STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent La'Tisha Walker-Rice (Respondent Walker-Rice) worked as a Correctional Officer for Respondent California Department of Corrections and Rehabilitation, Correctional Training Facility (Respondent CDCR). By virtue of her employment, Respondent Walker-Rice is a state safety member of CalPERS.

Respondent Walker-Rice applied for Industrial Disability Retirement with CalPERS on the basis of orthopedic (back, wrists) conditions. To evaluate Respondent Walker-Rice’s application, CalPERS referred Respondent Walker-Rice for an Independent Medical Examination (IME) with Robert Kolesnik, an orthopedic surgeon. Dr. Kolesnik issued a written report finding Respondent Walker-Rice was able to perform the usual and customary duties of a Correctional Officer for Respondent CDCR. On the basis of the IME report, and a review of Respondent Walker-Rice’s medical and employment records, CalPERS denied Respondent Walker-Rice’s application.

Respondent Walker-Rice appealed CalPERS’ determination. A one-day hearing was held in San Bernardino, California on October 25, 2016. Respondent Walker-Rice appeared on her own behalf. Respondent CDCR did not appear.

Prior to the hearing, CalPERS explained the hearing process to Respondent Walker-Rice and the need to support her case with witnesses and documents. CalPERS provided Respondent Walker-Rice with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Walker-Rice’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. Kolesnik. Dr. Kolesnik testified that he interviewed Respondent Walker-Rice, obtained a personal and medical history, physically examined Respondent Walker-Rice and reviewed her medical and work records.
Respondent Walker-Rice claimed that she injured both wrists and her low back when she slipped and fell on food that an inmate had thrown on the prison floor. During physical examination, Dr. Kolesnik observed normal alignment of both of Respondent Walker-Rice's wrists, minimal or no tenderness to palpation, mild pain in the right wrist, and full range of motion. Dr. Kolesnik also conducted a physical examination of Respondent Walker-Rice's low back. He found that Respondent grimaced and complained of pain during all low-back motions, and he observed decreased range of motion during lumbar spine and lower extremity movements. Other than mild tenderness at the junction between the thoracic spine and lumbar spine, Dr. Kolesnik found Respondent Walker-Rice's low back to be normal. On the basis of his review of records and in-office examination, Dr. Kolesnik diagnosed Respondent Walker-Rice as having resolved bilateral wrist sprains and a lumbosacral strain with mild facet arthritis.

As a Correctional Officer, Respondent Walker-Rice's usual and customary job duties include working overtime, wearing protective equipment, continuously walking, occasional climbing and running, and continuously wearing an equipment belt weighing approximately 15 pounds.

On the basis of his examination, and taking into account the physical requirements of the Correctional Officer position, Dr. Kolesnik opined that Respondent Walker-Rice was not substantially incapacitated. Respondent Walker-Rice presented with some exaggeration of her complaints of pain when compared to the objective findings. Dr. Kolesnik also noted that Respondent Walker-Rice's medical records included an MRI test which showed only mild degeneration of the low back but no evidence of nerve compression.

At hearing, Respondent Walker-Rice presented hearsay medical reports from physicians 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 on whether she was substantially incapacitated, the standard applicable to CalPERS disability retirement benefits. Respondent Walker-Rice testified that she still experienced pain in her low back and wrists, and that the injuries "devastated her life."

The Administrative Law Judge (ALJ) considered all the evidence, and credited as persuasive the report and testimony of Dr. Kolesnik. The ALJ held that Respondent Walker-Rice was a credible, albeit emotional witness, but that her testimony was not sufficient to refute the competent medical opinion expressed by Dr. Kolesnik.

The ALJ concluded that Respondent Walker-Rice'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

KEVIN KREUTZ
Senior Staff Attorney