

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

California Department of Developmental Services, Lanterman State Hospital employed Carolyn Pye (Respondent Pye) as a Psychiatric Technician. By virtue of her employment, Respondent Pye is a state miscellaneous member of CalPERS subject to Government Code section 21150.

Respondent Pye claimed disability on the basis of an orthopedic (right shoulder) condition as a result of an injury in 2011.

CalPERS arranged for Respondent Pye to be examined by an Independent Medical Examiner, Dr. Keolanui Gregory Chun, a Board-Certified Orthopedic Surgeon and he found that Respondent Pye was substantially incapacitated from the usual and customary duties of a Psychiatric Technician. However, he found the condition was not permanent.

After reviewing Dr. Chun's reports and other medical evidence, CalPERS staff denied Respondent Pye's application for disability retirement. Respondent Pye appealed and a hearing was held on September 9, 2015.

Under the applicable court rulings construing disability under the California Public Employees' Retirement Law (PERL), Respondent Pye has the burden of showing that she is substantially incapacitated from performing the usual and customary duties in her position as a 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.)

Prior to the hearing, CalPERS explained the hearing process to Respondent Pye and the need to support her case with witnesses and documents. CalPERS provided Respondent Pye with a copy of the Administrative Hearing Process Pamphlet. Prior to the hearing, CalPERS sent all exhibits to Respondent Pye and explained the procedure. Respondent Pye did not appear at hearing as she has relocated to Montana.

At the hearing, Dr. Chun testified and explained that Respondent Pye had a shoulder issue which was easily resolved through a shoulder manipulation under general anesthesia. He testified that Respondent Pye's doctor had recommended the procedure in 2012. Dr. Chun opined that without the recommended surgery Respondent Pye's condition was permanent and she was substantially incapacitated from her usual and customary duties of the position at the time he saw her. He explained the condition was completely correctable with the manipulation and so, in his opinion, Respondent Pye did not qualify for disability retirement.

In *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, the court addressed the issue as to whether a disability that could be resolved through surgery was a permanent disability. In *Reynolds*, the court upheld the Commission finding that appellant's

disability was not permanent because the “probabilities are great that (he) will be restored to normal functioning if he submits to surgery...and as a result his disability was not permanent. The recommended medical treatment is the kind of medical treatment to which a reasonable man would submit.”

In this case, Respondent Pye’s condition could be completely resolved with a simple procedure. However, the Administrative Law Judge (ALJ) concluded that requiring Respondent Pye to undergo surgery is not reasonable. The ALJ stated:

Here, CalPERS' own expert acknowledges that Respondent is substantially incapacitated from the performance of her regular duties as a psychiatric technician and will continue to be so incapacitated unless she has a second surgery and a successful outcome from the surgery. The law requires Respondent Pye to take reasonable steps to obtain medical treatment and to mitigate harm. Here Respondent Pye has already undergone one surgery, substantial physical therapy, and testing in a reasonable effort to correct her shoulder injury and return to work. Assuming that Respondent can locate a surgeon to perform the procedure either in California or Montana, it is not reasonable to require Respondent Pye to undergo a second surgery four years after her injury and endure the risks of general anesthesia and risks presented by Respondent Pye's history of hypertension in order to alleviate problems created by the first surgery.

The ALJ further opined that the *Reynolds* court did not contemplate the type of injury presented here involving the need for multiple surgeries and therapies over a period of years. Instead, the *Reynolds* court was presented with a case in which the applicant refused to undergo a single surgical repair of a torn meniscus in his knee. In this case, Respondent Pye has not refused surgical intervention and has already undertaken reasonable efforts and medical procedures to alleviate her injury. The ALJ concluded that the insistence on further surgical procedures four years after Respondent Pye’s injury is not reasonable. Accordingly, Respondent Pye has established by a preponderance of the evidence that she is substantially incapacitated from her usual duties as a Psychiatric Technician and is entitled to disability retirement.

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. Because the appeal was granted, the member is unlikely to file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

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