

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION, AS MODIFIED

Edward G. Kelly (Respondent) was employed by Respondent California State Prison Corcoran, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Officer. By virtue of his employment, Respondent was a state safety member of CalPERS. On or about September 4, 2012, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (low back) condition. Respondent's application was approved by CalPERS and he retired effective April 2013.

In 2018, CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that he would be reevaluated for purposes of determining whether he remains substantially incapacitated and is entitled to continue to receive an industrial disability retirement.

In order to remain eligible for disability retirement, competent medical evidence must demonstrate that the individual remains substantially incapacitated from performing the usual and customary duties of his former position. The injury or condition which is the basis of the claimed disability must be permanent or of an extended duration which is expected to last at least 12 consecutive months or will result in death.

As part of CalPERS' review of Respondent's medical condition, Respondent was sent to Robert K. Henrichsen, M.D., a board-certified Orthopedic Surgeon, for an Independent Medical Examination (IME). Dr. Henrichsen interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed medical records. Dr. Henrichsen also performed a comprehensive IME. Dr. Henrichsen opined that Respondent was not substantially incapacitated from performing the usual and customary duties of a Correctional Officer.

After reviewing all medical documentation and the IME report, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for industrial disability retirement, and should therefore be reinstated to his former position as a Correctional Officer.

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 11, 2019. 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.

A copy of the CDCR duty statement or job description for a Correctional Officer was received into evidence and its contents reviewed and considered by the ALJ. Respondent also testified, describing his duties as a Correctional Officer. The ALJ was aware of the physical requirements that are part of a Correctional Officer's usual and customary duties, making Factual Findings in Paragraphs 7 and 8 of the Proposed Decision on page 3.

The ALJ noted that Dr. Henrichsen has evaluated CalPERS members for purposes of eligibility for disability retirement since 2003. The ALJ found, "Based on his training and experience, Dr. Henrichsen was well qualified to render an expert opinion in this matter."

At the hearing, Dr. Henrichsen testified in a manner consistent with his examination of Respondent and the report prepared after the IME. Dr. Henrichsen noted that Respondent walked with a slightly flexed posture or position. Dr. Henrichsen wrote that he did not find any mechanical reason why Respondent would walk with his back in such a flexed position. Dr. Henrichsen found that Respondent's range of motion (flexion, extension, lateral bending and rotation) in his lumbar spine (low back), were all normal.

In addition to his clinical examination of Respondent, Dr. Henrichsen sought out diagnostic studies to assist in his evaluation of Respondent. The ALJ described these efforts as follows:

Dr. Henrichsen ordered x-rays that showed some mild arthritic changes and possibly a small amount of space-height reduction at L4-L5 and L5-S1. Overall, the x-rays showed some small degenerative disease at L5-S1 but no significant abnormalities that would preclude him from his correctional officer position.

After Dr. Henrichsen completed his evaluation, an MRI was performed on respondent's spine on August 10, 2018. Dr. Henrichsen reviewed the films, which showed disc protrusions at L4-L5 and L5-S1. There was also an annular tear at L5-S1. However, the protrusions were not producing overt stenosis, which is narrowing of the canal surrounding the nerve. There was no nerve root compression in the foramina laterally. There was some facet arthritic wear consistent with his age. Dr. Henrichsen noted that respondent presented with some reduction in his range of motion, but this was inconsistent with the MRI findings. Moreover, the reduction in the range of motion does not rise to the level of substantial impairment. Dr. Henrichsen did not believe that respondent is presently substantially incapacitated for his occupational duties.

Dr. Henrichsen's medical opinion is that Respondent can perform the duties of his position and is therefore no longer substantially incapacitated.

Respondent testified on his own behalf. Respondent testified that he cannot perform the

duties of a Correctional Officer. Respondent did not call any physicians or other medical professionals to testify on his behalf. Respondent submitted medical records from his treating physicians to support his appeal and argued that Dr. Henrichsen's opinion should not be given much weight by the ALJ because Dr. Henrichsen did not review all of Respondent's relevant medical records.

The ALJ considered Respondent's argument and made the following Legal Conclusion:

While Dr. Henrichsen did not review all of respondent's past medical records, this does not mean that Dr. Henrichsen's conclusions are flawed. Dr. Henrichsen was tasked with making a determination of respondent's present-day condition. The medical records of course provide information on the origin of the condition and past treatments, but ultimately Dr. Henrichsen's conclusions were based on an up-to-date physical examination, review of symptoms, and imaging studies. Put another way, regardless of what respondent's condition might have been in the past, it is his present condition that is most relevant to the determination of whether respondent is presently disabled.

The ALJ found that the only competent medical evidence was presented by Dr. Henrichsen's IME report and by his testimony at the hearing. The ALJ concluded that the evidence established Respondent is no longer substantially incapacitated from performing his duties as a Correctional Officer for Respondent CDCR:

Dr. Henrichsen found no physical exam abnormalities that correlate with the level of symptomatology reported by respondent. The most recent MRI, taken on August 10, 2018, showed some mild arthritic wear and disc protrusion. However, there was no evidence of stenosis or nerve root compression. ...the objective findings did not indicate that respondent was incapable of substantially performing the duties of a Correctional Officer.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent's appeal.

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 "respondent is still incapacitated" in the second paragraph on page 8 be changed to "respondent is no longer substantially incapacitated."

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

September 18, 2019

RORY J. COFFEY
Senior Attorney