

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Marlon Concepcion (Respondent) was employed as a Registered Nurse (RN) by the California Department of Corrections and Rehabilitation, California Medical Facility, Vacaville (CDCR). By virtue of his employment, Respondent was a state safety member of CalPERS. In August, 2013, Respondent submitted an application for Industrial Disability Retirement (IDR) on the basis of a claimed orthopedic (low back) and psychological (depression) conditions. Staff reviewed a written description of Respondent's usual and customary job duties and relevant medical reports. J. Hearst Welborn, M.D., a board-certified Orthopedic Surgeon, examined Respondent and prepared a written report which contained his observations, findings, conclusions, and ultimate opinion that Respondent was not, because of any orthopedic condition, substantially incapacitated from performing the usual and customary duties of an RN for CDCR. Michael Goldfield, M.D., a board-certified Psychiatrist, examined Respondent and prepared a written report which contained his observations, findings, conclusions, and ultimate opinion that Respondent was not, because of any psychological condition, substantially incapacitated from performing the usual and customary duties of an RN for CDCR. Staff determined that Respondent was not substantially incapacitated, based upon either an orthopedic or psychological condition, and denied his application for IDR. Respondent appealed Staff's determination and a hearing was held on February 25, 2016, April 18, 2016, and July 25, 2016. Post-hearing Briefs were submitted by Respondent and CalPERS.

Throughout the appeal process, including all three days of hearing and for purposes of submission of post-hearing Briefs, Respondent was represented by counsel.

The Administrative Law Judge (ALJ) received into evidence a written copy of Respondent's usual and customary job duties as an RN for CDCR at the Vacaville Medical Facility. Respondent also testified, describing his usual and customary duties. As an RN, Respondent attended to the medical needs of the inmates on wards at the Vacaville facility. He dispensed medications, changed dressings, administered injections, assisted with bathing, and responded to emergency situations.

A copy of Dr. Welborn's independent medical examination (IME) report was received into evidence and considered by the ALJ. Dr. Welborn testified consistently at hearing with the contents of his written report, noting that his clinical examination of Respondent disclosed little, if any, objective evidence of any problem in Respondent's lumbar spine. MRI studies of Respondent's lumbar spine, from 2011 and 2013, showed only minimal (2 – 3 mm) disc protrusions at L4-5, which did not contact nor impinge upon any nerves exiting from the spinal cord. A September, 2013, EMG report showed no evidence of lumbar radiculopathy (radiating pain into the lower extremities). Dr. Weldorn testified that there was no reliable medical evidence to explain Respondent's complaints of extreme low back pain. Dr. Welborn offered his opinion that Respondent was A) exaggerating his complaints, and B) not substantially incapacitated from performing his usual and customary duties.

Respondent did not call any physician to testify at the hearing regarding his claimed low back condition.

A copy of Dr. Goldfield's IME report was received into evidence and considered by the ALJ. Dr. Goldfield testified consistently at hearing with the contents of his written report. Dr. Goldfield described at least a half dozen instances where Respondent made a statement but, when confronted with contradictory evidence, was forced to admit that he had exaggerated or been less than truthful. Examples included Respondent telling Dr. Goldfield that he had attempted suicide by cutting his wrists. However, when asked to show his wrists, Dr. Goldfield observed that there were no scars present. Respondent told Dr. Goldfield that he could not/did not drive a car. When Dr. Goldfield informed Respondent that he (Dr. Goldfield) had watched surveillance images of Respondent driving a car, Respondent offered an explanation that those times were limited. Respondent told Dr. Goldfield that he did not work as an RN. Dr. Goldfield confronted Respondent with evidence that Respondent, since 2007, had worked essentially full time caring for a mentally impaired man with Cerebral Palsy. Respondent attempted to avoid this apparent inconsistency by describing that the work he performed was something other than nursing care.

Dr. Goldfield had reviewed reports prepared by other psychiatrists and psychologists who had evaluated Respondent. An initial psychological evaluation performed on Respondent in 2012 by a Dr. Green included psychological test results which indicated that Respondent had not been truthful in responding to the questions posed. Similarly, in 2013, a report prepared by a Dr. Taylor indicated Respondent was not being truthful. The ALJ summarized this evidence as follows:

"The results were deemed invalid because [Respondent] reported a considerably larger than average number of symptoms rarely described by individuals with a genuine severe psychopathology. The Millon Clinical Multiaxial Inventory (MCMI)-3 noted exaggeration as [Respondent] reported more psychological symptoms than objectively existed."
(See Factual Finding No. 34.)

Dr. Goldfield testified that Respondent greatly exaggerated his symptoms, was not credible and that there was no reliable evidence to support a finding of any disabling psychological condition. Accordingly, Dr. Goldfield stated that, in his opinion, Respondent was not substantially incapacitated from performing the usual and customary duties of an RN for CDCR.

Respondent had Frank Lucchetti, a clinical Psychologist, testify on his behalf. Dr. Lucchetti admitted that he was not familiar with the CalPERS standard for disability retirement. Dr. Lucchetti's opinion that Respondent was "disabled" was, as he again admitted, based upon his experience within the Workers' Compensation system. Accordingly, when Dr. Lucchetti testified that Respondent "was not 100 percent," he also acknowledged that "[he] does not have the expertise to determine if that is


sufficient to qualify for industrial disability retirement benefits under CalPERS law.”
(See Factual Finding No. 39.)

After considering all of the documentary evidence and the testimony, the ALJ concluded that Respondent had not sustained his burden of proof. The findings and testimony of Dr. Welborn regarding the claimed orthopedic condition were uncontradicted. And with respect to the claim of a disabling psychological condition, the ALJ found Dr. Goldfield’s findings and opinion to be more persuasive than that of Dr. Lucchetti.

The ALJ concluded that Respondent’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.

February 15, 2017



RORY J. COFFEY
Senior Staff Attorney