STAFF’S ARGUMENT TO ADOPT THE PROPOSED DECISION

Gary L. Fief (Respondent) applied for industrial disability retirement based on orthopedic (neck and back) conditions. By virtue of his employment as an Assistant Chief for Respondent California Highway Patrol (Respondent CHP), Respondent was a state safety member of CalPERS.

Respondent applied for service retirement on June 4, 2009, and he has been receiving benefits since that time.

As part of CalPERS’ review of Respondent’s medical condition, Ghol Ha’Eri, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Ha’Eri interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Ha’Eri opined that Respondent was not substantially incapacitated from the performance of his usual and customary job duties.

In order to be eligible for disability retirement, competent medical evidence must demonstrate that an individual is substantially incapacitated from performing the usual and customary duties of his or her position. The injury or condition which is the basis of the claimed disability must be permanent or of an extended and uncertain duration.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of his position.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on June 13, 2017. Respondent represented himself at the hearing. Respondent CHP did not appear at the hearing.

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

At the hearing, Dr. Ha’Eri testified in a manner consistent with his examination of Respondent and the IME report. On physical examination, Dr. Ha’Eri found that the range of motion in Respondent’s neck and back was essentially normal. The other testing during the IME, such as the neurological exam, was also normal. In addition, Dr. Ha’Eri reviewed the reports, including imaging studies from Respondent’s treating physicians, and found the results of those reports consistent with his own examination.

Dr. Ha’Eri, in reaching his opinion that Respondent was not substantially and permanently incapacitated from performing the usual duties of an Assistant Chief, employed the standards applicable in these types of disability retirement proceedings. His opinion that Respondent’s degenerative changes throughout his spine are a
naturally occurring phenomenon with advancing age, and that there was not objective medical evidence of a serious work related injury in the records and images he reviewed, was persuasive and consistent with the medical records offered at hearing.

Dr. Ha’Eri issued a supplemental IME report on February 19, 2017 about which he testified at the hearing. The supplemental report focused on ankylosing spondylitis, a rheumatologic condition with which Respondent was diagnosed by his treating physicians. While stating that the rheumatologic condition is non-industrial, and recommending treatment by a Rheumatologist, Dr. Ha’Eri’s opinion remained unchanged, stating that Respondent is not substantially incapacitated.

Respondent testified on his own behalf about his injuries. Respondent stated that his condition began in an on-duty motor vehicle accident in 2003, causing neck and right shoulder injuries. Respondent’s pain has increased since the 2003 accident. Respondent claims he lost the ability to do the tasks required of every CHP officer since the accident.

Respondent submitted medical records from his treating physicians to support his appeal. The medical records from his treating physicians showed the treatment that Respondent has received since his 2003 accident. Respondent also introduced a video, taken by his wife in 2015, which showed him immobilized with pain during a back spasm.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent’s appeal. The ALJ found that Respondent failed to establish that he was substantially incapacitated from the performance of his usual and customary job duties at the time he applied for disability retirement.

The ALJ concluded that Respondent is not eligible for industrial disability retirement.

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 ambiguity, staff recommends that the word “spondylosis” be changed to “spondylitis” in Paragraph 21, on Page six of the Proposed Decision. Staff recommends that the word “spondylosis” be changed to “spondylitis” in the second to last line of the first paragraph on Page nine, and in the quoted language directly under the first paragraph of Page nine. Staff also recommends inserting the word “Industrial” before the words “disability retirement” in the caption, and on pages one, two, three, ten, eleven and thirteen of the Proposed Decision.

The Proposed Decision applies the law to the salient facts of the case. For those reasons, Staff argues that the Proposed Decision be adopted by the Board.

September 20, 2017

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