

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Lorimarie Ortega (Respondent Ortega) applied for disability retirement on the basis of orthopedic (lower back problems and bulging discs in the upper and mid back) conditions. By virtue of her employment as an office assistant for Respondent Employment Development Department (EDD), she was a state miscellaneous member of CalPERS.

As part of CalPERS' review of her medical condition, Respondent Ortega was sent for an Independent Medical Examination (IME) by orthopedic surgeon Pierre S. Hendricks, M.D. Dr. Hendricks interviewed Respondent Ortega, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed medical records. Dr. Hendricks also performed a comprehensive IME. Dr. Hendricks opined that Respondent Ortega is not substantially incapacitated to perform her job duties as an office technician. After reviewing all medical documentation and the IME report, CalPERS determined that Respondent Ortega was not substantially incapacitated from performing her usual duties.

Respondent Ortega appealed CalPERS' determination, exercising her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. The ALJ presided over a one-day hearing in San Bernardino, California on September 27, 2016. Respondent Ortega represented herself at the hearing. Respondent EDD did not appear at the hearing.

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

At the hearing, Dr. Hendricks testified in a manner consistent with his examination of Respondent Ortega and the report prepared after the IME. Dr. Hendricks' medical opinion is that there are no specific job duties Respondent Ortega is unable to perform. Therefore, Respondent Ortega is not substantially incapacitated.

Respondent Ortega testified on her own behalf. She did not call any physicians or other medical professionals to testify. Respondent Ortega submitted certain medical reports to support her claim. Respondent Ortega testified that she was involved in an automobile accident that resulted in a serious injury to her back. Respondent Ortega testified that she attempted to return to her job after the accident, but that she could not keep up with the work load or perform her usual duties. Respondent Ortega testified that over time, she reduced the number of hours she attempted to work, until eventually she felt compelled to resign her position because she was unable to perform her job. Respondent Ortega testified that her physical condition continues to deteriorate and that

she is no longer able to participate in many of the activities she used to enjoy, including helping take care of her family.

Respondent Ortega submitted numerous medical records from her treating physicians. According to Respondent Ortega's medical records, she was seriously injured and underwent two back surgeries as a result of her injuries.

Respondent Ortega also called her mother, Antonia Ruiz, to testify on her behalf. Ms. Ruiz testified that her daughter is always in pain and is no longer able to care for her family. She also testified that her daughter was previously a happy girl, but as a result of her injuries she has stopped participating in the activities that previously made her happy.

The ALJ found Respondent Ortega was "sincere, credible and genuine." In addition, the ALJ found that Respondent Ortega did not "appear to exaggerate or equivocate when answering questions." Last, the ALJ found that Respondent Ortega's testimony "demonstrated a true and sincerely held belief that her injuries and medical condition resulted in her inability to perform the essential job duties of an Office Assistant."

Notwithstanding Respondent Ortega's testimony, the ALJ denied Respondent Ortega's appeal. The ALJ found that Respondent Ortega bears the burden to prove by a preponderance of evidence (based on competent medical evidence) that her orthopedic condition renders her unable to perform her usual job duties. The ALJ concluded that Respondent Ortega "made a compelling case for finding that she is disabled and substantially incapacitated from performance of her job duties of an Office Assistant." However, the ALJ held that "the determination must be based on 'competent medical evidence.'" Based upon the record in this matter, the ALJ held that:

the only finding supported by the evidence is that Ms. Ortega failed to prove by a preponderance of the evidence, and by competent medical evidence, that she is substantially incapacitated from performing the usual and customary duties of an Office Assistant.

The ALJ concluded that Respondent Ortega is not permanently and substantially disabled or incapacitated from the performance of her job duties, and therefore, is not entitled to disability retirement.

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 that the word "his" be replaced by the word "her" before the word "application" on page ten of 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 Writ Petition in Superior Court seeking to overturn the Decision of the Board.

December 21, 2016

A handwritten signature in blue ink, appearing to read "John Shipley", is written above a horizontal line.

JOHN SHIPLEY
Senior Staff Attorney