

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Daisy S. Chisholm (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated July 5, 2019. For reasons discussed below, staff argues that the Board deny the Petition and uphold its decision.

Respondent filed an application for industrial disability retirement based on orthopedic (neck and right shoulder) conditions on September 14, 2016.

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 opined that Respondent is not substantially incapacitated from performing her job duties as a Psychiatric Technician.

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 duration which is expected to last at least 12 consecutive months or will result in death.

After reviewing all the medical documentation 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 10, 2019. Respondent represented herself at the hearing. Respondent DSH - Stockton 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, answered Respondent's questions and clarified how to obtain further information on the process.

At the hearing, Dr. Kolesnik testified in a manner consistent with his examination of Respondent and the IME report. Dr. Kolesnik completed a thorough physical examination of Respondent and testified that Respondent complained of pain every time he touched her. He also testified that she seemed to be exaggerating symptoms. Dr. Kolesnik did not note any atrophy which would normally be expected if someone

was in such a degree of pain that they were not using a particular body part (i.e., shoulder, arms, etc.) Specifically, he noted Respondent's biceps and triceps were intact with no atrophy, defects or deformities. Similarly, Respondent's elbows had normal alignment and no angular or rotatory deformities. Respondent reported diffuse pain in her right shoulder when moving her right elbow. No atrophy, deformities or defects were observed in Respondent's forearms, wrists or hands, although Respondent complained of pain in her right wrist with all motion. Respondent had full range of motion of all fingers and both thumbs. On the grip-strength test, Respondent put forth poor effort on the right, and Dr. Kolesnik could not even obtain a grip strength. The left was normal. Ultimately, Dr. Kolesnik opined that there was no job duty of a Psychiatric Technician that Respondent was physically incapable of performing.

At the hearing, Respondent testified that she sustained an injury at work in July 2014, when she fell after she was hit from behind by a staff member who was pushing a cart. Respondent was treated for her injury and returned to work with no restrictions. Respondent claims she has "limitations," that she "should not" lift anything over her head, should not sit and should not push or lift anything over five pounds. Respondent also submitted medical reports, a declaration from her treating physician and a functional capacity evaluation which were admitted as administrative hearsay. Respondent did not call any physicians or other medical professionals to testify.

Respondent also testified that she gave "two weeks' notice" to her employer to attend jury duty. Respondent claimed that her employer told her that if she was not back in time from jury duty, she would be fired. Respondent testified that she began experiencing chest pain, back pain and all of her "injuries" flared up. Respondent was taken to the hospital by an ambulance and never returned to work after the incident.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that the only competent medical opinion provided at the hearing was the testimony and reports from Dr. Kolesnik, an expert Orthopedic Surgeon with extensive experience in conducting orthopedic examinations. Dr. Kolesnik conducted a thorough examination of Respondent. The ALJ also found that other than her subjective complaints of pain, there was no corresponding objective evidence of any limitations. Specifically, given the level of pain Respondent expressed, atrophy would have been expected - but was completely nonexistent. Further, Respondent exaggerated her complaints of pain. Her range of motion, hands and wrists were noted as normal, yet she exhibited no grip strength whatsoever in her right hand. Finally, even assuming Respondent's complaints of pain were not exaggerated, the ALJ concluded pain alone is not a sufficient basis upon which to grant a disability retirement.

The ALJ concluded that the competent medical evidence established that Respondent is not physically incapable of performing the duties of a Psychiatric Technician, and Respondent is not entitled to industrial disability retirement.

In the letter seeking a reconsideration of the Board's adoption of the Proposed Decision in her case, Respondent states that her original written argument against the Proposed Decision was not included in the August 21, 2019 Board Agenda Item. She states that the agenda item was delivered to the San Bernardino Regional Office (SBRO) on August 6, 2019, one day before the cut-off date for filing argument with the Board Unit. She believes that if the Board had had a chance to see her original Respondent's Argument, that it would not have adopted the Proposed Decision upholding the denial of her disability retirement application. She enclosed a copy of this original written argument with her Petition for Reconsideration.

It is true that her original Argument was not included in the August 21, 2019 agenda item. Because she did not follow the written instructions given to her as to where and how to file her Respondent's Argument, it was not received by either the Board Unit or the Legal Office in time to include it in the agenda item. Nor did either of these units receive a copy of this Argument in time to bring it to the Board during the August meeting. However, as discussed below, even had the Board been able to review her arguments in August, the outcome would not have changed.

In her Petition for Reconsideration, Respondent makes the same three arguments that she would have made at the original consideration of her case by the Board: (1) Dr. Kolesnik's testimony should be disregarded because he "was placed on suspension for causing Autism by vaccinations containing mercury," and he only examined Respondent once; (2) medical reports submitted by Respondent at the hearing show she is unable to return to work and (3) Respondent was treated unfairly by the ALJ. Notably, in the Petition for Reconsideration, Respondent admits that there ". . . were no medical diagnoses given that had determined that the Respondent was substantially incapacitated from the performance of the usual duties of her position." Respondent further correctly notes that "[c]omplete and competent medical evidence was not presented to establish that [Respondent] was substantially incapacitated from performing the usual and customary duties as a psychiatric technician." As explained below, Respondent's remaining arguments should be rejected, and the Petition for Reconsideration should be denied.

First, there was no evidence presented at the hearing, or as part of the Petition for Reconsideration, to support Respondent's allegation that Dr. Kolesnik was previously suspended for causing autism. However, even if Respondent's accusation is true, it has no bearing on his ability to credibly testify as an expert in Orthopedic Surgery in this case. At the hearing, Dr. Kolesnik testified that he reached his opinion based on his physical examination of Respondent and a review of Respondent's medical history with her treating physicians. Based on the objective medical evidence, Dr. Kolesnik opined that Respondent was not substantially incapacitated from performing her job duties.

Second, the Petition for Reconsideration points to excerpts from various medical reports and references a declaration submitted by her treating physician, Max Matos, M.D. All of the medical reports and the declaration of Dr. Matos were presented at the hearing and have already been considered by the ALJ in the Proposed Decision. The medical

reports and declaration do not constitute new evidence that would alter the analysis of the ALJ.

Finally, Respondent suggests she was treated unfairly by the ALJ because she was not allowed to review her medical records. As stated in the Proposed Decision, the medical reports and declaration of Dr. Matos were admitted into evidence and have been considered by the ALJ in the Proposed Decision. The Petition for Reconsideration fails to establish that the outcome in this case would have differed if she has been treated differently by the ALJ.

The Proposed Decision that was adopted by the Board at the August 21, 2019, meeting was well reasoned and based on the credible evidence presented at hearing. Therefore, for all the above reasons, staff argues that the Petition for Reconsideration made by Respondent Daisy Chisholm be denied by the Board.

September 18, 2019

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