

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Marianne D. Sullivan (Respondent Sullivan) worked as a Management Services Technician (MST) for Respondent California Department of Corrections, California Men's Colony (Respondent CDCR). By virtue of her employment, Respondent Sullivan was a state industrial member of CalPERS.

Respondent Sullivan applied for service pending disability retirement with CalPERS on the basis of orthopedic conditions (bilateral arm, bilateral elbow), which she claimed made her unable to work as a MST for Respondent CDCR. Respondent Sullivan's injuries arose from repetitive use of her arms and hands while performing her job duties as a MST. To evaluate Respondent Sullivan's application, CalPERS referred Respondent Sullivan for an Independent Medical Examination (IME) with Doctor Kenneth Baldwin. Dr. Baldwin issued a written report finding Respondent Sullivan was not, in his opinion, unable to perform the duties of a MST for Respondent CDCR. On the basis of the IME report, and a review of Respondent Sullivan's medical records and job duty statements, CalPERS denied Respondent Sullivan's service pending disability retirement application.

Respondent Sullivan 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 San Luis Obispo, California on May 3, 2016. Respondent Sullivan represented herself. Respondent CDCR did not appear.

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

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.)

At hearing, CalPERS presented the oral testimony and written IME report of Dr. Baldwin. Dr. Baldwin testified that he interviewed Respondent Sullivan, obtained a

personal and medical history, physically examined Respondent Sullivan and reviewed her medical and work records.

During examination, Dr. Baldwin found no loss of elbow function, motion or strength. Dr. Baldwin noted "no significant findings or limitations" in his IME report. Reviewing the MST job statement and the physical requirements form filled out by Respondent Sullivan, Dr. Baldwin noted that Respondent Sullivan was expected to spend a substantial amount of her work day scanning documents and keying the information contained in those documents into her computer. In his IME report, Dr. Baldwin opined that even though Respondent Sullivan may experience pain or discomfort while performing these tasks, there were not sufficient abnormal findings to suggest she was unable to perform the essential functions of the MST position. For these reasons, Dr. Baldwin stated in his report and testified at hearing that Respondent Sullivan was not substantially incapacitated.

At hearing, Respondent Sullivan testified that her motivation for appealing CalPERS' denial of her application was because she believed it would be unfair to not be compensated for the injury and pain caused by her work as a MST for Respondent CDCR. Respondent Sullivan testified that she had experienced improvement in her arms and shoulders, but that her treating physician advises she may require surgery in the future. Respondent Sullivan also testified that has difficulty doing gardening, sewing and needlepoint.

The ALJ considered all the evidence, and credited as persuasive the report and testimony of Dr. Baldwin. The ALJ ruled that a disability retirement applicant "cannot be considered substantially incapacitated when they are able to perform their duties, even when doing so would sometimes be painful or difficult." The ALJ concluded that Respondent Sullivan's appeal should be denied. 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 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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Senior Staff Attorney