

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Natasha Broome (Respondent Broome) applied for Industrial Disability Retirement (IDR) based on orthopedic (carpal tunnel syndrome, right shoulder injury) conditions. By virtue of her employment as a Parole Agent I for Parole and Community Services Division, California Department of Corrections and Rehabilitation (Respondent CDCR), she was a state safety member of CalPERS. CalPERS determined that Respondent Broome was not disabled, and Respondent Broome appealed. A hearing was completed on January 19, 2017. Respondent Broome was represented by counsel.

At the hearing the Respondent Broome testified that she began to notice problems with her right shoulder, wrist and elbow in 2009 or 2010. She experienced an ache, reduced flexibility, and pain after activities such as firing her side arm and while doing a "press check" (holding a gun and pulling the slide to ensure a bullet was in the chamber). She testified that she needed to be prepared for anything, because parole agents cannot predict when they might need to engage in physical activity. Parolees may need to be arrested or taken into custody in the field or at the office. A parole agent may need to subdue a parolee or may need to chase a parolee who decides to flee.

Respondent Broome called Jeff Faust, one of her co-workers, to testify about the usual duties of a Parole Agent, including the Parole Agent Standard Training (PAST) training. He testified to the active requirements of the job. For example, a Parole Agent might need to reach up to search for items, search for a person and/or defend himself. He or she might need to search cupboards and top shelves because parolees "don't hide things where it is easy to get to." He believes that physical limitations would limit a Parole Agent's utility, and confirmed the job is not primarily "clerical." Respondent Broome's husband also testified on her behalf.

Respondent Broome also called Dr. Mark Bernhard, D.O. to testify on her behalf. Dr. Bernhard is a Doctor of Osteopathic Medicine. He has been Respondent Broome's treating physician since March 2012. Dr. Bernhard took Respondent Broome off work in December 2012 because of carpal tunnel syndrome, and right shoulder, wrist and dorsal wrist pain. Dr. Bernhard found Respondent Broome substantially incapacitated from performance of her usual duties, and believes this incapacity is permanent. He considered her job duty statement, Physical Requirements of Position form, Essential Functions of a Parole Agent I and interviews with Respondent Broome to form his opinion. He testified that he found Respondent could perform "no frequent gripping, typing, writing, pinching, grasping. No more than occasional overhead work (<10% of workday, no lifting >5 pounds.)" He diagnosed right carpal tunnel syndrome, right shoulder impingement, tenderness, and a partial tear or tendinosis of her right shoulder.

As part of CalPERS' review of his medical condition, Respondent Broome was referred for an Independent Medical Examination (IME) to Orthopedic Surgeon Dr. Robert Kolesnik M.D. Dr. Kolesnik conducted an orthopedic IME of Respondent Broome, and prepared his IME report. His opinions were based on his examination, review of her medical records, and review of the Job Specification for Parole Agent I. Dr. Kolesnik testified that Respondent Broome's job was "mainly clerical work" but she "might need to do field work and arrests." He testified that he was generally familiar with the duties of a Peace Officer, but did not review the Essential Functions of a Parole Agent I document.

Dr. Kolesnik opined that there were no specific job duties that Respondent Broome was unable to perform, and that Respondent Broome was not substantially incapacitated from performing her job duties. At the hearing, Dr. Kolesnik testified to his examination and report.

The Administrative Law Judge (ALJ) found that Respondent Broome bears the burden to show by a preponderance of evidence (based on competent medical evidence) that her symptomology renders her unable to perform her usual job duties. Citing case law, the ALJ reasoned that California courts have repeatedly underscored that an expert's opinion is only as good as the facts and reasons upon which that opinion is based. When an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. The ALJ found the evidence uncontroverted that a Parole Agent is a Peace Officer, and the essential functions of her position required Respondent Broome to perform a wide range of physically demanding activities in order to supervise parolees. Her job was not merely clerical. The ALJ found Respondent Broome's testimony and that of her co-worker credible regarding her essential functions.

The ALJ also found that both experts were in agreement regarding the condition of Respondent Broome's right arm, shoulder, wrist and hand. They disagreed as to whether her condition rendered her incapacitated from performing her usual duties. On balance, the ALJ found that Respondent Broome's expert's opinion was more credible, due to the fact that he considered her actual job duties when rendering his opinion.

The ALJ found that Respondent Broome carried her burden of proof and that she did establish by competent, objective medical opinion, that, at the time of application, she was permanently disabled or incapacitated from performing her usual duties of a Parole Agent I.

The ALJ concluded that Respondent Broome's appeal should be granted. 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. Having prevailed at hearing the member is not likely to file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

April 19, 2017


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