

ATTACHMENT B

STAFF'S ARGUMENT

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

Jose L. Rivera (Respondent) applied for industrial disability retirement based on an orthopedic (back) condition. By virtue of his employment as a Correctional Officer for Respondent California Institution for Women, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

Respondent filed an application for service pending industrial disability retirement on August 24, 2018 and has been receiving benefits since that time.

As part of CalPERS' review of Respondent's medical condition, James M. Fait, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Fait interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Fait opined that Respondent is not substantially incapacitated from performing his usual job duties as a Correctional Officer.

Subsequent to the IME, CalPERS provided Dr. Fait with updated medical records for consideration. Dr. Fait reviewed the additional medical records and issued a Supplemental IME report. Dr. Fait's opinion did not change; Dr. Fait opined that Respondent is not substantially incapacitated from performing his usual job duties as a Correctional Officer.

In order to be eligible for industrial 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 medical documentation and the IME reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of his position.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. A hearing was held on September 11, 2019. Neither Respondent nor Respondent CDCR appeared at the hearing. CalPERS established that both Respondent and Respondent CDCR were properly served with notice of the hearing, and their defaults were taken under Government Code section 11520

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.

At the hearing, Dr. Fait testified in a manner consistent with his examination of Respondent and the IME report. Dr. Fait's medical opinion is that Respondent does not suffer from a medical condition that prevents him from performing his usual duties as a Correctional Officer. Therefore, Respondent is not substantially incapacitated.

Respondent failed to appear at the hearing. Consequently, Respondent failed to offer any evidence to support his claim, or in the alternative, to challenge Dr. Fait's medical 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. The ALJ found that Respondent did not meet his burden of establishing his substantial incapacity. The ALJ found that Respondent did not present competent medical opinion to support his application for industrial disability retirement. In addition, the ALJ found that Respondent did not present any evidence to refute Dr. Fait's opinion. Hence, the ALJ concluded that Respondent is not eligible for industrial disability retirement.

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 the Proposed Decision be modified by inserting the word, "industrial" before the words, "disability retirement" on page 2, in the "Issue" paragraph, on page 3 in paragraph 3, on page 4 in paragraph 4, on page 14 in paragraphs 16 and 17, and on page 15 in the "Order" paragraph.

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

November 20, 2019

JOHN SHIPLEY
Senior Attorney