

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO REMAND THE MATTER FOR THE TAKING OF FURTHER EVIDENCE

Meinert C. Toberer (Respondent) was employed by the California Department of Veteran's Affairs at Yountville (DVA) as a Health and Safety Officer. By virtue of his employment, Respondent is a state miscellaneous member of CalPERS, subject to Government Code section 21150. Respondent began working at DVA in 2005 and is vested for retirement.

Respondent submitted an application for service pending disability retirement, wherein he claimed disability on the basis of orthopedic ("chronic pain, osteopathy, lumbar degeneration, and osteoarthritis of the knees") and neurological ("DM2 diabetic peripheral neuropathy, and meralgia paresthetica") conditions.

CalPERS retained Gerald C. Barnes, M.D., a board certified Orthopedic Surgeon, and Robert D. Ansel, M.D., a board certified Neurologist and Psychiatrist, to examine Respondent. Both doctors testified as Independent Medical Examiners (IME) in this case.

Dr. Barnes examined Respondent and reviewed his medical and non-medical (work) records. Dr. Barnes found that Respondent was not substantially incapacitated from the usual and customary duties of his position due to his orthopedic conditions.

Dr. Ansel also examined Respondent and reviewed Respondent's medical and non-medical (work) records. Even though he had been retained to evaluate neurological conditions, Dr. Ansel found that Respondent was substantially incapacitated from the usual and customary duties of his position on an orthopedic basis. After being asked to file a supplemental report addressing neurological issues, which is what he was originally retained to do, Dr. Ansel found that Respondent was not substantially incapacitated from the usual and customary duties of his position on a neurological basis.

CalPERS denied Respondent's application for disability retirement, as both Dr. Barnes and Dr. Ansel found within their respective medical specialties that Respondent did not meet the criteria for disability retirement. Respondent appealed CalPERS' determination.

Under the applicable court rulings construing disability under the California Public Employees' Retirement Law, Respondent had the burden to prove that he is substantially incapacitated from performing the usual and customary duties of his position as a Health and Safety Officer. Prophylactic restrictions or 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.)

Hearsay evidence is admissible in administrative proceedings, but its use is limited. Hearsay alone cannot support a finding, though it may be used to supplement other evidence and aid in support of findings. (*Sunseri v. Board of Medical Examiners* (App. 1 Dist. 1964) 224 Cal.App.2d 309.)

A hearing was held before an Administrative Law Judge (ALJ) on June 30, 2015 and August 19, 2015. Prior to the hearing, CalPERS provided Respondent with a copy of the Administrative Hearing Process pamphlet. CalPERS staff answered Respondent's questions and provided him with information on how to obtain further information regarding the process. Respondent represented himself at hearing and did not have any medical experts testify. He did not provide any medical reports.

Dr. Ansel testified at the hearing. Dr. Ansel's examination of Respondent was necessary to assess his neurologic complaints. Dr. Ansel found that Respondent had a sensory neuropathy, meaning he had an inflammation or abnormality of the sensory branch of the nervous system that goes to his legs, a peripheral neuropathy. He opined it was likely a result of diabetes. He explained it could be managed by getting the diabetes under control.

Dr. Ansel testified he did a supplemental report to clarify his opinion that from a neurologic standpoint, specifically the peripheral neuropathy, Respondent was not substantially incapacitated from the usual and customary duties of his position. Dr. Ansel explained that although Respondent had some impairment as a result of his diabetic neuropathy, this by itself would not prevent him from working.

Regarding Respondent's orthopedic complaints, Dr. Barnes explained that Respondent definitely had some objective findings relating to both his knees and his back, and a history of having had injuries to his back on two occasions. He had had a prior knee surgery, which subsequently led a knee replacement. His knee replacement resolved the problems and left him with limited motion, typical for a knee replacement.

Dr. Barnes explained that during his testing for range of motion, he found some limitations, but not to the extent to impair Respondent's ability to work. Dr. Barnes explained, "I don't expect a 65-year-old individual to bend down and touch the toes. And which is the case here. He wasn't able to quite do that. But -- and they usually have complaints of discomfort while carrying out these ranges of motion -- not only forward, but bending backwards and bend to either side." In Dr. Barnes orthopedic opinion, Respondent was not substantially incapacitated for the performance of his usual duties as a Health and Safety Officer.

Dr. Robert Kaer is Respondent's treating physician. He did not testify at the hearing, but the CalPERS-retained physicians reviewed Dr. Kaer's records as part of their independent evaluation of Respondent. The ALJ found:

In this case, Dr. Kaer made the only overall assessment of respondent. Interestingly, Dr. Ansel's IME report is consistent with Dr. Kaer's assessment of respondent; and

CalPERS argues that Dr. Ansel's IME report should be disregarded. (Proposed Decision, p.8, no. 27.)

CalPERS did not argue that Dr. Ansel's entire report should be disregarded. Rather, CalPERS argued that Dr. Ansel's orthopedic findings should be disregarded, as he is not an orthopedic specialist and did not perform an orthopedic examination.

The ALJ further opined:

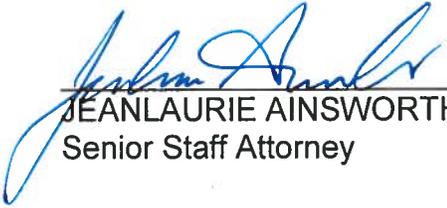
Ultimately, Dr. Kaer's medical opinion is competent and reliable. Both Dr. Barnes and Dr. Ansel cite to Dr. Kaer's chart notes and rely on his diagnosis of respondent to render their opinions. Dr. Kaer evaluated both respondent's orthopedic and neurologic conditions and his medications, their interactions and overall effects on respondent. Dr. Kaer concluded that '[respondent] has been officially disabled due to his pain since September 2011.' On December 23, 2011, Dr. Kaer verified the following on a CalPERS Report on Disability: "[respondent] has multiple sources of chronic pain, requiring substantial amounts of medication, which preclude his ability to crawl, bend, kneel, sit, and carry heavy loads, as well as his long-acting opiates result in difficulty with cognition." (Proposed Decision, p. 8, no. 27.)

CalPERS argues the matter should be remanded back to the Office of Administrative Hearings for the taking of further evidence regarding the opinions and writings of Dr. Kaer. The ALJ relies on Dr. Kaer's hearsay medical report as primary evidence of Respondent's medical condition, in contravention of Government Code Section 11513, which allows for the admission of hearsay evidence only to supplement or explain direct evidence. (Cal. Gov. Code § 11513(d).) Even if properly admitted, the parties were not afforded a sufficient opportunity to explore Dr. Kaer's opinions at the hearing. Respondent did not submit any of Dr. Kaer's reports, nor did he proffer Dr. Kaer as a witness. There is also no evidence of Dr. Kaer's qualifications to evaluate Respondent's orthopedic or neurological conditions, the purported effects of Respondent's medications on his ability to work as a Health and Safety Officer, or the manner in which Dr. Kaer evaluated Plaintiff.

For these reasons, CalPERS argues the Proposed Decision is not supported by admissible evidence. Staff requests the matter be remanded back to OAH for the taking of further evidence.

The Proposed Decision is not supported by admissible evidence. Staff requests that the matter be remanded to the Office of Administrative Hearings for the taking of further evidence.

December 16, 2015



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JEANLAURIE AINSWORTH  
Senior Staff Attorney