

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Eddie Johnson (Respondent Johnson) worked as a Parole Agent for Respondent California Department of Corrections and Rehabilitation, Parole and Community Services Division (Respondent CDCR). By virtue of his employment, Respondent Johnson was a state safety member of CalPERS.

Respondent Johnson applied for Service Pending Industrial Disability Retirement with CalPERS on the basis of an orthopedic (left wrist) condition. To evaluate Respondent Johnson's application, CalPERS referred Respondent Johnson for an Independent Medical Examination (IME) with Daniel M. D'Amico, an orthopedic surgeon. Dr. D'Amico issued a written report finding Respondent Johnson was able to perform the duties of a Parole Agent for Respondent CDCR. On the basis of the IME report, and a review of Respondent Johnson's medical and employment records, CalPERS denied Respondent Johnson's application.

Respondent Johnson appealed CalPERS' determination. A one-day hearing was held in Sacramento, California on November 14, 2016. Respondent Johnson represented himself. Respondent CDCR did not appear. Upon satisfactory proof of service of the Statement of Issues and Notice of Hearing, the matter proceeded as a default against Respondent CDCR pursuant to Government Code §11520(a).

Prior to the hearing, CalPERS explained the hearing process to Respondent Johnson and the need to support his case with witnesses and documents. CalPERS provided Respondent Johnson with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent Johnson'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. D'Amico. Dr. D'Amico testified that he interviewed Respondent Johnson, obtained a personal and medical history, physically examined Respondent Johnson and reviewed his medical and work records.

Respondent Johnson explained that in February 2014, while placing his duty bag inside the trunk of his car, the hood of the trunk came down on his left wrist. Respondent Johnson, who is right-hand dominant, had surgery on his left wrist in October 2014, and was told he should not go back to work. He complained of left wrist and hand pain as well as shoulder pain during the IME. On physical examination, Dr. D'Amico found minimal loss of range of motion in Respondent Johnson's left wrist compared to the right. Grip strength was 35 percent to 40 percent reduced in the left wrist, but there was no evidence of atrophy of the forearm muscles. Dr. D'Amico found that the pain that Respondent Johnson complained of was out of proportion to the examination results.

As a Parole Agent, Respondent Johnson's usual and customary job duties included conducting investigations, searching parolees for contraband, subduing parolees when necessary, qualifying at the range with CDCR-approved weapons, using force when necessary, lifting and carrying light to medium weight objects frequently, pushing and pulling while opening doors and/or gates, and moving his hands and wrists while working at a computer.

On the basis of his examination, and taking into account the physical requirements of the Parole Agent position, Dr. D'Amico opined that Respondent Johnson was not substantially incapacitated. Dr. D'Amico did not believe that the pain Respondent Johnson experienced in his left wrist would make him unable to serve as a Parole Agent. With appropriate treatment and physical therapy, Respondent Johnson could perform the duties of a Parole Agent, including computer work, notwithstanding the condition of his left wrist, according to Dr. D'Amico.

At hearing, Respondent Johnson testified that he continues to experience pain and takes ibuprofen. He testified that physical therapy was improving his wrist. He cannot lift weights every day and cannot do pushups. Respondent Johnson also testified that he cannot type for long periods and that driving causes him pain. Respondent Johnson did not call any doctors to testify on his behalf, but submitted the hearsay medical records of workers' compensation doctors.

The Administrative Law Judge (ALJ) considered all the evidence, and credited as persuasive the report and testimony of Dr. D'Amico in finding that Respondent Johnson was not substantially incapacitated. The ALJ concluded that Respondent Johnson'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.

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 inconsistency and ambiguity, staff recommends that "industrial" in the Caption on page 1 be changed to "service pending industrial" and that "disability retirement" on Page 6, paragraphs 23 and 24, Page 7, paragraph 4, and Page 8 be changed to "service pending industrial disability retirement."

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.

February 15, 2017



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