

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Thomas R. Barkley (Respondent Barkley) worked as a Professor of Nursing with Respondent California State University, Los Angeles (Respondent CSULA). By virtue of his employment, Respondent Barkley was a state miscellaneous member of CalPERS.

Respondent Barkley applied for disability retirement with CalPERS on the basis of a "Degenerative Joint disease, spinal cord compression requiring accommodations, L5-S1, disk herniation also numbness in fingers and [left] hip and leg pain [leading to] MRI's [leading to] surgery", which he claimed made him unable to work as a Professor of Nursing with Respondent CSULA.

To evaluate Respondent Barkley's disability retirement application, CalPERS referred Respondent Barkley for an Independent Medical Examination (IME) with Orthopedic Surgeon, Thomas W. Fell, M.D. Dr. Fell interviewed Respondent Barkley, reviewed his work history and job descriptions, obtained a history of his past and present complaints and reviewed medical records. In addition, Dr. Fell also performed a comprehensive IME. Dr. Fell issued a written report finding Respondent Barkley was not, in his opinion, unable to perform his duties as a Professor of Nursing with Respondent CSULA. However, Dr. Fell did suggest in the IME report that Respondent Barkley avoid certain activities related to his job. For this reason, CalPERS requested that Dr. Fell provide his opinion as to whether Respondent Barkley could perform his usual job duties without restrictions. Dr. Fell issued a supplemental report finding that Respondent Barkley can perform all of his work duties without modifications. On the basis of the IME report, supplemental IME report and a review of Respondent Barkley's medical records, CalPERS denied Respondent Barkley's disability retirement application.

Respondent Barkley appealed CalPERS' determination, exercising his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. The ALJ presided over a one-day hearing in Los Angeles, California on December 19, 2016.

Prior to the hearing, CalPERS explained the hearing process to Respondent Barkley and the need to support his case with witnesses and documents. CalPERS provided Respondent Barkley with a copy of the administrative hearing process pamphlet, answered his questions and clarified how to obtain further information on the process.

Despite proper notice being given to Respondent Barkley and Respondent CSULA, no appearances were made at the December 19, 2016 hearing by either Respondent. Due to the Respondents' failure to appear at the hearing, the matter proceeded by default, pursuant to Government Code section 11520.

At the hearing CalPERS made arguments and introduced documentary evidence, including Dr. Fell's IME report and supplemental IME report. CalPERS' evidence established that Respondent Barkley is not substantially incapacitated from performing his usual duties as a Professor of Nursing with Respondent CSULA.

Respondent Barkley, although he did not personally appear, submitted a memorandum containing sixteen (16) paragraphs to support his appeal. The ALJ considered all of the arguments contained in Respondent Barkley's memorandum.

The ALJ found that Dr. Fell's IME report and supplemental IME report "embody the only competent medical opinion" on Respondent Barkley's medical condition. Dr. Fell's medical opinion is that Respondent Barkley is not substantially incapacitated from the performance of his work duties as a Professor of Nursing. The ALJ found Dr. Fell's medical findings and opinion thorough and un-contradicted.

The ALJ also found that Respondent Barkley bears the burden to prove by a preponderance of evidence (based on competent medical evidence) that his orthopedic condition renders him unable to perform his usual job duties. The ALJ found Respondent Barkley offered no competent medical opinion to support his argument that he is substantially unable to perform his usual duties as a Professor of Nursing.

The ALJ concluded that Respondent Barkley'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 motion with the Board under Government Code section 11520(c), requesting that, for good cause shown, the Decision be vacated and a new hearing be granted.

March 15, 2017



JOHN SHIPLEY
Senior Staff Attorney