

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY PETITION FOR RECONSIDERATION

Respondent Ryann O. Mullen (Respondent Mullen) petitions the Board of Administration (Board) to reconsider its adoption of the Proposed Decision (PD) with minor changes of the Administrative Law Judge (ALJ) dated September 22, 2016. The Board adopted the PD on November 16, 2016. Staff argues that the Petition for Reconsideration (Petition) should be denied.

Respondent Mullen worked as a Correctional Case Records Analyst for Respondent California Department of Corrections and Rehabilitation, Wasco State Prison (CDCR). By virtue of her employment, she was a state miscellaneous member of CalPERS.

Respondent Mullen submitted a disability retirement application with CalPERS on March 11, 2014, claiming disability on the basis of orthopedic (right upper extremity, upper back, neck and headaches, carpal tunnel syndrome, right/hand wrist, bulging disc in the cervical section C3/4, severe tendinitis in the right shoulder, chronic pain in the neck and right shoulder with radiating pain in the upper back, and migraine headaches) conditions. Respondent Mullen's disability retirement application was approved and she was retired for disability effective December 13, 2012.

Pursuant to Government Code section 21192, CalPERS sought to have Respondent Mullen examined to determine whether she should be reinstated to her former position with CDCR. To evaluate Respondent Mullen's current medical condition, CalPERS referred Respondent Mullen for an Independent Medical Examination (IME) with orthopedic surgeon Ghol Ha'Eri, M.D. Dr. Ha'Eri performed a comprehensive IME and issued a written report finding Respondent Mullen was not, in his opinion, unable to perform her duties as a Correctional Case Records Analyst with CDCR. On the basis of Dr. Ha'Eri's IME report and a review of Respondent Mullen's medical records, CalPERS determined that Respondent Mullen was no longer substantially incapacitated and should be reinstated to her position with CDCR.

The ALJ presided over a one-day hearing in Fresno, California on August 9, 2016. Prior to the hearing, CalPERS explained the hearing process to Respondent Mullen and the need to support her case with witnesses and documents. CalPERS provided Respondent Mullen with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Mullen's questions and clarified how to obtain further information on the process.

CalPERS presented testimony from Dr. Ha'Eri. Dr. Ha'Eri testified that it was his medical opinion that there are no specific job duties Respondent Mullen is unable to perform because of a physical or medical condition. In addition, CalPERS presented evidence regarding the job duties associated with Respondent Mullen's current position as a Judicial Courtroom Assistant for the Superior Court of California, County of Kern.

Respondent Mullen testified that she did not believe that she could perform all of the job duties as a Correctional Case Records Analyst. Respondent Mullen testified that she was told by Physician's Assistant Kevin Groh, on August 25, 2014, that she could no longer perform the duties of a Correctional Case Records Analyst. Respondent Mullen did not call any physicians or other medical professionals to testify on her behalf.

At Respondent Mullen's request, the ALJ provided Respondent Mullen two weeks to submit medical records to support her claimed incapacity. The deadline for Respondent Mullen to submit these medical records was August 23, 2016. On August 24, 2016, CalPERS' staff contacted Respondent Mullen to inquire as to whether she intended to submit additional records. On September 14, 2016, due to the fact Respondent Mullen did not submit medical records and did not contact the Office of Administrative Hearings to request additional time to submit medical records, CalPERS requested that the matter be closed and a decision issued.

The ALJ denied Respondent Mullen's appeal. The ALJ found that CalPERS submitted sufficient evidence to meet its burden to establish by a preponderance of evidence that Respondent Mullen is no longer substantially incapacitated. The ALJ found Dr. Ha'Eri's testimony and opinion persuasive. In addition, the ALJ found that Respondent Mullen did not present competent medical evidence to refute Dr. Ha'Eri's opinion.

Respondent Mullen's Petition is largely based on medical records that were not introduced as evidence prior to the matter being submitted and the record closed. Respondent Mullen argues that the Board should reconsider its decision in light of these records. Staff does not agree that the Board should consider these records. In addition, even if the Board were to consider these records, staff does not believe the records would warrant the Board vacating its decision to adopt the PD, with minor changes.

First, staff does not believe Respondent Mullen has presented good cause for why the record should be reopened to allow her to submit additional records for consideration in this matter. All of the medical records referenced by Respondent Mullen in the Petition were arguably in her possession well before the August 9, 2016, hearing date. The medical records are from 2012, 2013, 2014 and 2015. Respondent Mullen has not presented any basis for why she was unable to introduce the medical records as evidence at the hearing on August 9, 2016. In addition, as Respondent Mullen acknowledges, she was provided additional time by the ALJ to submit the medical records after the hearing date. In fact, when Respondent Mullen did not submit the records by the given deadline, CalPERS' staff contacted her to inquire as to the status of the records. Respondent Mullen did not contact the ALJ to request additional time or submit records. Although staff is sympathetic to Respondent Mullen's personal issues that may have made it difficult to submit the records, she had months to prepare the documents for hearing and has not presented good cause as to why she was unable to do so.

Second, the records do not support a finding that the ALJ's finding was erroneous or that it would be reversed. Respondent Mullen relies heavily in her argument on the

AME report of Dr. Phillip Kanter, M.D. Dr. Kanter appears to have evaluated Respondent Mullen in connection with a workers' compensation claim, and not at the request of CalPERS. Because the standard used in determining eligibility for disability retirement differs from a finding of permanent and stationary for workers' compensation purposes, this report should be given little or no weight.

Respondent Mullen also wants the Board to consider additional medical records from her treating occupational therapist, Carlos Guerrero, and treating physician Alan Moelleken, M.D. Respondent Mullen argues that these doctors support Dr. Kanter's finding that she is permanent and stationary. However, as noted above, this finding carries little to no weight in a CalPERS disability hearing because it is an entirely different standard.

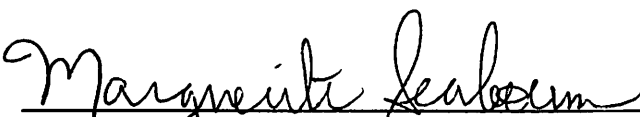
Last, because these doctors were not presented to testify in person, the records would have been received as administrative hearsay. A finding of substantial incapacity must be based on competent medical evidence. Medical records introduced as administrative hearsay evidence do not constitute competent medical evidence; therefore, even if these records had been introduced, they could not have overcome the evidence upon which the ALJ relied in order to support a contrary determination than the one reached.

Finally, as Respondent Mullen acknowledges in the Petition, Dr. Ha'Eri was questioned about the opinions of the doctors who authored that at-issue medical reports. Dr. Ha'Eri did not agree with the opinions of these doctors. In the end, the ALJ found Dr. Ha'Eri's testimony and opinion persuasive. Consequently, the opinions of these doctors was already considered by the ALJ, and it was the ALJ's opinion that Dr. Ha'Eri's testimony and opinion was enough for CalPERS to meet its burden that Respondent Mullen is no longer substantially incapacitated. Simply put, Respondent Mullen has not raised any new evidence or legal analysis which would warrant reconsideration.

Staff argues the Board should deny the Petition for Reconsideration and uphold its decision.

Because the Decision applies the law to the salient facts of this case, the risks of denying the Petition for Reconsideration are minimal. Respondent Mullen may file a writ petition in superior court seeking to overturn the decision of the Board.

December 21, 2016


JOHN SHIPLEY
Senior Staff Attorney