

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION WITH MODIFICATION

Respondent Nellie E. Rodriguez (Respondent Rodriguez) applied for Service Pending Industrial Disability Retirement on the basis of orthopedic (neck, low back, right shoulder, and right upper extremity) conditions. By virtue of her employment as an Investigator with the State of California, Department of Health Care Services (Respondent Department), she was a state safety member of CalPERS. Respondent Rodriguez service retired on October 1, 2014, and has been receiving a service retirement allowance since that time. CalPERS denied the Industrial Disability portion of the Application and a hearing was held on July 13, 2016.

As part of CalPERS' review of her medical condition, Respondent Rodriguez was sent for an Independent Medical Examination (IME) to Robert B. Fenton, M.D., a board-certified orthopedic surgeon. Dr. Fenton reviewed medical records and conducted a physical examination. Dr. Fenton prepared an IME report and testified at the hearing.

Dr. Fenton's findings and diagnoses were consistent with Respondent Rodriguez's treating physicians. Specifically, that Respondent Rodriguez suffered from Cervical Strain with Degenerative Disc Disease at C3-4, mild posterior disc osteophyte complex with mild central stenosis at C3-4 and C4-5; Right Shoulder Impingement with bicipital Tendinitis and mild acromioclavicular joint Arthrosis; Bilateral proximal extensor Tendinitis; and, Mild Lumbosacral Strain with degenerative changes L4-5. Dr. Fenton's ultimate conclusion was that Respondent Rodriguez could perform a majority of her duties and was not permanently incapacitated.

Respondent Rodriguez was represented by counsel at the hearing and offered testimony and documentary evidence. The critical required task relevant to this matter, based on testimony and reports of medical experts, is the requirement that Investigators for Respondent Department are required to comply with mandatory continuing training under Peace Officer Standards and Training (POST). Thus, Respondent Rodriguez was required to qualify for her weapon four times per year, which required shooting 42 rounds after practicing with 80 to 100 training rounds. Qualifying consisted of use of a handgun, shotgun, and shooting with one hand.

Respondent Rodriguez testified that while she was capable of shooting her handgun, the repetition required for qualification was too painful and her hand would freeze up. The Administrative Law Judge (ALJ) found that Respondent Rodriguez was terminated from her position as an Investigator because she was physically incapable of qualifying to use a weapon, an essential job requirement for her position. The ALJ further found that Respondent Rodriguez established on the basis of competent medical opinion and relevant evidence that she has a physical disability of permanent or extended and uncertain duration that incapacitates her for the performance of her required duties as an Investigator for Respondent Department.

The ALJ concluded that Respondent Rodriguez'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.

Pursuant to Government Code section 11517(c)(2)(C), the Board is authorized to "make technical or other minor changes in the Proposed Decision." In order to avoid ambiguity, staff recommends deleting the name *Dr. Hendricks* and replacing it with the name *Dr. Fenton* on page 6, paragraph 29 of the Proposed Decision. The context of the paragraph makes clear that the ALJ was referring to *Dr. Fenton* and not *Dr. Hendricks*. The Proposed Decision is supported by the law and the facts. Staff argues that the Board adopt the Proposed Decision, as modified above.

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 she file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

November 16, 2016


for CHRISTOPHER PHILLIPS
Senior Staff Attorney