

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Respondent Robert Pierce (Respondent Pierce) applied for service pending Industrial Disability Retirement (IDR) on the basis of an orthopedic (back, left hip, and left arm) condition. By virtue of his employment as a Psychiatric Technician with Respondent California Department of Corrections and Rehabilitation – California Department of State Hospitals (Respondent CDSH), Respondent Pierce is a state safety member of CalPERS.

As part of CalPERS' review of his medical condition, Respondent Pierce was sent for an Independent Medical Examination (IME) to Orthopedic Surgeon James Fait, M.D. Dr. Fait interviewed Respondent Pierce, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Fait performed a comprehensive IME examination on April 18, 2016.

To be eligible for IDR, competent medical evidence must demonstrate the member is substantially incapacitated from performing the usual and customary duties of his position.

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

At the hearing, CalPERS made arguments, called Dr. Fait as a witness, and introduced documentary evidence, including medical reports. Dr. Fait testified to his examination and reports. Dr. Fait explained his IME report, which states that Respondent Pierce was not substantially incapacitated at the time of examination.

Dr. Fait's IME report noted that Magnetic Resonance Imaging (MRI) of Respondent Pierce's lumbar spine indicated degeneration of lumbar discs, but the nerves were unaffected by the bulging disc. Also, Dr. Fait stated that there was no way to tell when the degeneration began.

Dr. Fait's IME report also detailed a physical examination of Respondent Pierce. On examination, Dr. Fait did not find any objective symptoms of damage or injury to support Respondent Pierce's complaints of pain. When measuring Respondent Pierce's lower extremities to test for atrophy due to disuse, Dr. Fait found the measurements to be unremarkable. In other words, the measurements of the lower extremities did not support a finding of a back injury.

Dr. Fait also examined Respondent Pierce's shoulders for injury. The range of motion in Respondent Pierce's shoulders was normal. On palpation of Respondent Pierce's shoulders and upper arms, Dr. Fait found no abnormalities that would indicate an injury.

In addition to the physical examination and review of medical records, Dr. Fait also reviewed a job description, which appeared to be signed by Respondent Pierce on January 19, 2016. The job description was for Respondent Pierce's employment at Anka Behavioral Health, where he worked as a vocational nurse. Dr. Fait noted that the job duties as a vocational nurse with Anka Behavioral Health more or less mirrored those from Respondent Pierce's position as a Psychiatric Technician with Respondent CDSH.

Dr. Fait ultimately concluded, in his IME report and at hearing, that Respondent Pierce had degenerative disc disease, degenerative facet arthrosis, and an annular tear at L5-S1. Dr. Fait also noted, though, that the diagnosed conditions pre-existed the April 2014 incident that led to Respondent Pierce's injuries. Dr. Fait ultimately concluded that Respondent Pierce was not substantially incapacitated from the performance of his duties as a Psychiatric Technician.

Respondent Pierce testified on his own behalf. Respondent Pierce first explained an April 2014 incident during which he was injured while restraining a combative patient. During the incident, the patient bit Respondent Pierce. The incident, Respondent Pierce claimed, ultimately led to a leave of absence from his job beginning in December 2014. Respondent Pierce did not present any medical evidence, but testified that he feared a return to work may exacerbate his back injury.

The ALJ concluded that Respondent Pierce's appeal should be denied because Respondent Pierce is not substantially incapacitated from performing his usual duties as a Psychiatric Technician. 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 "April 2016" in Paragraph 11 in the middle of Page 6 be changed to "April 2014" in two places.

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.

April 19, 2017



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