

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Darren Gutierrez (Respondent) was employed by the California Department of Corrections (CDCR) as a Correctional Officer. By virtue of his employment, Respondent is a safety member of CalPERS. On June 17, 2011, Respondent submitted an application for Industrial Disability Retirement on the basis of an orthopedic condition (right shoulder). Respondent's application was approved by CalPERS and he retired effective October 19, 2010.

In October 2014, CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that his file was currently under review. As part of the reexamination, staff reviewed medical reports regarding Respondent's condition, a written description of his usual and customary job duties, records from Respondent's treating physician, and Respondent's Workers' Compensation file. Ghol Ha'Eri, M.D., a board-certified Orthopedist, examined Respondent, and reviewed medical reports and two written job descriptions. In his report, Dr. Ha'Eri concluded that Respondent was no longer substantially incapacitated from the performance of his usual and customary job duties of a Correctional Officer. Respondent timely appealed this determination, and a hearing was conducted on August 2, 2016.

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 clarified how to obtain further information on the process.

Respondent testified at the hearing regarding his job duties and his inability to perform his usual and customary job duties due to his physical condition. Respondent testified concerning his medical conditions and the limitations imposed by the health issues. Respondent also presented a July 6, 2016, report signed by Dr. Mark Schamblin and his Physician's Assistant. Dr. Schamblin was Respondent's Orthopedic Surgeon and completed an arthroscopic repair of Respondent's torn rotator cuff in 2010. The report did not state whether Respondent was substantially incapacitated, but rather referred Respondent to his primary doctor to make a determination regarding that issue.

Dr. Ha'Eri testified at the hearing that he found Respondent could perform the essential functions of his job. Dr. Ha'Eri testified that Respondent had recovered and was no longer substantially incapacitated from performing his job duties. Dr. Ha'Eri also opined that Dr. Schamblin's July 6, 2016, report was computer generated and likely not prepared by Dr. Schamblin. Dr. Ha'Eri also pointed out other deficiencies in Dr. Schamblin's report and questioned Dr. Schamblin for recommending surgery six years after the initial surgery, which was unsuccessful.

The Administrative Law Judge (ALJ) found Dr. Ha'Eri's testimony persuasive. After reviewing the evidence, the ALJ determined by a preponderance of the evidence that Respondent was no longer substantially incapacitated from performing the usual and customary duties of a Correctional Officer. The ALJ denied Respondent's appeal of CalPERS' determination that he be reinstated to his former position as a Correctional Officer.

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.

November 16, 2016



PREET KAUR
Senior Staff Attorney