

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Respondent Cari J. McCormick (Respondent McCormick) petitions the Board of Administration (Board) to reconsider its adoption of the Proposed Decision (PD) of the Administrative Law Judge (ALJ) dated July 19, 2016. The Board adopted the PD on September 21, 2016. Staff argues that the Petition for Reconsideration should be denied.

Respondent McCormick worked as an Appraiser III for Respondent County of Lake (Respondent Lake). By virtue of her employment, she was a local miscellaneous member of CalPERS.

Respondent McCormick applied for disability retirement (DR) with CalPERS on the basis of an internal (respiratory, systemic health problems) condition. CalPERS denied her DR application, following an Independent Medical Examination (IME) and review of the IME reports of Dr. Soheila Benrazavi, together with review of her other medical and employment documentation. Respondent McCormick timely appealed.

The ALJ presided over a one-day hearing in Sacramento, California on June 8, 2016. CalPERS presented testimony by its IME, Dr. Benrazavi, and respondent McCormick presented testimony by Dr. Mahmoudi, D.D., Ph.D, an internal medicine practitioner. Closing briefs were submitted by CalPERS and Respondent McCormick on June 24, 2016. Respondent McCormick was represented at the hearing by attorney Benjamin K. Karpilow.

The ALJ denied Respondent McCormick's appeal. The ALJ found that Respondent McCormick bears the burden to prove by a preponderance of evidence (based on competent medical evidence) that her internal condition renders her unable to perform her usual job duties as an Appraiser III. The ALJ found that when "all the competent medical evidence is considered, Dr. Benrazavi and Dr. Mahmoudi's opinions were in agreement that respondent [McCormick] was not permanently disabled or substantially incapacitated from performing her usual duties as an Appraiser III for the County [Respondent Lake] on the basis of her internal condition...." The ALJ concluded that California case law does not support Respondent McCormick's contention that she is entitled to DR benefits because she was substantially incapacitated from performing her duties at her place of employment, and Respondent Lake would not accommodate her to work at a different location.

Respondent McCormick' Petition for Reconsideration (Petition) asserts the ALJ's analysis is flawed in two respects (1) the ALJ purportedly ignored evidence that Respondent McCormick is required to work at a particular location that allegedly triggers her illness; and (2) the ALJ's rationale presupposes that Respondent McCormick would in fact have been able to complete her job duties at another location. Staff does not agree that the ALJ's analysis was flawed.

First, there is no support for Respondent McCormick's contention that the ALJ ignored evidence regarding where she is required to work. In fact, the PD states "[t]he County moved her work location to other locations within the Courthouse, but the changes did not relieve her symptoms. The County did not offer to accommodate her by moving her to a work location outside the Courthouse." Consequently, the PD establishes that the ALJ considered the specific evidence regarding her work location that Respondent McCormick claims the ALJ ignored.

Second, Respondent McCormick argues that the ALJ's analysis is flawed because it is based on speculation. Respondent McCormick argues that the ALJ found that "Respondent [McCormick] *may* be able to perform her duties from some other location is pure speculation and unsupported by the evidence (Emphasis in original.)" Respondent McCormick's argument misrepresents the evidence presented at the hearing and the ALJ's finding. The ALJ relied on competent medical evidence in arriving at the conclusion that Respondent McCormick could perform her duties. Dr. Benrazavi's examination of Respondent McCormick "showed normal results with no evidence that respondent could not physically perform her job duties." Dr. Mahmoudi's "physical examination of respondent showed normal results." Consequently, the competent medical opinion of both doctors was that Respondent McCormick could perform her job duties. The ALJ correctly relied on these medical opinions to find that Respondent McCormick is not substantially incapacitated.

The Petition also claims the ALJ improperly applied three separate California cases interpreting disability retirement laws: *Nolan v. City of Anaheim* (2004) 33 Cal. 4th 335 ("Nolan"), *Craver v. City of Los Angeles* (1974) 42 Cal. App. 3d 76 ("Craver"), and *Wolfman v. Board of Trustees of the State Teachers Retirement System* (1983) 148 Cal. App. 3d 787 ("Wolfman"). Respondent McCormick argues that due to the ALJ's errors, the wrong result was reached in this matter. There is no support for this claim.

First, it should be noted that the facts in this matter are distinguishable from the three cases cited by the ALJ. Here, the medical evidence that favors a finding of substantial incapacity establishes that, at best, Respondent McCormick was temporarily incapable of performing her usual duties at the location of her job. As discussed above, both doctors who evaluated Respondent McCormick found she could perform her job duties, which is not surprising given that Respondent McCormick's disability application stated the same thing. Dr. Benrazavi found the disability temporary and recommended Respondent McCormick return to work. The medical opinions in the three cases cited by the ALJ involved doctors unequivocally finding the applicants suffered from a medical and/or mental condition that prevented them from performing their usual duties.

