

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Respondent Patricia Anderson (Respondent Anderson) worked as a Lecturer for Respondent California State University at San Marcos (Respondent University). By virtue of her employment, she was a state miscellaneous member of CalPERS.

Respondent Anderson applied for disability retirement with CalPERS on the basis of various conditions which she claimed made her unable to work as a Lecturer for Respondent University. CalPERS denied her disability retirement application, following IME examination and review of the IME report of Dr. Vrijesh Tantuwaya, together with review of her other medical and employment documentation.

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

Hearing was completed in Orange, California on March 30, 2016. At hearing, CalPERS presented the oral testimony and written report of Dr. Tantuwaya, who interviewed Respondent Anderson, obtained her personal and medical history, physically examined her and reviewed her work and medical records, including various diagnostic studies. Dr. Tantuwaya testified that Respondent Anderson was well-oriented during her IME and showed good memory, and cognition, and showed no weakness or significant pathology that would interfere with her job duties. Dr. Tantuwaya opined that Respondent Anderson was not substantially incapacitated.

At hearing, Respondent Anderson criticized Dr. Tantuwaya's examination and report, but did not present any competent medical evidence to support her claims. She did present letters from her husband, friends and colleagues describing her condition, but none of the authors of the letters testified at hearing.

The Administrative Law Judge (ALJ) considered all the evidence and upheld CalPERS' denial of Respondent Anderson's application for disability retirement. The ALJ found Dr. Tantuwaya to be a "credible witness" who testified clearly and concisely, "buttressed by his wealth of knowledge and years of experience as a neurologist." The ALJ further held Respondent Anderson did not meet her burden of presenting competent medical evidence to contradict Dr. Tantuwaya's testimony and report.

The ALJ concluded that Respondent Anderson failed to establish that she was substantially unable to perform her usual job duties, and therefore, was not entitled to disability retirement. The ALJ concluded that Respondent Anderson's appeal should be denied. The Board adopted the Proposed Decision at its meeting on June 15, 2016.

Respondent Anderson filed a Petition for Reconsideration on July 7, 2016. Respondent Anderson's grounds for reconsideration are based on exceptions to the hearsay rule of

evidence. She believes that the documents she introduced at hearing should be admitted "to prove [her] condition of being disabled." She identifies these documents as CalSTRS documents, US Social Security Administration documents, medical records, and a police report. At hearing, all these documents were admitted as administrative hearsay. Respondent Anderson believes the ALJ incorrectly ruled on their admissibility.

Hearsay is defined as a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated. (Evid. Code §1200). Hearsay is inadmissible unless it meets an exception to the hearsay rule. In an administrative hearing, hearsay may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (APA §11513).

The documents Respondent Anderson presented at hearing were all clearly hearsay. When admitting them as administrative hearsay, the ALJ implicitly ruled they did not fit any exception. Therefore they can only be used to supplement or explain other evidence by Respondent Anderson, since CalPERS' counsel timely objected to each document. Nevertheless, Respondent Anderson argues that the ALJ should have accepted her documents as direct evidence.

With respect to Respondent Anderson's disagreement with the ALJ's admission of documents, it is clear from the Proposed Decision that numerous exhibits were submitted, and given their appropriate weight. Respondent Anderson did not prepare a proper foundation for the documents, nor did she call any witnesses to authenticate them. Without some indicia of credibility, the ALJ properly found them to be administrative hearsay. Respondent Anderson has not raised any new evidence or change in circumstances which would warrant reconsideration.

Moreover, any finding of disability must be based on competent medical evidence. Government Code Section 20026 provides that "disability" and "incapacity for performance of duty" as a basis of retirement, mean "disability of permanent or extended and uncertain duration, as determined by the board... on the basis of competent medical opinion." The only doctor to testify at hearing was Dr. Tantuwaya. He verified the results, interviews, testing and conclusions found in his IME report. Dr. Tantuwaya's testimony was that Respondent Anderson was not disabled. No other medical professional provided testimony and no other competent medical evidence was provided for the ALJ to consider. Since Respondent Anderson did not present the authors of the medical and other records she brought to hearing, they were correctly admitted as administrative hearsay. As such, they cannot be used to prove the truth of the matters asserted. The ALJ correctly found that they cannot be considered sufficient "competent medical opinion" to support a finding of disability under Government Code Section 20026.

For all of the reasons stated above, staff argues the Board deny the Petition for Reconsideration.

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

August 17, 2016


KEVIN KREUTZ
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