

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

**STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION**

Respondent Marcos Rivera (Respondent) was employed by the Department of Corrections and Rehabilitation, California Institution for Men (CDCR) as a Correctional Officer. By virtue of his employment, Respondent was a state safety member of CalPERS. In October, 2008, Respondent submitted an application for Industrial Disability Retirement on the basis of a claimed psychiatric (post-traumatic stress disorder, PTSD) condition. CalPERS' staff reviewed relevant medical reports and a written job description. Respondent was evaluated by a Board certified psychiatrist, who concluded that Respondent was substantially incapacitated from performing the usual and customary duties of a correctional officer because of symptoms from PTSD. Respondent was approved for Industrial Disability Retirement. Respondent was 36 years old.

In 2012, when Respondent was 40 years old and therefore under the minimum age for voluntary retirement, pursuant to Government Code section 21192, CalPERS informed Respondent that he would be reevaluated for the purpose of determining whether he was still substantially incapacitated from performing the usual and customary duties of a correctional officer and, therefore, still entitled to receive Industrial Disability Retirement. As part of the reevaluation process, Respondent was evaluated by Perry Maloff, M.D., a Board-certified Psychiatrist. Dr. Maloff reviewed relevant medical reports, a written job description and performed a mental status examination of Respondent. Dr. Maloff prepared a written report which contained his observations, findings, and conclusions. Dr. Maloff expressed an opinion that Respondent was no longer substantially incapacitated from performing the usual and customary duties of a correctional officer because of symptoms of PTSD and that Respondent was not otherwise disabled because of any active psychological disorder or condition. CalPERS determined that Respondent was no longer substantially incapacitated, should no longer receive Industrial Disability Retirement, and should be reinstated to his former position as a correctional officer with CDCR. CalPERS informed both CDCR and Respondent of its determination. Respondent appealed CalPERS' determination and a hearing was held on July 30, 2014, March 9, 2015, and, September 30, 2015.

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

In order for an individual to receive disability retirement, competent medical evidence must demonstrate that he or she is substantially incapacitated from performing the usual and customary duties of their position. The injury or condition which is the basis of the disability must be permanent or of an uncertain and extended duration. Conversely, if CalPERS is going to cease providing disability retirement to an individual, competent medical evidence must demonstrate that the individual is no longer

substantially incapacitated, on the basis of the injury or condition for which they were approved for disability retirement, from performing their usual and customary duties.

Respondent testified at the hearing and offered medical/psychological reports into evidence. Respondent did not call a qualified psychiatrist or psychologist to testify at the hearing on his behalf.

Respondent described experiencing increasing feelings of anxiety and fear working as a correctional officer. He sought treatment, which included some psychological counseling. Treating physicians recommended that Respondent try a course of anti-anxiety and/or anti-depressant medications, which he refused.

The Administrative Law Judge (ALJ) summarized Dr. Maloff's IME report, which was received into evidence, as follows:

Dr. Maloff disagreed with [previous IME's] assessment that [Respondent] suffered from post-traumatic stress disorder (PTSD). In Dr. Maloff's opinion, [Respondent's] symptoms had not risen to the threshold necessary for that diagnosis. [Respondent] was not continually experiencing marked symptoms of anxiety, panic attacks, or dissociative episodes in response to environmental triggers that reminded him of traumatic events at the prison. He was not re-experiencing symptoms that caused problems in his everyday routine. [Respondent] did not report hyper-arousal symptoms, feeling on edge, being easily startled, having difficulty sleeping, or having outbursts of anger. ...[Respondent's] symptoms were not consistent with PTSD. In addition, Dr. Maloff observed that [Respondent's] treating psychologist never diagnosed [Respondent] with PTSD or provided or recommended treatment for PTSD. Dr. Maloff opined that [Respondent's] prior diagnosis was major depressive illness that was now in sustained remission. ...In Dr. Maloff's opinion, [Respondent] no longer had a psychiatric condition, and he was not disabled from performing the usual and customary duties of a correctional officer.  
(See Factual Finding No. 23.)

At the conclusion of the July 30, 2014, the first day of hearing, counsel for CalPERS argued, *inter alia*, that Respondent could no longer be considered substantially incapacitated due to his continued refusal to take recommended anti-anxiety and/or anti-depressant medications. (See, *Reynolds v. City of San Carlos* (1981) 126 Cal. App 3d 208.) In *Reynolds*, the Court of Appeal upheld the CalPERS determination that a firefighter was not permanently disabled from performing his usual and customary duties because he unreasonably refused to submit to knee surgery that would have given him a 98 percent probability of a full recovery.

In response, the ALJ requested post-hearing briefs. After considering these briefs, the ALJ re-opened the record and requested additional evidence to determine whether the *Reynolds* decision applied to psychiatric conditions. (See, Factual Finding 31.)

