

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Francine Valentine (Respondent) applied for disability retirement based on a neurological condition (severe pain, balance loss, eye sight loss, memory loss, muscle loss). By virtue of her employment as an Instructional Assistant for Respondent San Joaquin County Schools (Respondent Schools), Respondent was a local miscellaneous member of CalPERS.

As part of CalPERS' review of her medical condition, Respondent was sent for an Independent Medical Examination (IME) to board-certified Neurologist and Internist Michael M. Bronshvag. Dr. Bronshvag initially found Respondent to be substantially incapacitated to perform her usual job duties. He opined that "these difficulties have been present since 2004 in disabling form, and probably existed for years prior to that as well (2000 would be a reasonable estimate). The records are not clear of the date she last worked, and Ms. Valentine cannot recall, so a more specific date that her disability began is difficult to determine." Dr. Bronshvag identified several specific duties he believed that Respondent could not perform at all due to her disability.

Dr. Bronshvag was subsequently presented with surveillance footage of Respondent. In a Supplemental IME Report, Dr. Bronshvag amended his opinion and concluded that Respondent is not substantially incapacitated for the performance of her usual job duties due to neurologic condition. Dr. Bronshvag was troubled about this conclusion, and offered to see Respondent again to complete additional evaluation.

A hearing was completed on February 23, 2016. Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her 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.

At the hearing, Dr. Bronshvag testified that Respondent was "impaired and pathetic" at the IME appointment. He could not explain how she "looked fine" on the video. He found this contradiction "very upsetting," and testified that "something dreadful" might well turn up on further examination. Dr. Bronshvag was visibly upset during his testimony.

Respondent attempted to testify at hearing. The Administrative Law Judge (ALJ) found that her demeanor throughout the hearing was the most compelling evidence of her substantial incapacity. CalPERS presented its case-in-chief first, and Respondent was somewhat capable of participating in CalPERS' presentation of evidence. When it was Respondent's turn to testify, she struggled to hold her right hand up while being administered the oath and had difficulty spelling her name. She testified at times with a staccato speech pattern. Other times, she stopped testifying mid-sentence and stared off into space. Towards the end of Respondent's testimony, it was unclear how much of it was even her own, as opposed to parroting information given to her by her daughter.

At the conclusion of her testimony, Respondent was largely unresponsive, and had to be helped to her feet and carried from the courtroom.

When all the evidence was considered, the ALJ held that Respondent was substantially incapacitated for the performance of her usual duties due to a neurologic condition. The ALJ found Dr. Bronshvag's initial report more persuasive than the one he formed after reviewing the surveillance footage. The ALJ found that Dr. Bronshvag's original opinion was bolstered by the opinion of another "well-respected" neurologist, Dr. Duggar. Finally, the ALJ found that Respondent's symptoms exhibited at hearing were genuine, and constituted credible evidence of her substantial incapacity.

The ALJ found that the surveillance was not persuasive evidence of Respondent's physical capabilities given its short duration (approx. 15 minutes over 2 days), and because it did not depict Respondent on either day "performing vigorous physical activities", which was the evidence Dr. Bronshvag noted in his IME Report that would cause him to change his opinion that Respondent is disabled.

The ALJ concluded that Respondent had met her burden of proof to establish that she was substantially unable to perform her usual job duties as an Instructional Assistant, and therefore, found that Respondent was entitled to disability retirement.

The ALJ also concluded that the persuasive evidence established that Respondent Schools was aware that Respondent's disability prevented her from performing her usual job duties at the time she stopped working, but failed to apply for a disability retirement on her behalf despite a statutory duty to do so. The ALJ found that Respondent School's failure to comply with its statutory obligation entitled Respondent to have her effective date of retirement made retroactive to March 5, 2008 (her last day on pay).

The ALJ concluded that Respondent's application for disability retirement with an effective date of March 5, 2008, should be granted. 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 is not likely to file a Writ Petition in Superior Court seeking to overturn the Decision of the Board, since she prevailed.

May 18, 2016


ELIZABETH YELLAND
Senior Staff Attorney