

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Respondent Lori Gibson (Respondent) petitions the Board to reconsider its adoption of the Proposed Decision (PD) of the Administrative Law Judge (ALJ) dated April 20, 2016. Staff argues that the Petition for Reconsideration should be denied.

Respondent was employed by the California Department of Corrections and Rehabilitation, California Correctional Center (CDCR), as a correctional officer. On March 12, 2003, Respondent submitted an application for Industrial Disability Retirement on the basis of orthopedic conditions. Pursuant to her application, Respondent broke her right thumb while shutting a gate.

Respondent was evaluated by Dr. James Fisher, M.D., an Independent Medical Examiner (IME) in 2003. Dr. Fisher found Respondent was substantially incapacitated from performing her job duties. However, he expected the incapacity to last only one to two years and suggested Respondent be reevaluated at a later time to determine if she continued to be substantially incapacitated from performing her job duties.

To be eligible for Industrial Disability Retirement, a member must demonstrate, through competent medical evidence, that she is substantially incapacitated from performing the usual and customary duties of her position at the time the Industrial Disability Retirement application is submitted. The injury or condition that is the basis for the claimed disability must be permanent or of an uncertain and extended duration. Pursuant to Government Code section 21192, the Board may re-evaluate members receiving Industrial Disability Retirement benefits who are under the minimum age for service retirement.

In 2011, Respondent was reevaluated by IME Edward Katz, orthopedic surgeon. Dr. Katz found Respondent continued to be substantially incapacitated. Therefore, Respondent remained on Industrial Disability Retirement. Respondent was later reevaluated by IME Dr. Joseph Serra, orthopedic surgeon, in 2014. Dr. Serra physically examined Respondent and reviewed her medical history and job duty requirements. Dr. Serra found that Respondent's right thumb injury had resolved and Respondent was not substantially incapacitated from performing her usual job duties.

In Respondent's Petition for Reconsideration, she states that CalPERS went "doctor shopping" and that Dr. Serra's opinions are at odds with five other doctors. Respondent's argument, however, lacks merit. Dr. Serra's opinion, that Respondent has recovered, is in line with that of Dr. Fisher, who had anticipated that Respondent should recover after one to two years. The evidence also demonstrated that Dr. Serra's opinions were in line with Respondent's treating doctor, Dr. Donald Schwartz, who had previously opined Respondent's thumb injury had healed.

Respondent failed to counter Dr. Serra's medical opinion with competent medical evidence. Respondent presented the testimony of Dr. Andrew Burt, a doctor that she

handpicked merely for the purpose of testifying at hearing. Dr. Burt's testimony, however, fell short of convincing the ALJ that Respondent is unable to perform her job duties, because his conclusion, that Respondent cannot perform her job duties, was not based on objective evidence, but merely based on Respondent's complaints.

Respondent fails to provide a valid reason for her Petition for Reconsideration. Presumably, Respondent did not like the result after hearing. Respondent 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, and medical evidence was introduced. Exhibits and the testimonies of expert witnesses from both parties were submitted for consideration by the ALJ. Respondent was represented by counsel. 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.

August 17, 2016



PREET KAUR
Senior Staff Attorney