

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Oscar Fuentes (Respondent) was approved for Industrial Disability Retirement on December 1, 2005, based on an orthopedic condition (back and neck). Subsequently, CalPERS found that Respondent was no longer disabled from the performance of his duties as a Warehouse Manager II (WM) with California Department of Corrections and Rehabilitation, State Prison—San Quentin (CDCR), and that he should be reinstated.

As part of CalPERS' review of his medical condition, Respondent was sent for an independent medical examination (IME) to Orthopedic Surgeon Dr. Joseph W. McCoy.

Dr. McCoy interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, reviewed medical records, viewed surveillance video of Respondent, read Respondent's deposition transcript in a related matter and performed a comprehensive IME examination.

Dr. McCoy examined Respondent's upper and lower extremities, and focused on his back and neck. Dr. McCoy found that Respondent displayed an excellent range of motion in his cervical, thoracic and lumbar spine. Respondent's neurologic exam was entirely normal. During the examination, Dr. McCoy was unable to identify any significant neurologic deficit in either Respondent's upper or lower extremities. Dr. McCoy's impression was that Respondent had degenerative disc disease of the cervical spine without evidence of myelopathy or radiculopathy and lumbar degenerative disc disease without evidence of any significant impairment. Dr. McCoy concluded that there were no specific job activities that Respondent was incapable of performing. Dr. McCoy opined that Respondent is not substantially incapacitated for the performance of his usual duties.

Respondent appealed. The hearing was completed on January 26, 2015. Respondent was represented at the hearing by attorney Robert McCann.

At the hearing, Dr. McCoy testified to his examination and report. During the hearing, Dr. McCoy was shown portions of the surveillance video taken of Respondent. Dr. McCoy testified that Respondent's physical activities, as seen in the video, were consistent with his own assessment of Respondent's physical abilities. Dr. McCoy testified that Respondent's demonstrated abilities on the surveillance video supported his conclusion that Respondent could easily meet the physical requirements of the WM position. Dr. McCoy's medical opinion is that Respondent is not substantially disabled, even if he is experiencing some degenerative disc disease.

CalPERS elicited testimony from Terri McKay, who was the Return to Work Coordinator for Respondent CDCR at the time Respondent submitted his industrial disability application. Ms. McKay testified regarding the physical requirements for the WM position, as well as to the fact that Respondent previously misrepresented what the physical requirements are to a Workers' Compensation doctor.

CalPERS also elicited testimony from Joseph Holmberg. Mr. Holmberg is a licensed private investigator who was retained by the State Compensation Insurance Fund to perform surveillance of Respondent in connection with Respondent's workers' compensation claim. During his testimony, Mr. Holmberg authenticated the surveillance video and provided a summary of the activities he witnessed Respondent performing over a five day period. Mr. Holmberg testified that on sequential days of observation, Respondent did not appear to be in any pain as a result of the prior day's activities.

Respondent testified on his own behalf. He did not call any physicians or other medical professionals to testify. He did offer as evidence medical records from his treating physician.

The Administrative Law Judge (ALJ) found that CalPERS bears the burden to show by a preponderance of the evidence (based on competent medical evidence) that Respondent was no longer substantially incapacitated and should be involuntarily reinstated to his former position (Govt. Code §§ 21191, 21192). The ALJ found that CalPERS met its burden of proof, by a preponderance of the evidence, that Respondent is no longer substantially incapacitated for the performance of his usual and customary duties as a WM with the CDCR.

The ALJ found that Respondent's testimony that his usual job duties required heavy lifting and intense physical activity was not credible. The ALJ found that Ms. McKay persuasively testified that the WM position is a supervisory position and that Respondent was specifically instructed that his duties did not require him to engage in the physical activities of the staff working under him. The ALJ found that Respondent's history of engaging in dishonest conduct for personal gain undermines his credibility. Furthermore, the ALJ found Respondent's felony conviction for fraudulently attempting to obtain a higher disability rating, coupled with his physical abilities seen on surveillance and Dr. McCoy's findings, established that Respondent's testimony is to be viewed with distrust.

The ALJ further found that Respondent provided no objective, competent medical evidence to support his claim of continued disability. The great weight of the medical evidence supports a conclusion that there is no orthopedic reason why Respondent cannot perform the usual and customary duties of his position. The ALJ found that Respondent is no longer substantially incapacitated. The ALJ concluded that Respondent's appeal should be denied and that he should be reinstated to his former usual job duties as a WM for CDCR.

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.

April 20, 2016.

fn Marguerite Seaborn
JOHN SHIPLEY
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