

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Shelly Lozano (Respondent Lozano) worked as a Correctional Officer (CO) for Respondent California Department of Corrections, Wasco State Prison (Respondent CDCR). By virtue of her employment, Respondent Lozano was a state safety member of CalPERS.

In 2002, Respondent Lozano applied for and received industrial disability retirement from CalPERS on the basis of an orthopedic (back) condition. In 2015, CalPERS referred Respondent Lozano for a re-evaluation with Doctor Ghol Ha'Eri, a board-certified Orthopedic Surgeon. Dr. Ha'Eri issued a written report finding Respondent Lozano was no longer substantially incapacitated from performing the duties of a CO for Respondent CDCR. On the basis of the Independent Medical Examiner's (IME) report, and a review of Respondent Lozano's medical and employment records, CalPERS determined that Respondent Lozano was no longer substantially incapacitated, and moved to reinstate her to the CO position with Respondent CDCR.

Respondent Lozano appealed CalPERS' determination. A one-day hearing was held in Fresno, California on May 10, 2016. Counsel appeared on behalf of CalPERS and Respondent Lozano. Respondent CDCR 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.) Where CalPERS seeks to have a member removed from the disability retirement roll and reinstated to employment, it is CalPERS' burden to prove substantial incapacity no longer exists. (*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. Ha'Eri. Dr. Ha'Eri testified that he interviewed Respondent Lozano, obtained a personal and medical history, physically examined Respondent Lozano and reviewed her medical and work records.

CalPERS originally approved Respondent Lozano for disability retirement after she slipped in water and twisted her back while on duty. She was diagnosed with lumbar stenosis and left-sided radiculopathy due to a herniated disc. Respondent Lozano underwent conservative treatment after the incident and eventually returned to work without restrictions. Thereafter, she complained of continued low back pain with radiation to her legs.

In 2015, Respondent Lozano told Dr. Ha'Eri that she still had low back pain radiating to her legs, right more than left, and numbness in her right leg. On physical examination, Dr. Ha'Eri found Respondent Lozano's posture and gait were normal, with normal curvature of the spine in the low back. Dr. Ha'Eri noted mild tenderness to palpation of the low back, no muscle spasms, and no atrophy of the muscles in the low back or lower extremities. Respondent Lozano's neurological evaluation of the lower extremities (sensory motor, reflexes) was grossly intact. Respondent Lozano's range of motion in her low back was found to be 20 degrees to 30 degrees of normal. On the basis of the physical examination and a review of MRI reports from 2012, Dr. Ha'Eri diagnosed Respondent Lozano as having mild degenerative disc disease. Dr. Ha'Eri also opined that Respondent Lozano's industrial accident was minor in nature and would not cause a long-term injury.

As a CO, Respondent Lozano was required to frequently stand, walk, engage in simple grasping, repetitively use her hands, and walk on uneven ground. A CO would occasionally run, crawl, kneel, climb, squat, push and pull, carry between 10 pounds and 75 pounds, drive, and work at heights.

On the basis of his examination, and taking into account the physical requirements of the job, Dr. Ha'Eri opined that Respondent Lozano was not substantially incapacitated.

Dr. Allan Moelleken, a board-certified orthopedic surgeon, testified on behalf of Respondent Lozano. His primary disagreement with Dr. Ha'Eri pertained to narrowing of the cervical spine canal in the L 4-5 vertebrae. Dr. Moelleken reviewed the MRI images himself, and presented them at hearing. Dr. Moelleken testified that the MRI images showed compressed nerve roots and were objective evidence of lumbar radiculopathy. Dr. Moelleken testified that a person with this condition could not perform the duties of a CO, such as extracting an inmate from a cell. Dr. Moelleken testified that he felt Dr. Ha'Eri "missed" the nerve compression and related radiculopathy because he reviewed the MRI report and not the MRI images, which Dr. Moelleken considered to be objective evidence supporting a finding of substantial incapacity.

The Administrative Law Judge (ALJ) considered all the evidence, and credited the report and testimony of Dr. Moelleken. The ALJ found Dr. Moelleken to be persuasive in his opinion that Respondent Lozano could not satisfy the physical requirements of her job as a CO on the basis of the nerve compression in her low back.

The ALJ concluded that Respondent Lozano's appeal should be granted. The Proposed Decision is supported by the law and the facts. Staff argues that the Board should 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.

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