

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Julie Hawpe (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated May 24, 2019. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Julie Hawpe (Respondent) applied for disability retirement based on internal (MRSA¹, hearing, sinusitis, vertigo, tinnitus, and headache) conditions. By virtue of her employment as an Associate Governmental Program Analyst for Respondent Ironwood State Prison, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state industrial² member of CalPERS.

Respondent filed an application for service pending disability retirement on March 17, 2017, and has been receiving service retirement benefits since that time.

As part of CalPERS' review of Respondent's medical condition, Pierre F. Giammanco, M.D., a board-certified Otolaryngologist (ENT), performed an Independent Medical Examination (IME). Dr. Giammanco interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Giammanco opined that Respondent is able to perform all of the duties of her job. Therefore, Dr. Giammanco concluded that Respondent is not substantially incapacitated.

After reviewing all medical documentation and the IME reports, 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 May 6, 2019. Respondent represented herself at hearing. Respondent CDCR did not appear at the hearing.

At the hearing, Dr. Giammanco testified in a manner consistent with his examination of Respondent and the IME reports. The initial IME report summarized the complaints voiced by Respondent for the examination, as Respondent claimed that she was positive for 37 of 40 symptoms in the Systems Review Questionnaire.

¹ MRSA is the acronym for Methicillin-Resistant Staphylococcus Aureus, an antibiotic resistant bacterium.

² Under Government Code section 20048, state industrial members who receive a disability retirement may be entitled to an industrial disability retirement if the alleged disability directly results from a violent act perpetrated by an inmate of a state prison while the member was performing his or her official duties.

On physical examination, though, Dr. Giammanco found Respondent to be relatively normal and asymptomatic. Respondent's head examination was normal, although there was some tenderness at the location where Respondent commonly felt her headaches. Respondent did not exhibit abnormalities when Dr. Giammanco tested her for vertigo and balance issues. Respondent's ear canals were clear. The tuning fork tests, which test for hearing, were both normal. There was no evidence of MRSA on Dr. Giammanco's physical examination.

Dr. Giammanco stated that there were no records diagnosing Respondent with a MRSA infection, but only MRSA colonization. Dr. Giammanco explained that MRSA colonization means that Respondent is a carrier of MRSA, but she need not be treated for MRSA as a carrier.

Dr. Giammanco's first IME report initially found that Respondent was substantially incapacitated from performing her usual and customary duties. However, when asked to detail which job duties Respondent was unable to perform due to her condition, Dr. Giammanco changed his opinion. Dr. Giammanco then stated that Respondent could perform all of the duties of her job, although she may be slower than before or have difficulty multi-tasking. Therefore, Dr. Giammanco concluded that Respondent is not substantially incapacitated.

Respondent testified on her own behalf that she believes that she is substantially incapacitated. Respondent described her job duties, and then testified as to why she thinks she is unable to perform those duties. Respondent also discussed the treatments that doctors have prescribed for her, and that the medications she takes have caused additional issues.

Respondent did not call any physicians or other medical professionals to testify. However, Respondent did submit medical records from her treating physicians to support her appeal. Dr. Giammanco reviewed the medical records during the hearing, and he concluded that the additional records did not change his opinion. Instead, the documentation confirmed Dr. Giammanco's opinion that Respondent is not substantially incapacitated.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. Although the ALJ felt that Respondent was heartfelt and sincere in her testimony, the ALJ determined that Respondent exaggerated her condition. The ALJ also determined that Dr. Giammanco was a poor witness. Although Dr. Giammanco possessed extensive ENT knowledge, the ALJ found his opinions to be difficult to follow.

Despite Dr. Giammanco's shortcomings, Respondent had the burden to prove that she is substantially incapacitated. To meet her burden, Respondent needed to support her appeal with competent medical opinion showing that she is substantially incapacitated from performing her usual and customary duties. Since Respondent did not present competent medical opinion in support of her appeal, she did not meet her burden. The ALJ thus concluded that Respondent is not eligible for disability retirement.

Instead of making an argument in support of her Petition, Respondent provides additional records and documentary evidence. Respondent provided no explanation as to how the attached medical records support her purported substantial incapacity, or how they could change the ALJ's reasoning. Due to the fact that the Administrative Law Judge issued a Protective Order Sealing Confidential Records in this case, applicable to all of Respondent's medical records, the medical records submitted as part of her Petition for Reconsideration have not been made a part of the public agenda item and will only be provided to the members of the Board of Administration and their independent counsel.

Respondent also attached a copy Dr. Giammanco's curriculum vitae with her Petition, and she asserts that Dr. Giammanco is not an ENT. However, Dr. Giammanco is a board-certified Otolaryngologist, or Ear, Nose, and Throat (ENT) doctor.

No new evidence has been presented by Respondent that would alter the analysis of 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.

September 18, 2019

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