

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Jeffery Hymer (Respondent) worked for the California Department of Transportation, as a Toll Sergeant. Due to his employment, Respondent is a state miscellaneous member of CalPERS. He filed an application for disability retirement claiming disability on the basis of orthopedic and neurological conditions related to his spine, hands, arms, bilateral carpal tunnel and right knee. On his application, Respondent indicated that his conditions limited him from lifting, pushing or pulling greater than 20 pounds, but that his job requires him to lift up to 100 pounds.

CalPERS staff reviewed medical reports regarding Respondent's conditions, and a written description of his usual and customary job duties. CalPERS retained A.K. Bhattacharyya, M.D., a board certified Neurologist, to conduct an Independent Medical Examination. Dr. Bhattacharyya examined Respondent, reviewed medical records and a written job description. Based on his examination and record review, Dr. Bhattacharyya issued a report indicating that Respondent had no neurologic deficits, thus he was not substantially incapacitated for performing the usual and customary duties of a Toll Sergeant. Consequently, staff denied Respondent's application for disability retirement. Respondent submitted a timely appeal of staff's determination and a hearing was held to determine whether Respondent was substantially incapacitated from performance of his duties as a Toll Sergeant.

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

At the first day of hearing, Respondent testified on his own behalf. Upon concluding his testimony regarding his job duties as a Toll Sergeant and physical condition, Respondent requested a continuance of the hearing so that he could have additional time to obtain his orthopedic medical records to put into evidence. The Administrative Law Judge (ALJ) granted Respondent's request. In response, CalPERS had Respondent examined by board certified Orthopedic Surgeon Arun Mehta, M.D. Dr. Mehta conducted an Independent Medical Examination, and reviewed medical records and a written job description. Initially, Dr. Mehta opined that Respondent was substantially incapacitated from performing his job duties as a Toll Sergeant, which included the requirement of lifting 100 pounds. In a supplemental report, Dr. Mehta indicated that Respondent's disability did not begin until May 23, 2014 – more than two years after Respondent filed his application for disability retirement.

To be eligible for disability retirement, competent medical evidence must demonstrate that an individual is substantially incapacitated from performing the usual and customary duties of his or her position. The injury or condition which is the claimed basis for the disability must be permanent or of an extended and uncertain duration from the time the application is filed and continuing. Because Dr. Mehta did not find Respondent disabled

at the time he submitted his application for disability retirement, Respondent's application remained denied, and the matter proceeded to a second day of hearing.

The medical evidence presented by Respondent in support of his disability retirement application came from treatment records from Kaiser Permanente. The records detailed the treatment Respondent received for various injuries, including carpal tunnel release, a total knee replacement, and an L4-5 fusion and L1-5 laminectomy. Respondent's primary care doctor, Lilly Chen, M.D. restricted him from lifting more than 20 pounds and this restriction was permanent. Due to this restriction, Respondent submitted his application for disability retirement.

At the second day of hearing, Respondent again testified on his own behalf about the job duties performed by a Toll Sergeant, including the requirement that he lift up to 100 pounds, and how his back and knee injuries occurred. During his testimony, Respondent also discussed the treatment he received and the physical limitations that he had, most notably the 20 pound lifting restriction imposed by Dr. Chen. Upon further questioning, however, Respondent acknowledged that although Toll Sergeants on the day shift had to lift up to 100 pounds, Toll Sergeants on the graveyard shift (the shift that he was assigned) were not required to do so.

Based on the testimony presented at the hearing and the evidence submitted by the parties, the ALJ found that Respondent has not demonstrated through competent medical evidence that he is permanently incapacitated from performance of his duties as a Toll Sergeant for the Department of Transportation. As the ALJ explained, an employee may not retire for disability if a modified duty assignment is available consistent with his limitations. (*O'Toole v. Retirement Board* (1983) 139 Cal.App.3d 600.) Accordingly, while Dr. Mehta determined that Respondent was substantially incapacitated, that determination was based on the 100 pound lifting requirement, which Respondent was not required to perform on the graveyard shift. Further, the ALJ concluded that the medical evidence did not support that Respondent was incapacitated at the time he applied for disability retirement. Therefore, the ALJ denied Respondent's application for disability retirement.

The Proposed Decision is consistent with the law and the facts. For the reasons stated above, staff argues that the Board should 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 may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

September 21, 2016


for RENEE SALAZAR
Senior Staff Attorney