

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Meinert C. Toberer (Respondent Toberer) worked as a Health and Safety Officer for the California Department of Veteran's Affairs, Yountville (Respondent DVA). By virtue of his employment, Respondent Toberer is a state miscellaneous member of CalPERS, subject to Government Code section 21150.

Respondent Toberer applied for service pending disability retirement with CalPERS on the basis of orthopedic (chronic pain, osteopathy, lumbar degeneration, and osteoarthritis of the knees) and neurological (DM2 diabetic peripheral neuropathy, and meralgia paresthetica) conditions.

To evaluate Respondent Toberer's service pending disability retirement application, CalPERS referred Respondent Toberer for Independent Medical Examinations (IME) with Gerald C. Barnes, M.D., a board certified Orthopedic Surgeon, and Robert D. Ansel, M.D., a board certified Neurologist and Psychiatrist.

Dr. Barnes examined Respondent Toberer and reviewed his medical and non-medical (work) records. Dr. Barnes found that Respondent Toberer was not substantially incapacitated from the usual and customary duties of his position due to his orthopedic conditions.

Dr. Ansel also examined Respondent Toberer and reviewed Respondent Toberer's medical and non-medical (work) records. Even though he had been retained to evaluate neurological conditions, Dr. Ansel found that Respondent Toberer was substantially incapacitated from the usual and customary duties of his position on an orthopedic basis. After being asked to file a supplemental report addressing neurological issues only, Dr. Ansel found that Respondent Toberer was not substantially incapacitated. On the basis of these medical opinions, CalPERS denied Respondent Toberer's application.

Respondent Toberer appealed CalPERS' determination, exercising his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). The ALJ presided over two days of hearing in Sacramento, California, on June 30, 2015 and August 19, 2015. The ALJ thereafter issued a Proposed Decision on October 9, 2015, granting Respondent Toberer's appeal. Finding the ALJ relied solely upon hearsay evidence in making her determination, CalPERS' Board of Administration remanded the case back to OAH for the taking of additional evidence. A third day of hearing was held on July 1, 2016, in Sacramento, California. At both hearings, Respondent Toberer represented himself. Respondent DVA did not appear at any hearing.

Prior to the hearings, CalPERS explained the hearing process to Respondent Toberer and the need to support his case with witnesses and documents. CalPERS provided Respondent Toberer with a copy of the administrative hearing process pamphlet.

CalPERS answered Respondent Toberer's questions and clarified how to obtain further information on the process.

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.) On appeal, it is the member's burden to prove substantial incapacity. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

During the second day of hearing, CalPERS presented the oral testimony and written IME reports of Dr. Barnes and Dr. Ansel. Dr. Ansel found that Respondent Toberer had a sensory neuropathy, meaning he had an inflammation or abnormality of the sensory branch of the nervous system that goes to his legs, a peripheral neuropathy. He opined it was likely a result of diabetes. He explained it could be managed by getting the diabetes under control.

Dr. Ansel testified he did a supplemental report to clarify his opinion that from a neurologic standpoint, specifically the peripheral neuropathy, Respondent Toberer was not substantially incapacitated from the usual and customary duties of his position. Dr. Ansel explained that although Respondent Toberer had some impairment as a result of his diabetic neuropathy, this by itself would not prevent him from working.

Regarding Respondent Toberer's orthopedic complaints, Dr. Barnes explained that Respondent Toberer definitely had some objective findings relating to both his knees and his back, and a history of having had injuries to his back on two occasions. He had had a prior knee surgery, which subsequently led a knee replacement. His knee replacement resolved the problems and left him with limited motion, typical for a knee replacement. Dr. Barnes explained that during his testing for range of motion, he found some limitations, but not to the extent to impair Respondent Toberer's ability to work.

Dr. Robert Kaer is Respondent Toberer's treating physician. He did not testify during the first or second day of hearing, but the CalPERS-retained physicians reviewed Dr. Kaer's records as part of their independent evaluation of Respondent Toberer.

Dr. Kaer testified by telephone during the third day of hearing on July 1, 2016. Dr. Kaer is Board-Certified in Family Medicine. He is a family practitioner based in Napa, California. He has been Respondent Toberer's treating physician since 2008. Dr. Kaer confirmed that he has been treating Respondent Toberer for medical conditions including those identified in Respondent Toberer's service pending disability retirement application filed with CalPERS.

Dr. Kaer conducted various orthopedic examinations of Respondent Toberer and reviewed diagnostic studies. He found Respondent Toberer to have substantially limited range of motion, drastic loss of sensation, and pain caused by orthopedic and neurological conditions, which are not sufficiently controlled by opiate prescription such that he could perform the usual and customary duties of an Officer for Respondent DVA. Dr. Kaer testified that Respondent Toberer's physical condition, as confirmed by physical examinations and review of diagnostic studies, precludes him from crawling, repetitive bending, kneeling, sitting, and carrying heavy loads.

As an Officer for Respondent DVA, Respondent Toberer was required to occasionally, for up to three hours per day, stand, walk, kneel, climb, squat, bend or twist his back or waist, reach above or below the shoulder, push and pull, engage in fine manipulation, perform a variety of grasping maneuvers, and lift up to 25 pounds.

The ALJ considered all the evidence, and credited as persuasive the report and testimony of Dr. Kaer. The ALJ found that Dr. Kaer made an overall assessment of Respondent Toberer, and persuasively explained how his orthopedic and neurological conditions together resulted in a finding of substantial incapacity. The ALJ concluded that Respondent Toberer's appeal should be granted. 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. Since the member prevailed it is not likely that he will file a Writ Petition in Superior Court seeking to overturn the Decision of the Board

September 21, 2016



KEVIN KREUTZ
Senior Staff Attorney