

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Kerri A. Hawkins (Ms. Hawkins) was employed as a Sergeant with the Department of California Highway Patrol (CHP). As a result of her employment, Ms. Hawkins was a state safety (patrol) member of CalPERS, subject to Government Code section 20390.

Ms. Hawkins submitted an application for Industrial Disability Retirement (IDR), wherein she stated that she was unable to work due to a psychological condition. Ms. Hawkins was approved by CalPERS for an Industrial Disability Retirement effective August 11, 2004. On or about April 5, 2007, Ms. Hawkins submitted an application for reinstatement from IDR. CalPERS retained Dr. William Goldsmith, M.D., a Psychiatrist-Neurologist, as its Independent Medical Examiner (IME). Dr. Goldsmith examined Ms. Hawkins, reviewed her medical records, and prepared a report documenting his findings and conclusions. Dr. Goldsmith concluded that Ms. Hawkins was not substantially incapacitated from performing her usual and customary duties.

Accordingly, by letter dated January 25, 2008, CalPERS notified Ms. Hawkins that after review of new medical reports and other information, she was no longer disabled from the usual job duties as a Sergeant and would be reinstated to employment. By letter dated February 8, 2008, CHP informally appealed CalPERS' approval of Ms. Hawkins reinstatement by indicating that it was processing Ms. Hawkins for reinstatement by conducting testing and background reviews. On July 17, 2008, CHP informed CalPERS that based upon a State Personnel Board (SPB) screening, Ms. Hawkins was disqualified during the psychological screening process; therefore, she would not be appointed to her former peace officer position with the CHP.

The CHP requested that Ms. Hawkins remain on CalPERS' IDR, and requested an administrative hearing. The hearing was conducted on July 30, 2010, January 4, 2011, January 5, 2011, and January 26, 2011, by an Administrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH). The ALJ issued a Proposed Decision (PD) on April 14, 2011, granting CHP's appeal.

The initial Proposed Decision was considered by the Board at its June 2011, meeting. The Board rejected the Proposed Decision and remanded the matter back to the ALJ for the purpose of taking additional evidence. Because the hearing had occurred over four (4) days of hearing, it was necessary to secure transcripts of the hearing testimony. Difficulties were encountered in securing the transcripts from the court reporters who had served at the four (4) days of hearing. After securing transcripts from the previous days of hearing, the matter was remanded to the OAH in November 2013. A hearing on remand occurred on May 12, 2015.

Because of the passage of time, a different ALJ presided over the Hearing on Remand. The new ALJ reviewed all of the documents entered into evidence and reviewed the testimony of all of the witnesses who had testified in the four (4) days of hearing by

reviewing the transcripts from those hearings. The ALJ also received and considered additional medical evidence offered by CalPERS. A Proposed Decision After Remand was issued on July 23, 2015. OAH has documentation that the Proposed Decision After Remand was mailed to CalPERS on or about June 24, 2015. However, the Proposed Decision After Remand and 18 pounds of exhibits, have never been located by the CalPERS Legal Office, even after an exhaustive search.

If the recipient of a disability retirement allowance was an employee of the state or of the university, and is so determined to be not incapacitated for duty in the position held when retired for disability or in a position in the same class, he or she shall be reinstated at his or her option to that position. (Government Code section 21193.)

In the Proposed Decision After Remand, the ALJ noted Ms. Hawkins' medical and psychological history, leading up to her application for Industrial Disability Retirement. (See Factual Findings Numbers 7,8,9,10 & 11.) The ALJ noted the competent medical evidence that supported the determination to approve Ms. Hawkins for Industrial Disability Retirement. (See Factual Finding No. 12.) The ALJ also noted the competent medical evidence that supported the determination by CalPERS staff to approve Ms. Hawkins' request to be reinstated to her position with CHP. (See Factual Finding No. 19.)

Of importance regarding why the Board should deny CHP's Petition for Reconsideration is the ALJ's findings with respect to the additional competent medical evidence produced at the Hearing After Remand.

Lawrence Albers, M.D. (Dr. Albers) examined respondent Hawkins at the request of CalPERS. On March 12, 2012, Dr. Albers issued an Independent Medical Evaluation, which supplemented Dr. Goldsmith's opinion in certain respects. Dr. Albers examined respondent Hawkins, reviewed historical data, conducted a mental status examination, and reviewed medical records. Dr. Albers diagnosed respondent Hawkins with PTSD with "no symptoms present at the time." He concluded that respondent Hawkins was not substantially incapacitated for the performance of her duties and that there was no indication that she was unable to perform any specific job duties. (Factual Finding No. 31.)

In stating his Legal Conclusions, the ALJ properly assessed and commented upon all of the opinions expressed by the various medical experts.

The report of Dr. Albers, received as additional evidence at the Remand Hearing, supplements the direct testimony of Dr. Goldsmith that respondent Hawkins is presently capable of performing the usual job duties of a CHP sergeant. (Legal Conclusion No. 5.)

...

...there was no conflict in the facts that supported all expert opinions.

Respondent Hawkins is presently asymptomatic of PTSD; she is no longer suffering from the physical manifestations attributed to PTSD; and there is no evidence that respondent Hawkins is physically impaired from gastrointestinal bleeding, sleeplessness, or migraine headaches. (Legal Conclusion No. 7.)

...
Dr. Carroll [CHP expert] acknowledged that respondent Hawkins is currently asymptomatic of PTSD...A disability must prevent respondent Hawkins from performing her customary duties in the present, not a some unspecified future time. (Legal Conclusion No. 8.) (Emphasis added.)

...
Accordingly, the preponderance of the evidence proves that respondent Hawkins is presently capable of performing the usual duties of a CHP Sergeant. Under the circumstances, reinstatement is mandatory.... (Legal Conclusion No. 112.)

The Proposed Decision After Remand is supported by the law and the facts. As noted earlier in this Staff Argument, the Proposed Decision is the Decision of the Board, by virtue of it having been deemed adopted by operation of law. Had the Proposed Decision After Remand been presented to the Board, Staff would have argued that the Board adopt it as its Decision. In the current procedural posture, Staff recommends that the Board deny CHP's Petition for Reconsideration.

If the Board rejects the Petition for Reconsideration, and CHP is dissatisfied with the Board's action, CHP can file a petition for writ of mandamus with the Superior Court.

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