

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO REMAND THE MATTER FOR THE TAKING OF FURTHER EVIDENCE

Albert R. Peterson (Respondent) was employed by the California State Prison Los Angeles County, California Department of Corrections and Rehabilitation (CDCR) as a Correctional Officer. By virtue of his employment, Respondent is a state safety member of CalPERS, subject to Government Code section 21151. Respondent began working for CDCR in 2002 and is vested for retirement.

Respondent submitted an application for service pending industrial disability retirement, wherein he claimed disability on the basis of "hypertension, chronic diabetic diarrhea, gastro esophageal reflux disease (GERD), degenerative disc and bulging discs, injuries to both shoulders, ... right elbow and ankles."

CalPERS retained Robert J. Kolesnik, M.D., a board certified Orthopedic Surgeon to examine Respondent. Dr. Kolesnik testified as an Independent Medical Examiner (IME) in this case and concluded that, based on a review of the Respondent's medical records, a physical examination of the Respondent and a review of the Respondent's job descriptions, the Respondent was not substantially incapacitated to perform his job duties as a Correctional Officer due to his orthopedic conditions.

CalPERS denied Respondent's application for disability retirement based on the review of Respondent's medical records, as Dr. Kolesnik found that Respondent did not meet the criteria for industrial disability retirement for his orthopedic conditions. CalPERS notified Respondent that his application for industrial disability retirement was denied. Respondent appealed CalPERS' determination.

Under the applicable court rulings construing disability under the California Public Employees' Retirement Law (PERL), Respondent had the burden to prove that he is substantially incapacitated from performing the usual and customary duties of his position as a Correctional Officer. Prophylactic restrictions or risk of possible future injury cannot support a finding of disability. (*Mansperger v. Pub. Employees' Ret. System* (1970) 6 Cal.App.3d 873; *Hosford v. Bd. Of Administration* (1978) 77 Cal.App.3d 854.)

A hearing was held before an Administrative Law Judge (ALJ) on August 25, 2016. Prior to the hearing, CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS staff answered Respondent's questions and provided him with information on how to obtain further information regarding the process. Respondent represented himself at hearing and did not call any medical experts to testify. Respondent submitted reports from Darren L. Bergey, M.D, and Albert Simpkins, Jr., M.D., Qualified Medical Examiners in his workers' compensation matter. These reports were admitted as administrative hearsay only.

At the hearing, Dr. Kolesnik testified that he interviewed Respondent, took Respondent's work history, and reviewed Respondent's job descriptions, medical

records and diagnostic studies. He also performed a comprehensive IME examination. Dr. Kolesnik diagnosed Respondent with arthritis, tendinitis and lumbosacral strain with degenerative disc disease.

Dr Kolesnik opined that there were no specific job duties that Respondent was unable to perform, and that Respondent was not substantially incapacitated from performing the duties of a Correctional Officer.

Respondent testified on his own behalf that he was unable to respond to calls for cell extractions and was a liability to his fellow Correctional Officers due to his orthopedic condition.

The ALJ found that "There was no evidence in Dr. Kolesnik's report, or in his testimony at the hearing, that Dr. Kolesnik interviewed Mr. Peterson about his daily, usual or customary job duties." (Proposed Decision, p.6, no. 19.) However, CalPERS had provided Dr. Kolesnik job descriptions received from CDCR outlining the customary duties of a Correctional Officer. Dr. Kolesnik testified he relied on those job descriptions in forming his opinion.

Relying on the workers' compensation reports, which were admitted as administrative hearsay, the ALJ concluded:

Competent medical opinions support a finding that Mr. Peterson is disabled and substantially incapacitated from performance of the job duties of a correctional officer. In performing their evaluations of Mr. Peterson, Drs. Simpkins and Bergey interviewed Mr. Peterson and discussed his actual job duties and activities. There is no evidence that Dr. Kolesnik did more than review the Department of Corrections documents relating generally to all correctional officers. Dr. Kolesnik did not consider the duties Mr. Peterson actually performed and, for that reason, his opinion regarding Mr. Peterson's ability to perform his job duties is less persuasive. (Proposed Decision, p.13 no. 11.)

Hearsay evidence is admissible in administrative proceedings, but its use is limited. Hearsay alone cannot support a finding, though it may be used to supplement direct evidence and aid in support of findings. (*Sunseri v. Board of Medical Examiners* (App. 1 Dist. 1964) 224 Cal.App.2d 309.)

CalPERS argues the matter should be remanded back to the Office of Administrative Hearings for the taking of further evidence regarding the Respondent's job duties and obtaining further competent medical evidence pursuant to section 21156 of the PERL. It is the Respondent's burden of proof to present competent non-hearsay evidence establishing his substantial incapacity which he failed to do. The ALJ incorrectly relied on the workers' compensation doctors' reports, which were hearsay,

and which used a different standard than CalPERS in determining disability to find in favor of the Respondent.

The use of the workers' compensation reports without explanatory testimony by the doctors who authored them, as primary evidence of Respondent's medical condition, contravenes Government Code Section 11513, which only allows for the admission of hearsay evidence to supplement or explain direct evidence. (Cal. Gov. Code § 11513(d).) In addition, the parties were not afforded a sufficient opportunity to explore the opinions of Drs. Simpkins and Bergey at the hearing as Respondent did not proffer Drs. Simpkins or Bergey as witnesses. Furthermore, there was no evidence of Drs. Simpkins' or Bergey's qualifications to evaluate Respondent's orthopedic condition.

For these reasons, CalPERS argues the Proposed Decision is not supported by competent medical evidence. Staff requests the matter be remanded back to OAH for the taking of further evidence regarding the Respondent's job duties and competent medical evidence.

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