

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Gwyndolyn Harshaw (Respondent Harshaw) worked as a Custodian for Respondent Fresno Unified School District (Respondent District). By virtue of her employment, Respondent Harshaw is a local miscellaneous member of CalPERS.

Respondent Harshaw applied for disability retirement with CalPERS on the basis of orthopedic (shoulder and arm weakness) conditions. To evaluate Respondent Harshaw's disability retirement application, CalPERS referred Respondent Harshaw for an Independent Medical Examination (IME) with Doctor Joseph Serra. Dr. Serra issued a written report finding Respondent Harshaw was able to perform the duties of a Custodian for Respondent District. On the basis of the IME report, and a review of Respondent Harshaw's medical and employment records, CalPERS denied Respondent Harshaw's disability retirement application.

Respondent Harshaw appealed CalPERS' determination. A one-day hearing was held in Sacramento, California on September 20, 2016. Respondents Harshaw and District did not appear. Upon satisfactory proof of service of the Statement of Issues and Notice of Hearing, the matter proceeded as a default against Respondents pursuant to Government Code § 11520(a).

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

Pursuant to the California Public Employees' Retirement Law (PERL), a CalPERS member who is incapacitated from the performance of his or her duties shall be retired for disability. (Cal. Gov. Code §21150(a).) The statute has been interpreted and applied to require a showing of substantial inability to perform the usual duties of the job. (See, e.g., *Mansperger v. Public Employees Retirement System* (1970) 6 Cal.App.3d 873, 876.) On-the-job discomfort does not qualify a member for disability retirement; risk of further or future injury is similarly insufficient. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862-64.) On appeal, it is the member's burden to prove substantial incapacity. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

At hearing, CalPERS presented the oral testimony and written IME report of Dr. Serra. Dr. Serra testified that he interviewed Respondent Harshaw, obtained a personal and medical history, physically examined Respondent Harshaw and reviewed her medical and work records.

During examination, Respondent Harshaw complained that in early 2013, she developed dizziness, confusion, and a general inability to function. Respondent Harshaw told Dr. Serra that she was taken off of work at various times during 2013 until

she stopped working entirely in August 2013. At the time of the IME, Respondent Harshaw complained she could not hold her grandchildren because of weakness in her arms and shoulders, could not do chores, and that she used a walker on a daily basis.

On physical examination, Dr. Serra found no evidence of atrophy or tremors in Respondent Harshaw's upper extremities. Dr. Serra found Respondent Harshaw to have full range of motion in her hands, some weakness in her grip strength, and that she was subjectively resistant to movement of the fingers and wrists. Dr. Serra also conducted a neurological examination, and found Respondent Harshaw's motor function to be intact despite complaints of weakness. Respondent Harshaw complained of "stocking type" numbness. However, Dr. Serra testified that stocking numbness only occurs in severe cases such as muscular dystrophy, or in cases where all three nerves of the upper extremities have sustained significant injury. Dr. Serra found no evidence of these conditions during the IME or in Respondent Harshaw's medical records.

On the basis of his examination, and taking into account the physical requirements of the Custodian position, Dr. Serra opined that Respondent Harshaw was not substantially incapacitated. Dr. Serra diagnosed Respondent Harshaw as having subjective complaints of weakness of unknown cause, and presenting with significant exaggeration of complaints. Dr. Serra noted in his report that Respondent Harshaw's "subjective complaints far outweigh objective findings."

The Administrative Law Judge (ALJ) considered all the evidence, and credited as persuasive the report and testimony of Dr. Serra. The ALJ agreed with Dr. Serra that there are no objective findings to support Respondent Harshaw's subjective complaints of pain and weakness in her upper extremities.

The ALJ concluded that Respondent Harshaw's appeal should be denied. The Proposed Decision is supported by the law and the facts. Staff argues that the Board 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 motion with the Board under Government Code §11520(c), requesting that, for good cause shown, the Decision be vacated and a new hearing be granted.

November 16, 2016



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