

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION WITH MODIFICATION

Respondent Perry Leffler (Respondent) was employed by California Department of Corrections and Rehabilitation (CDCR) as a Correctional Officer. By virtue of his employment, Respondent is a safety member of CalPERS. Respondent submitted an application for Industrial Disability Retirement on the basis of orthopedic (left shoulder, left knee, and back) conditions. Respondent was initially approved for Industrial Disability Retirement and he retired for disability effective October 1, 2009.

In May 2013, CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that his file was currently under review. As part of the reexamination, staff reviewed medical reports regarding Respondent's condition and a written description of his usual and customary job duties. Staff reviewed all medical records in the file, including Respondent's treating physician records and his workers' compensation file. Robert Henrichsen, M.D., a board certified Orthopedic Surgeon, examined Respondent, reviewed medical reports and two written job descriptions. In his report, Dr. Henrichsen concluded that Respondent was not substantially incapacitated from performing the usual and customary job duties of a Correctional Officer. Respondent timely appealed.

The hearing on this matter was held on August 25, 2015. Respondent was present and was represented by counsel.

Respondent testified that he was injured while intervening in a physical altercation in 2003. He testified that he was injured his back and left knee in 2008 while breaking up a prison riot.

Respondent received treatment from Dr. Tim Mar, his primary care physician, since approximately 2002. Dr. Mar testified at the hearing regarding Respondent's medical conditions and the diagnosis. Dr. Mar testified that Respondent's complaints about pain were consistent with the objective medical findings. As a result of these medical conditions, Dr. Mar concluded Respondent continues to be incapacitated from performance of his job duties.

Respondent testified that he cannot perform the essential functions of his job due to his injuries. Dr. Henrichsen testified at the hearing that he found Respondent could perform the essential functions of his job; although, Respondent would have difficulty with repeated overhead lifting, hammering or throwing with the left hand.

After reviewing the evidence, the Administrative Law Judge (ALJ) determined the preponderance of evidence established that Respondent was substantially unable to perform the usual and customary duties of a Correctional Officer. According to the ALJ, the testimony of Dr. Mar, the treating physician, was more persuasive than

the testimony of Dr. Henrichsen. The ALJ granted Respondent's appeal of CalPERS' determination that he be reinstated to his former position as a Correctional Officer.

Pursuant to Government Code section 11517(c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." In order to avoid ambiguity, staff recommends that the word "industrial" be inserted before the words "disability retirement" on pages one, two, five, twelve, fourteen, and fifteen. Staff argues that the Board adopt the Proposed Decision, as modified.

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 is unlikely to file a writ petition in superior court seeking to overturn the decision of the Board, which is in his favor.

February 18, 2016



PREET KAUR
Senior Staff Attorney