In response to Respondent's first two arguments in support of his request for Reconsideration (See Petition for Reconsideration, "A" and "B"), CalPERS did not have the option of having Respondent examined or evaluated by a Board certified psychiatrist other than Dr. Maloff. The entirety of Factual Finding No. 31 reads as follows:

On September 3, 2014, the administrative law judge issued an order reopening the record and advising the parties that consideration of the *Reynolds* decision required additional evidence be taken before the administrative law judge could determine if the *Reynolds* decision applied to psychiatric conditions. The administrative law judge listed questions to be answered by [CalPERS'] expert and any other expert medical professionals either party intended to call, and set a trial setting conference for an additional hearing date. Following the trial setting conference, the hearing was continued to March 9, 2015. (Emphasis added.)

Pursuant to the ALJ's order, Respondent was scheduled for further evaluation by Dr. Maloff. Respondent failed to appear for the rescheduled evaluation. At the March 9, 2015, hearing Respondent was advised that Government Code section 21175 allows CalPERS to cancel a retiree's disability retirement benefit if the retiree is under the age of voluntary retirement and refuses to submit to a requested medical evaluation. Respondent agreed to be re-evaluated by Dr. Maloff and a second day of hearing was scheduled. In response to Respondent's argument that "I had no choice but to submit to this medical evaluation", the ALJ's Factual Finding No. 32 is as follows:

The parties appeared for the continued hearing on March 9, 2015, and CalPERS' expert, Perry Maloff, M.D., was present and ready to testify. CalPERS's counsel indicated that he had requested that Mr. Rivera be re-evaluated by Dr. Maloff but Mr. Rivera had refused. Mr. Rivera had not been aware of the provisions of Government Code section 21175, which permits CalPERS to cancel a retiree's disability retirement allowance if the retiree is under the age of voluntary retirement and the retiree refuses to submit to a medical evaluation for more than a year. Following further discussion, Mr. Rivera agreed to be re-evaluated by Dr. Maloff and the parties Agreed to continue the hearing to permit Dr. Maloff to re-evaluate Mr. Rivera. (Emphasis added.)

Respondent was not forced to agree to be re-evaluated by Dr. Maloff. He was informed of the applicable statute that "permits" – but does not require – CalPERS to cancel a retiree's disability retirement allowance if the individual refuses to be examined.

Respondent was fully informed and aware that he could proceed with his appeal without submitting to a re-evaluation by Dr. Maloff. Respondent was informed and fully aware that it was the ALJ, not CalPERS, had requested the re-evaluation. Respondent chose to proceed with his appeal and to be re-evaluated by Dr. Maloff.

The second day of hearing was September 30, 2015. Dr. Maloff's supplemental report, in which he responded to the specific questions posed by the ALJ and described his observations, findings, and conclusions on re-evaluation of Respondent, was received into evidence. Dr. Maloff testified consistently with his report. Dr. Maloff stated that, when he met with Respondent in the April, 2015, reevaluation, Respondent described being able to search for employment, do household chores, and help his children with homework. Respondent denied having any difficulty being in crowds, driving on the freeway, watching violent television shows, or movies. Respondent denied feeling depressed or hopeless. Accordingly, "Dr. Maloff's expert opinion did not change following his 2015 evaluation of [Respondent]. He still opined that [Respondent] did not suffer from a disability that rendered him incapable or substantially incapacitated from performing his prior duties as a correctional officer." (See Factual Finding No. 39.)

In response to Respondent's final argument, that he "was never provided the second medical report that Dr. Maloff issued until the day of the final hearing," Respondent did not request a copy of Dr. Maloff's Supplemental Report at any time between the date of re-evaluation (April 7, 2015) and the second day of hearing (September 30, 2015). Further, as the ALJ noted:

Dr. Maloff's expert opinion did not change following his 2015 evaluation of Mr. Rivera. He still opined that Mr. Rivera did not suffer from a disability that rendered him incapable or substantially incapacitated from performing his prior duties as a correctional officer.  
(Factual Finding No. 39.)

After considering all of the evidence and testimony, the ALJ concluded as follows:

Although [Respondent] has anticipatory anxiety at the prospect of returning to work as a correctional officer, his anticipatory anxiety is not a permanently disabling condition, and he is not suffering from any psychiatric condition that renders him incapacitated from his usual and customary duties as a correctional officer. As a result, he is no longer eligible for disability retirement on the basis of a psychiatric condition.  
(See Legal Conclusion No. 14.)

The ALJ concluded that Respondent's appeal should be denied. The Proposed Decision is supported by the law and the facts. Respondent has not provided any factual or legal basis which would support the Board granting his request for Reconsideration.

Because the Decision applies the law to the salient facts of this case, the risks of denying the Request for Reconsideration are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

February 18, 2016

  
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Senior Staff Attorney