ATTACHMENT B

STAFF’S ARGUMENT
STAFF’S ARGUMENT TO ADOPT TO ADOPT THE PROPOSED DECISION

Jameka M. Johnson (Respondent) applied for disability retirement based on orthopedic (lumbar spine, left shoulder) conditions. By virtue of her employment as a Food Service Technician I for Respondent Department of State Hospitals - Patton (Respondent DSH), Respondent was a state miscellaneous member of CalPERS.

Respondent filed an application for disability retirement on March 9, 2017.

As part of CalPERS’ review of Respondent’s medical condition, Robert J. Kolesnik, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Kolesnik interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Kolesnik also reviewed an investigative report and DVD prepared by a CalPERS investigator. Dr. Kolesnik opined that there were no duties of a Food Service Technician I that Respondent would be unable to perform.

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, the investigative report, and the IME report, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of her position.

Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on June 20, 2018. Respondent represented herself at the hearing. Respondent DSH did not appear at the hearing.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her 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, an investigator for CalPERS, testified that he performed an investigation of Respondent that included surveillance and monitoring her social media accounts. The witness testified about his observations of Respondent and that he prepared a report and DVD of videos Respondent published to social media. The DVD, which was entered into evidence, contains twenty different videos posted by Respondent showing her performing various activities at a gym, including jumping rope, lifting weights, using a lateral pull-down machine and riding a stationary bicycle.
At the hearing, Dr. Kolesnik testified in a manner consistent with his examination of Respondent and the IME report. Dr. Kolesnik’s medical opinion is Respondent is not substantially incapacitated for the performance of her duties. Respondent’s examination revealed no atrophy about the left shoulder, and review of the surveillance videos show Respondent working out at the gym, with stressful use of the left shoulder and the left upper extremity, in no apparent pain. Additionally, Dr. Kolesnik noted the MRI findings of the left shoulder demonstrate only mild subacromial bursitis and mild supraspinatus tendinitis. In regard to the lumbar spine, there is no atrophy in the lower extremities and there are no focal neurologic deficits. Therefore, Respondent is not substantially incapacitated.

Respondent testified on her own behalf that she was injured at work while lifting a heavy ice chest, that she received physical therapy thereafter and had great improvement, and that she wanted to return to her job but Respondent DSH was unable to accommodate her because of a “permanent restriction” to not lift more than 20 pounds. Respondent did not call any physicians or other medical professionals to testify. Respondent did not submit medical records from her treating physicians to support her appeal.

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 prove by a preponderance of the evidence that she is substantially incapacitated to perform her usual job duties. The ALJ found Dr. Kolesnik to be credible and forthright and that he provided objective observations to substantiate his conclusions that Respondent did not put forth her best effort during the physical examination, that she provided symptom magnification and exaggeration of her complaints, and that the workout videos contradicted Respondent’s complaints.

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

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

September 26, 2018

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