

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Respondent Tammie Short (Respondent) was employed by Respondent Department of Developmental Services, Porterville State Hospital (DDS) as a Psychiatric Technician Assistant. By virtue of her employment Respondent was a state safety member of CalPERS. In 2006 Respondent submitted an application for industrial disability retirement (IDR) on the basis of a claimed orthopedic (left shoulder, cervical spine, thoracic spine and lumbar spine) condition. CalPERS staff approved Respondent for industrial disability retirement and Respondent has been receiving a disability retirement allowance since 2006.

In 2015, CalPERS staff sought to reevaluate Respondent, pursuant to Government Code section 21192, in order to determine if Respondent remained substantially incapacitated from performing the usual and customary duties of a Psychiatric Technician Assistant for DDS. Ghol Ha'Eri, M.D., a board-certified Orthopedic Surgeon, reviewed a written job description, reviewed relevant medical reports, and performed an independent medical examination (IME) of Respondent. Dr. Ha'Eri prepared a written report which contained his observations, findings, and conclusions regarding Respondent. Dr. Ha'Eri expressed his opinion that Respondent was not substantially incapacitated from performing the usual and customary duties of a Psychiatric Technician Assistant. CalPERS staff determined that Respondent was no longer substantially incapacitated from performing the usual and customary duties of her position, was no longer entitled to receive the disability retirement allowance, and could be reinstated to her position with DDS. Notice of CalPERS staff determination was provided to both Respondent and DDS. Respondent appealed CalPERS staff's determination and a hearing was held on June 21, 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.

In order to be eligible for disability retirement, competent medical evidence must demonstrate that the individual is substantially incapacitated from performing the usual and customary duties of their position. The injury or condition which is the basis for the disability must be permanent or of an extended and uncertain duration. Conversely, in order for an individual who has been approved for disability retirement to be reinstated to their former position, competent medical evidence must demonstrate that the individual is not substantially incapacitated from performing the usual and customary duties of their position.

DDS did not appear at the hearing. Accordingly, the Administrative Law Judge (ALJ) ruled that the matter could proceed by way of default as to DDS.

Respondent testified at the hearing. She introduced copies of medical reports from her current treating physician. Respondent testified that she continues to experience pain in her left shoulder, neck, and low back. Respondent testified that she has not improved in any significant way since she was approved for disability retirement in 2006.

Dr. Ha'Eri testified consistently with his written report. Dr. Ha'Eri found no objective evidence to support Respondent's complaints of pain. (See Factual Findings No. 15 & 16.)

After considering all of the documentary evidence and testimony, the ALJ found Respondent to be more credible than Dr. Ha'Eri. Because CalPERS had the burden of proof to demonstrate, on the basis of competent medical evidence, that Respondent was no longer substantially incapacitated and could perform the usual and customary duties of the Psychiatric Technician Assistant position with DDS, the ALJ concluded that sufficient proof had not been presented or established to meet the burden. Accordingly, the ALJ, in essence, granted Respondent's appeal, although the Order is that "CalPERS' request that respondent be involuntarily reinstated from disability retirement 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 this case, the risks of adopting the Proposed Decision are minimal. The member's appeal was granted; Respondent Short is unlikely to file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

August 17, 2016

  
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RORY J. COFFEY  
Senior Staff Attorney