

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Mark B. Allgyer (Respondent) applied for industrial disability retirement based on neurological (head and headaches) and psychological conditions. By virtue of his employment as a Licensed Vocational Nurse (LVN) for Respondent California Department of Corrections & Rehabilitation - Salinas Valley State Prison (Respondent CDCR), Respondent was a state safety member of CalPERS.

As part of CalPERS' review of Respondent's medical condition, Perry A. Maloff M.D., a board-certified Psychiatrist, and Robert Allen Moore, M.D., a board-certified Neurologist, performed Independent Medical Examinations (IME). Both doctors interviewed Respondent, reviewed his work history and job descriptions, obtained histories of his past and present complaints, and reviewed his medical records. Both doctors opined that Respondent is not substantially incapacitated from performing his usual and customary job duties as a LVN.

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 as an LVN for Respondent CDCR.

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 November 16, 2017. Respondent represented himself at the hearing. Respondent CDCR 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.

Respondent claims that his disability stems from a September 15, 2012, incident during which he struck his head on the door frame of an ambulance while loading a gurney into the ambulance. Respondent continued working as a LVN over the next approximately three years, through December 2015.

At the hearing, Dr. Maloff testified in a manner consistent with his examination of Respondent and his IME report. Dr. Maloff conducted a mental status examination of Respondent, from which Dr. Maloff found Respondent to be alert and oriented. During the mental status examination, Respondent was more verbally fluent when describing events prior to his injury, but was less focused and unable to describe his history

following his injury. Dr. Maloff found that Respondent's difficulties in describing his post-injury history to be exaggerated.

The first indication that Respondent magnified his complaints, according to Dr. Maloff, came from a review of Respondent's VA records, and Respondent's reporting on those records. Respondent was given a 70 percent service-connected disability rating for rheumatoid arthritis, sinusitis, migraine headaches, and flat feet. Respondent, though, was unable to report any history of treatment for those conditions, and could not explain how they resulted from his service in the Navy.

Dr. Maloff also stated that Respondent's claimed progression of his symptoms following the 2012 injury showed symptom magnification. During his examination with Dr. Maloff, Respondent claimed that his symptoms had gotten worse in the years since his injury, which Dr. Maloff explained was contrary to how traumatic brain injury symptoms manifest. Dr. Maloff explained that if Respondent had suffered traumatic brain injury, Respondent would have suffered his most serious difficulties and symptoms in the immediate aftermath of the event, and not how Respondent explained his symptoms.

The medical records reviewed by Dr. Maloff also indicated that Respondent was exaggerating his symptoms. A Test of Memory Malingering (TOMM) was administered on Respondent in 2016. The TOMM test is specifically designed to discern malingering, or exaggerated responses. Dr. Maloff's review of Respondent's TOMM results indicated that Respondent was purposefully malingering.

Dr. Maloff's medical opinion is that Respondent does not suffer from any psychiatric disorder that was caused, aggravated, or accelerated by his employment. Dr. Maloff is also of the opinion that Respondent feigned the alleged cognitive disorder due to traumatic brain injury. Therefore, Dr. Maloff concluded that Respondent is able to perform his job duties as a LVN, and is not substantially incapacitated.

Dr. Moore also testified in a manner consistent with his examination of Respondent and his IME report. Dr. Moore stated that, at most, Respondent suffered a mild level of traumatic brain injury in 2012 when he bumped his head on the ambulance door frame. While there is no objective test to determine whether a patient has experienced symptoms, Dr. Moore explained that Respondent's CT scan from October 5, 2012, less than a month after the injury, was normal.

From a neurological standpoint, Dr. Moore opined that there are no specific job duties that Respondent is unable to perform. Dr. Moore noted that Respondent performed his usual and customary duties for more than three years following his 2012 injury. Hence, Dr. Moore concluded that Respondent is not substantially incapacitated.

Respondent testified on his own behalf that he could not perform his job duties as an LVN due to anxiety attacks. Respondent explained that his anxiety attacks are unpredictable, and that their unpredictability precludes him from performing his job duties. Respondent did not introduce any documents or medical records to support his appeal.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The medical opinions of Drs. Maloff and Moore were unrefuted. The ALJ found that the preponderance of the evidence established that Respondent is not substantially incapacitated from performing his usual and customary job duties as a LVN.

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

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

February 14, 2018



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