

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

The hearing on this case was completed March 8, 2016. Following the hearing, a Proposed Decision was issued on March 28, 2016. The Proposed Decision was in favor of CalPERS (to reinstate Respondent because he is no longer substantially incapacitated from performing his usual job duties). The Board adopted the Proposed Decision on May 18, 2016. Respondent Jordan Conway (Respondent) submitted this Petition for Reconsideration on May 27, 2016.

Respondent was employed by the Department of Forestry and Fire Protection (Respondent CalFIRE) as a Firefighter I. Respondent was approved for CalPERS Industrial Disability Retirement (IDR) on October 17, 2011, on the basis of an orthopedic condition (left knee). He was 23 years old at the time. He has remained on IDR since that time.

Respondent's original disability was based on an Independent Medical Examination (IME) and a report of Dr. Joseph Serra. Dr. Serra opined that Respondent was temporarily incapacitated from the performance of his duties, due to orthopedic conditions, and that his temporary incapacity was expected to last for "one to two years."

On October 4, 2013, Respondent was notified that under Government Code section 21192, CalPERS was reviewing his disability retirement status. Pursuant to Government Code section 21192, a member who retires on disability at an age less than 50 can be required to undergo subsequent medical examination to determine if he or she remains incapacitated from the usual and customary duties of his or her position. Respondent was 25 years old in 2013.

CalPERS staff arranged for a new medical examination, and then reviewed that report as well as other relevant medical reports. Dr. Ghol Ha'Eri, a board-certified Orthopedic Surgeon, conducted an IME examination of Respondent, and determined that he was no longer substantially incapacitated from performing his usual and customary job duties of Firefighter I for Respondent CalFIRE. Based on this report, CalPERS determined that Respondent is no longer entitled to IDR.

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.

At the hearing, the Administrative Law Judge (ALJ) heard evidence from two witnesses: Dr. Ha'Eri and Respondent. Dr. Ha'Eri diagnosed Respondent with "left knee sprain/strain," and opined that Respondent "underwent a full course of conservative medical care, i.e. medications, knee brace and physical therapy." Dr. Ha'Eri noted that Respondent was instructed to "continue with his own exercise program in order to strengthen his thigh muscle in the left lower extremity." Dr. Ha'Eri testified that Respondent was no longer substantially incapacitated from the performance of his duties due to an orthopedic condition.

Respondent testified that he still suffers from pain and weakness in his left knee when he stands for long periods of time. Respondent does not feel that he is able to perform the duties of Firefighter I, particularly the requirement that he lift heavy objects. Respondent did not call any health care providers to testify. He offered various medical reports which were admitted as administrative hearsay.

The ALJ found that Dr. Ha'Eri's opinion was sufficient to sustain reinstatement of Respondent to his former position as a Firefighter I, especially when considered with Dr. Serra's medical opinion that Respondent's disability was temporary, not to exceed one or two years (from 2011). The ALJ found that Respondent's medical submissions were not persuasive, especially since the authors of those documents were not present at hearing, and did not opine using the CalPERS standard of disability: whether Respondent was substantially incapacitated from the performance of his job duties.

The ALJ concluded that Respondent failed to establish that he was substantially unable to perform his usual job duties, and therefore, was not entitled to industrial disability retirement. The ALJ concluded that Respondent's appeal should be denied.

Respondent makes the same arguments in his Petition for Reconsideration that he made at hearing. The medical records he produces, and arguments he makes, were already considered by the ALJ. In the Proposed Decision, the ALJ states:

Although Respondent submitted reports from Ms. Dumas and Dr. Saperstien regarding recent evaluations, the reports were not persuasive. Ms Dumas did not opine that respondent was substantially incapacitated for the performance of his duties as a Firefighter I due to his orthopedic condition. Dr. Saperstein did not provide an explanation as to why he believed respondent was substantially incapacitated from the performance of his duties. Additionally, because the authors of these reports and correspondence were not available at hearing for cross-examination, their opinions were admitted only as administrative hearsay and cannot be relied upon, standing alone, to support any findings as to respondent's orthopedic condition. Gov. Code §11513, subd. (d).

Presumably, Respondent did not like the result after hearing. He disagrees with the ALJ's findings of fact and legal analysis, but it is clear from the Proposed Decision that evidence was taken on the underlying facts, medical evidence, and Respondent's claimed disability. Exhibits from both parties were submitted for consideration by the ALJ. The ALJ simply found against Respondent. Respondent has not raised any new evidence or change in circumstances which would warrant reconsideration.

Staff argues the Board deny the Petition for Reconsideration and uphold its Decision.

Because the Decision applies the law to the salient facts of this case, the risks of denying the Petition for Reconsideration are minimal. Respondent may file a writ petition in superior court seeking to overturn the decision of the Board.

June 15, 2016


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