

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Claudelle Halcomb (Respondent Halcomb) worked as a Mobile Road Enforcement Officer (MRE) for Respondent California Highway Patrol (Respondent CHP). By virtue of her employment, Respondent Halcomb was a state safety member of CalPERS.

Respondent Halcomb applied for service pending industrial disability retirement with CalPERS on the basis of orthopedic conditions (right shoulder, arm and hand). To evaluate Respondent Halcomb's service pending industrial disability retirement application, CalPERS referred Respondent Halcomb for an Independent Medical Examination (IME) with Doctor Frank Minor. Dr. Minor issued a written report finding Respondent Halcomb was not, in his opinion, substantially incapacitated. On the basis of the IME report, and a review of Respondent Halcomb's medical records and job duty statements, CalPERS denied Respondent Halcomb's service pending industrial disability retirement application.

Respondent Halcomb appealed CalPERS' determination, exercising her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. The ALJ presided over a one-day hearing in Sacramento, California on January 6, 2016. Both CalPERS and Respondent Halcomb were represented by counsel at the hearing. Respondent CHP did not appear.

Pursuant to the California Public Employees' Retirement Law (PERL), a CalPERS member who is incapacitated from the performance of his or her duties shall be retired for disability. (Cal. Gov. Code §21150(a).) The statute has been interpreted and applied to require a showing of substantial inability to perform the usual duties of the job. (See, e.g., *Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 876.) On-the-job discomfort does not qualify a member for disability retirement; risk of further or future injury is similarly insufficient. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862-64.) On appeal, it is the member's burden to prove substantial incapacity. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

The determination of whether a CHP Officer¹ is substantially incapacitated must be based on an evaluation of whether, at the time the Officer applied for disability retirement, the Officer was able to perform the usual duties of a CHP Officer, including the 14 Critical Tasks, and not just the usual duties of the Officer in his or her most recent position with Respondent CHP. (*California Department of Justice v. Board of Administration of California Public Employees' Retirement System (Resendez)* (2015) 242 Cal.App.4th 133, 139.) The 14 Critical Tasks include but are not limited to lifting and carrying objects weighing up to 50 pounds, dragging a 200-pound individual resisting arrest, separating uncooperative individuals, climbing hills, embankments and gullies, firing a handgun, shotgun and rifle, and operating a computer keyboard.

¹ A MRE Officer is a "CHP Officer".

At hearing, CalPERS presented the oral testimony and written IME report of Dr. Minor. Dr. Minor testified that he interviewed Respondent Halcomb, obtained a personal and medical history, physically examined Respondent Halcomb and reviewed her medical and work records.

Respondent Halcomb complained to Dr. Minor of constant burning pain in her right shoulder and aching in her posterior right neck and shoulder. She also reported pins and needles extending to her right thumb with numbness. Dr. Minor's physical examination of Respondent Halcomb showed partially limited range of motion in the right shoulder, as well as a positive impingement sign and positive Finkelstein's test (tendinitis in fingers, cramping). Dr. Minor also extensively reviewed the 14 Critical Tasks. Based on his examination and review of relevant records, Dr. Minor diagnosed Respondent Halcomb with multiple cervical strains, untreated right hand de Quervain's and noted that she had previously had right shoulder surgery, carpal tunnel release, and right trigger finger release.

On the basis of these findings, Dr. Minor found that Respondent Halcomb was "unable to frequently crawl, kneel, squat, reach above her shoulder, perform keyboard or mouse use." However, Dr. Minor felt Respondent Halcomb was capable of performing these duties occasionally and for up to three hours.

Respondent Halcomb told Dr. Minor that she was concerned she might have difficulty pulling or dragging an incapacitated person in an emergency situation. Her duty statement noted that Respondent Halcomb was expected to do this one or two times per year for a minute. Dr. Minor felt she could perform these activities. Respondent Halcomb also told Dr. Minor she was concerned she could not deal with physical altercations or separate uncooperative persons. Dr. Minor opined, based on his examination of Respondent Halcomb, that she could perform these duties for one to three times per month for five to 60 seconds, as her job duty statement required. For these reasons, and despite the work-related limitations noted, Dr. Minor found that Respondent Halcomb was not substantially incapacitated. Concluding his report, Dr. Minor stated "it is not clear why she is so limited, other than having subjective pain."

