

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Elizabeth Hoffman (Respondent Hoffman) worked as an Electrician II for Respondent California Department of Corrections and Rehabilitation, Wasco State Prison (Respondent CDCR). By virtue of her employment, Respondent Hoffman is a state safety member of CalPERS.

Respondent Hoffman applied for Industrial Disability Retirement with CalPERS on the basis of an internal (West Nile Virus) condition. To evaluate Respondent Hoffman's application, CalPERS referred Respondent Hoffman for an Independent Medical Examination (IME) with Samuel B. Rush, a doctor of internal medicine. Dr. Rush issued a written report finding Respondent Hoffman was able to perform the usual and customary duties of an Electrician II for Respondent CDCR. On the basis of the IME report, and a review of Respondent Hoffman's medical and employment records, CalPERS denied Respondent Hoffman's application.

Respondent Hoffman appealed CalPERS' determination. A one-day hearing was held in Fresno, California on September 29, 2016. Counsel appeared on behalf of Respondent Hoffman. Respondent CDCR did not appear.

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. Rush. Dr. Rush testified that he interviewed Respondent Hoffman, obtained a personal and medical history, physically examined Respondent Hoffman and reviewed her medical and work records.

Respondent Hoffman told Dr. Rush that she was bitten on the neck by a mosquito in 2007 and that she developed severe headaches, neck pain, nausea, vomiting and a generalized rash. The symptoms lasted several months. Respondent Hoffman was diagnosed with West Nile Virus, returned to work briefly, then stopped working altogether in February 2013, almost 7 years after the original West Nile Virus diagnosis.

At hearing, Dr. Rush testified that West Nile Virus is rare and difficult to diagnose. Common symptoms include muscle pain, rash and encephalitis. A spinal tap is usually taken to determine the virus' effect on the central nervous system, if any. During the IME, Respondent Hoffman reported a history of chest pain, but no heart disease. She also had arthritis of the neck and had experienced neck stiffness for several years.

Dr. Rush stated in his report that Respondent Hoffman presented with a normal examination of her ears, nose and throat. Her neck was somewhat tight in certain areas but there was no evidence of lymphadenopathy, discernible mass, or venous distention. Overall, Respondent Hoffman presented with good range of motion in the neck, and normal range of motion in her shoulders, elbows, forearms, wrists, hands, hips, knees and ankles. Respondent Hoffman walked easily during her physical examination. Her neurological examination was also normal. On the basis of his review of records and in-office examination, Dr. Rush believed that Respondent Hoffman did at one time have West Nile Virus, but she appears to have recovered, with no evidence of post-virus complications. Dr. Rush also diagnosed Respondent Hoffman as having degenerative joint disease of the cervical spine with evidence of muscle tightness, with no physical limitations.

As an Electrician II, Respondent Hoffman's usual and customary job duties include supervising and working with an inmate crew, and installing and repairing electrical equipment at the prison. Respondent's physical requirements include constantly walking and frequently standing, bending and twisting at the waist, twisting at the neck, reaching above and below her shoulders, simple and power grasping, and repetitive use of her hands. Respondent Hoffman would also carry up to 50 pounds, work at heights, and use special equipment in the performance of her duties.

On the basis of his examination, and taking into account the physical requirements of the Electrician II position, Dr. Rush opined that Respondent Hoffman was not substantially incapacitated. Respondent Hoffman may have contracted West Nile Virus in 2007, but Dr. Rush believed her condition had resolved since then. Dr. Rush also stated that Respondent Hoffman had no orthopedic limitations and presented with a basically normal neurological examination.

At hearing, Respondent Hoffman presented a single, hearsay medical report from Dr. Meth, a physician retained to evaluate her for purposes of determining her eligibility for workers' compensation benefits and treatment. She did not call any physicians to testify at hearing or state an opinion as to whether she was substantially incapacitated, the standard by which CalPERS administers disability retirement benefits.

The Administrative Law Judge (ALJ) considered all the evidence, and credited as persuasive the report and testimony of Dr. Rush. The ALJ held that the workers' compensation report proffered by Respondent Hoffman was not relevant to the question of whether she was substantially incapacitated. Moreover, Respondent Hoffman's lay testimony concerning her disability was insufficient to satisfy her burden of proof on substantial incapacity, which is a matter of scientific medical knowledge.

The ALJ concluded that Respondent Hoffman'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 Writ Petition in Superior Court seeking to overturn the Decision of the Board.

December 21, 2016



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