal tunnel syndrome.

CalPERS arranged for Respondent Acheta to be examined by Neil Katz, M.D., a Board-Certified Orthopedic Surgeon. Dr. Katz testified as an Independent Medical Examiner (IME) in this case. Dr. Katz reviewed Respondent Acheta's medical records, and prepared reports finding that Respondent Acheta was not substantially incapacitated from the usual and customary duties of her position as a Senior Psychiatric Technician.

Accordingly, CalPERS denied Respondent Acheta's application for disability retirement. Respondent Acheta appealed this determination and a hearing was conducted on May 7, 2015, by an Administrative Law Judge (ALJ) from the Office of Administrative Hearings.

Under the applicable court rulings construing disability under the California Public Employees' Retirement Law, Respondent Acheta has the burden of showing that she is substantially incapacitated from performing the usual and customary duties of her position as a Senior Psychiatric Technician. 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 Acheta was represented by counsel. CalPERS provided Respondent Acheta with a copy of the Administrative Hearing Process Pamphlet. CalPERS answered Respondent Acheta's counsel's questions and provided him with information on how to obtain further information on the process as well.

Dr. Katz testified extensively at the hearing. Dr. Katz explained he performed a physical examination of Respondent Acheta and found she had some areas of tenderness on her cervical spine, but her reflexes were within normal limits. Dr. Katz found there was no weakness of the neck musculature, and gross muscle strength testing was normal about the neck.

However, Dr. Katz did find some slight limitations in the range of motion in her neck. Dr. Katz's examination of Respondent Acheta's shoulders and elbows found some tenderness but full motion and strength. The results of Dr. Katz's examination of Respondent Acheta's hands and wrist were normal, and there was no evidence of carpal tunnel. The tests for carpal tunnel did not result in any positive findings for the

condition. Dr. Katz found there was some tenderness to palpation (low level pain) in Respondent Acheta's shoulders, elbows, and wrists.

Based on his medical examination of Respondent Acheta, Dr. Katz opined that Respondent did not appear to be substantially incapacitated from the performance of her usual job duties. Dr. Katz concluded that Respondent Acheta had some mild symptoms but they were not enough to prevent her from performing her job as a Senior Psychiatric Technician.

Respondent presented the testimony of Mark Swanson. Mr. Swanson was the supervisor for the unit to which Respondent Acheta was assigned. Mr. Swanson worked at Fairview from approximately 1976 until 2010, when he retired. Mr. Swanson's testimony established that Unit 214 had 27 or 28 clients. The clients were non-ambulatory and received more medications and tube feedings than clients in other units.

Dr. Mumtaz Ali, M.D. also testified for Respondent Acheta. He is Board Certified in Neurology, Pain Medicine, and Electro Diagnostic Medicine. Respondent Acheta began treating with Dr. Ali in November 2013. Dr. Ali has diagnosed Respondent Acheta with chronic pain due to cervical spine injuries, chronic headache, and bilateral carpal tunnel syndrome. Dr. Ali opined that Respondent Acheta has suffered from chronic pain syndrome since she began treating with him in November 2013. Dr. Ali acknowledged that Respondent Acheta can perform most of the duties on the Duty Statement, except the duties relating to responding to emergencies.

Respondent Acheta contends that, since August 2010, she can no longer perform the job duties of a Senior Psychiatric Technician that involve lifting, pushing and pulling. Respondent feels that the amount she can lift without unbearable pain is five to ten pounds.

The parties filed closing and reply briefs. The evidentiary hearing was closed on July 22, 2015.

The ALJ found that Respondent Acheta failed to show by a preponderance of the evidence that she is substantially incapacitated from performing her usual duties as a Senior Psychiatric Technician at Fairview. According to the ALJ, Dr. Ali's findings that Respondent Acheta was permanent and stationary and his order of permanent restrictions were made in connection with Respondent Acheta's workers' compensation claim, and the purpose of the permanent restrictions for Respondent Acheta was to prevent future injury. In addition, the ALJ concluded that CalPERS is not bound by findings and rulings from Respondent Acheta's workers' compensation action. The ALJ further concluded that Dr. Ali's testimony was not sufficient or probative enough to establish "substantial incapacity" at the time of Respondent Acheta's application, because Respondent Acheta did not begin treating with Dr. Ali until two years after she submitted the application for disability retirement.

The ALJ found that Respondent Acheta did not establish by competent, objective medical opinion, that at the time of her disability application she was permanently disabled or incapacitated from performing the usual duties of a Senior Psychiatric Technician. Accordingly, the ALJ denied Respondent Acheta's appeal.

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 21, 2015


JEANLAURIE AINSWORTH
Senior Staff Attorney