

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Carey Kelly (Respondent) was employed as a State Traffic Officer by Respondent Department of California Highway Patrol (CHP). By virtue of her employment, Respondent was a state safety member of CalPERS. In 1998, Respondent submitted an application for Industrial Disability Retirement (IDR) on the basis of claimed orthopedic (neck, low back and left shoulder) conditions. CalPERS Staff (Staff) reviewed medical reports and a written job description of Respondent's usual and customary duties. Respondent was approved to receive IDR in 1999, and has been receiving a monthly benefit since that date.

Because Respondent was under the minimum age for voluntary service retirement, pursuant to Government Code section 21192, in 2012, Staff informed Respondent that she would be reevaluated for purposes of determining whether she remained substantially incapacitated and entitled to continue to receive an IDR benefit. Brendan McAdams, M.D., a board-certified Orthopedic Surgeon, reviewed medical reports, a written description of the usual and customary duties of a CHP Officer and conducted an Independent Medical Examination (IME) of Respondent. In a written report, dated May 21, 2012, Dr. McAdams noted his observations, findings, conclusions, and ultimate opinion that Respondent was not substantially incapacitated from performing the usual and customary duties of a CHP Officer. Staff determined that Respondent was not substantially incapacitated, was no longer entitled to receive an IDR benefit, and should be reinstated to her former position as a State Traffic Officer with CHP. Staff informed both Respondent and CHP of their Re-Evaluation determination by letter dated December 12, 2012. Respondent appealed Staff's determination and a hearing was held on November 17, 2016.

Prior to the hearing and during the hearing, Respondent was represented by counsel.

In order to be eligible for IDR, competent medical evidence must demonstrate that the individual is substantially incapacitated from performing the usual and customary duties of his or her position. The injury or condition which is the basis for the claimed disability must be permanent or of an extended and uncertain duration. Correspondingly, in order for an individual to be found ineligible for continued receipt of a previously approved disability retirement, competent medical evidence must demonstrate that he or she is no longer substantially incapacitated from performing the usual and customary duties of their former position.

A copy of the CHP's 14 Critical Tasks was offered and received into evidence. The Administrative Law Judge (ALJ) considered the 14 Critical Tasks, specifically the identified physical requirements, in the Proposed Decision. (See Factual Finding No. 2. Pages 2-4.)

The ALJ reviewed and considered Dr. McAdams' written report. Dr. McAdams testified at the hearing and the ALJ considered his testimony as well. The ALJ quoted extensive

portions of Dr. McAdams' report. With respect to the cervical spine and upper extremities, Dr. McAdams found a full, unrestricted range of motion, "excellent strength" in both arms, full sensation, and no evidence of atrophy (muscle wasting). (See Factual Finding No. 6, page 6.) With respect to the lumbar spine, the ALJ quoted Dr. McAdams' findings, as noted in his report:

"[Respondent] stood erect. There was no list. She was able to forward flex to a point where her fingertips easily touched the floor. She fully reversed her lumbar lordotic curve. She extends 10 degrees and lateral bends is 30 degrees in both directions and has a full 90 degrees of rotation in both directions. She is able to squat down and come back up without any hesitation. She walks on her heels and toes without any evidence of weakness. Sitting position, deep tendon reflexes, knee jerks, and ankle jerks are equal and active. She has full extension of the knees without any evidence of lumbar lurch."

(See Factual Finding No. 6, page 5-6.)

The ALJ's summary of Dr. McAdams' testimony regarding Respondent's lumbar spine is also found as part of Factual Finding No. 6. The ALJ noted that Dr. McAdams "found good strength and flexibility", that Respondent's "reflexes were normal" and that there were "no objective signs of disability."

In July, 2016, as part of her preparation to appeal Staff's determination, Respondent retained Lee Snook, Jr, M.D., to conduct an examination of her and prepare a written report. Dr. Snook's written report was reviewed by Dr. McAdams and he prepared his own report. The ALJ again quoted from Dr. McAdams' follow-up report, as follows:

"After reviewing this report [Dr. Snook's] as well as my own report, I must again conclude that this lady, in my opinion, at the time that I saw her had reached her pre-injury status. She had no evidence at all of any restriction, weakness, reflex changes, or sensory changes in her axial spine or extremities."

(See Factual Finding No. 10, page 8.) (Emphasis added.)

The remaining area or condition claimed by Respondent to be disabling was her left shoulder. The ALJ summarized Dr. McAdams' findings, as noted in his reports, and his testimony at the hearing, as follows:

"Dr. McAdams opined that the MRI of [Respondent's] shoulder does not show any condition that would likely cause substantial physical impairment."

(See Factual Finding No. 11.)

The ALJ considered the contents of Dr. Snook's written report and his testimony at the hearing. The ALJ quoted Dr. Snook's findings, on physical examination of Respondent,

in Factual Finding No. 14, on page 9 of the Proposed Decision. While Dr. Snook did make note of a complaint of tenderness, the remaining findings, such as cervical and lumbar range of motion, muscle strength, reflexes, and sensation, are consistent with the findings of Dr. McAdams.

Dr. Snook agreed, in essence, with Dr. McAdams' testimony regarding the condition of Respondent's left shoulder. As found by the ALJ:

"...an MRI imaging report dated May 17, 2016, showed some abnormality in the [Respondent's] left shoulder. Dr. Snook testified that he cannot say whether this is clinically significant, and would refer her to an orthopedist for a determination whether work restrictions are recommended."
(See Factual Finding No. 16, page 10.)

Of seeming critical significance to the ALJ, was the fact that Dr. McAdams was familiar with and applied the correct standard for determining disability for CalPERS purposes, while Dr. Snook did not.

"Dr. Snook testified that a peace officer must be able to perform at 100 percent to return from disability. When Dr. Snook was asked on cross-examination where he obtained the standard that a peace officer must be 100 percent, Dr. Snook replied that he obtained the standard from the injured peace officers he has been seeing."
(See Factual Finding No. 20, page 11.)

"[D]r. McAdams applied the correct standard in reaching his opinion. ...Dr. McAdams opined that [Respondent] could perform each of the Critical Physical Activities of a CHP Officer, though some of the tasks may be difficult. Dr. McAdams' written report and testimony were well reasoned and persuasive."
(See Factual Finding No. 25, page 13.)

"Respondent's expert, Dr. Snook, did not apply the correct standard in reaching his opinion that [Respondent] remains disabled. Specifically, Dr. Snook's opinion is based on the premise that a peace officer must be able to function at 100 percent capacity, not 98 and not 99 percent. In Dr. Snook's own words, this is a very low threshold for determining disability. Given that Dr. Snook applied an incorrect standard for determining disability, his conclusion that [Respondent] would not be able to perform certain of the Critical Physical Activities of a CHP Officer is unpersuasive."
(See Factual Finding No. 26, page 13.)


After considering all of the documentary evidence and testimony, the ALJ found that Staff's determination, that Respondent is no longer substantially incapacitated from performing the usual and customary duties of a CHP officer, was and is supported by competent medical evidence and that Respondent did not offer sufficient competent medical evidence to rebut the evidence offered by CalPERS.

(See Legal Conclusion No. 5, page 14.)

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



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