At hearing, Respondent Halcomb testified to her medical and work history. She had been involved in several motor vehicle accidents between 1999 and 2002. Respondent Halcomb suffered a tear in her right shoulder in 2008 during hand-to-hand combat training. She had surgery on her right shoulder in 2010, carpal tunnel release in February 2012, and trigger finger release in November 2012. After surgery, Respondent Halcomb returned to full duty in January 2013, transferred to modified duty in August 2013, and retired in December 2013.

Regarding the 14 Critical Tasks, Respondent Halcomb testified that the last time she qualified at the range with a handgun was in 2009, and that she qualified in 2008 with her rifle and shotgun. In early 2011, after right shoulder surgery, Respondent Halcomb went to the range to try to qualify with the shotgun, rifle and pistol. She fired one shotgun shot, went to her knees, and was in visible pain. Officer Schubert, who

supervised the range, ended the session. Respondent Halcomb testified she “flew under the radar” with regard to firearm qualifications. Respondent CHP never audited her to determine whether she could maintain firearm qualifications. Respondent Halcomb also never drew a weapon during her work as a MRE Officer.

In August 2013, Respondent Halcomb testified she had an “epiphany” while inspecting a commercial truck in a remote area, realizing that her physical condition prevented her from being able to defend herself if necessary. As a result, Respondent Halcomb became “emotionally distraught” and felt vulnerable; she sought out treatment under the Employee Assistance Program (EAP) for her anxiety. An EAP nurse noted that Respondent Halcomb’s “depression and anxiety have increased, and she now is unable to even pull a trigger.”

In 2015, Respondent Halcomb underwent surgery on her right shoulder (rotator cuff). As a result, her hand is no longer numb.

Dr. Michael Cohen also testified on behalf of Respondent Halcomb and has been treating her since 2009, though not continuously. At hearing, Dr. Cohen admitted he was not aware of the legal definition of “substantially incapacitated.” Regarding the 14 Critical Tasks, Dr. Cohen testified that there were some that Respondent Halcomb could not perform because it might be difficult, unsafe, or hazardous to the public for her to do so. He was also concerned that performing these tasks might cause future injury.

The ALJ considered all the evidence, and found that Respondent Halcomb “ceased working full time based upon her own personal determination that she was not able to perform her job duties, not due to a traumatic or disabling injury.” The ALJ further held that Dr. Cohen’s opinions were inconsistent with the substantial incapacity standard that CalPERS applies.

In contrast, the ALJ held that Dr. Minor applied the correct standard applicable to disability retirement proceedings, and carefully considered the 14 Critical Tasks. His opinion that Respondent Halcomb was not substantially incapacitated, based upon subjective complaints of pain, “was persuasive and consistent with the medical records offered at hearing.”

In her closing brief, Respondent Halcomb argued that Dr. Minor’s opinions should be given little weight because he did not recognize that the positive impingement sign was evidence of a rotator cuff tear in Respondent Halcomb’s right shoulder. The ALJ rejected this argument, and noted that even Respondent Halcomb’s treating physician, Dr. Cohen, could not determine whether the rotator cuff tear occurred before or after Respondent Halcomb retired in December 2013. Moreover, the ALJ held that the fact that Respondent Halcomb’s symptoms improved after the 2015 rotator cuff surgery supported a finding that Respondent Halcomb did not have a permanent disabling condition, which is required to prove substantial incapacity.

The ALJ concluded that Respondent Halcomb's appeal should be denied. 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 phrase "service pending industrial" be inserted before the words "disability retirement" on pages one, two, three, five, ten, eleven, twelve, thirteen and fifteen of the Proposed Decision. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision, as modified.

Because the Proposed Decision applies the law to the salient facts of the 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.

June 15, 2016



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