Second, Respondent McCormick argues the ALJ's reliance on *Nolan* in the PD as a case interpreting California disability retirement laws invalidates the ALJ's ultimate determination, that Respondent McCormick is not substantially incapacitated. Respondent McCormick argues that the holding in *Nolan* should not guide the Board's decision. Respondent McCormick supports her argument by correctly pointing that the Legislature amended Government Code section 21156 in 2006. In fact, CalPERS, in

its' closing brief, informed the ALJ that "Section 21156 has been modified since it was decided; however, the modifications do not impact the Court's discussion of the intent of the Legislature with respect to the entitlement of disability rights." Consequently, CalPERS did not argue that the holding in *Nolan* should be applied in this matter, but that *Nolan's* guidance regarding intent of the Legislature was informative.

Nolan, as CalPERS quoted in its closing brief, found that it is "inconceivable that the Legislature, in enacting the Public Employees' Retirement Law (PERL), 'to effect economy and efficiency in the public service,' intended to grant an applicant permanent disability retirement benefits" in a situation where someone is entirely capable of performing his or her usual job duties. (See *Nolan*, supra, at pg. 342.) The Court in *Nolan* is referencing Government Code section 20001, which provides the purpose of the PERL is to "effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees...." (See Government Code section 20001.) Despite the fact Government Code section 21156 has been modified, the purpose of the PERL remains the same.

If CalPERS intended to apply the *Nolan* standard to this case, it would have required Respondent McCormick to establish that she could not work at any other employer, either with Respondent Lake or another CalPERS contracting agency, to be entitled to receive disability retirement benefits. CalPERS did not do that. Here, the evidence established that Respondent McCormick could perform her usual duties at another location, and that one doctor's medical opinion was that she should go back to work with Respondent Lake. Based on this evidence and under the PERL, CalPERS determined that Respondent McCormick is not entitled to receive disability retirement benefits. The ALJ agreed that CalPERS correctly reached its determination.

Third, Respondent McCormick tries to distinguish *Carver* and cites to *Wolfman* to establish the ALJ made an incorrect determination. The ALJ, in citing to both *Carver* and *Wolfman*, referenced these cases as case law that interprets California's disability retirement laws. In trying to rely on *Wolfman*, and distinguish *Carver*, Respondent McCormick is attempting to present facts and legal arguments in a manner that best supports her case. However, there is nothing in the PD that would indicate the ALJ did not properly apply the law to the facts of this particular case. Clearly, Respondent McCormick does not agree with the conclusion reached by the ALJ, or the Board in adopting the ALJ's PD; however, that is not conclusive proof that the ALJ, or the Board, got it wrong and that a different result must be reached.

The Petition concludes with an argument that the medical evidence supports a finding that Respondent McCormick is substantially incapacitated from the performance of her job duties. The Petition quotes from the initial IME report of Dr. Benrazavi to support this argument. However, the actual medical evidence contradicts Respondent McCormick's contention. As discussed above, both doctors who testified at the hearing concluded that Respondent McCormick, at the time they examined her, was capable of performing her job duties. However, there was some concern that the location of her job

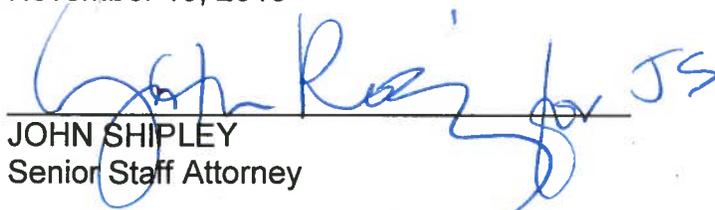
might make her symptomatic. The courthouse where Respondent McCormick worked was tested to ensure the air quality met all legally required standards. In addition, there was testing performed to ensure there was not an unhealthy level of mold in the building. All tests came back negative. It was for this reason that "Dr. Benrazavi believed that respondent should return to work at the Courthouse..." If Dr. Benrazavi believed Respondent McCormick was substantially incapacitated from performing her job duties, surely Dr. Benrazavi would not have recommended that Respondent McCormick return to work at the courthouse.

The ALJ found that when all competent medical evidence is considered, both Dr. Benrazavi and Dr. Mahmoudi were in agreement that Respondent McCormick was not permanently disabled or substantially incapacitated from performing her usual duties as an Appraiser III for Respondent Lake. Respondent McCormick disagrees with the ALJ's findings of fact and legal analysis, but it is clear from the PD that evidence was taken on the underlying facts, medical evidence, and Respondent McCormick's claimed disability. Exhibits from both parties were submitted for consideration by the ALJ. At the hearing, testimony from competent medical professionals was elicited by both parties. Both parties submitted closing briefs in support of their respective positions. The ALJ simply found against Respondent McCormick based on the evidence and the law. Respondent McCormick has not raised any new evidence or legal analysis 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 McCormick may file a writ petition in superior court seeking to overturn the decision of the Board.

November 16, 2016



JOHN SHIPLEY
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