

ATTACHMENT B

STAFF'S ARGUMENT

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

Terri L. Ray (Respondent) applied for disability retirement based on rheumatological (fibromyalgia) and psychological conditions. By virtue of her employment as a Motor Vehicle Field Representative for Respondent Department of Motor Vehicles (DMV), Respondent was a state miscellaneous member of CalPERS.

Respondent filed an application for service pending disability retirement on November 15, 2016, and has been receiving benefits since that time.

As part of CalPERS' review of Respondent's medical condition, Scott T. Anderson, M.D., a board-certified rheumatologist, performed an Independent Medical Examination (IME). Dr. Anderson interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, reviewed her medical records and performed a physical examination. Dr. Anderson opined that Respondent can perform the essential duties of her job and that fibromyalgia does not preclude her from performing the office work outlined in her job description.

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 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 September 17, 2019. Respondent represented herself at the hearing. DMV did not appear at the hearing.

At the hearing, the ALJ received documentary evidence demonstrating that CalPERS had provided both Respondent and DMV with proper notice of the date, time and place of the hearing. The ALJ found that the matter could proceed as a default against DMV, pursuant to Government Code section 11520 (a).

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.

Copies of written job descriptions for the position of Motor Vehicle Field Representative for DMV were received into evidence and considered by the ALJ.

At the hearing, Dr. Anderson testified in a manner consistent with his examination of Respondent and the IME report. Dr. Anderson's medical opinion is that Respondent exaggerated her symptoms, she did not fully cooperate with the physical examination, and her subjective complaints were not consistent with the objective findings at the examination. Dr. Anderson noted that Respondent filled out a medical history survey at the IME and reported that she experiences 47 of the 60 symptoms on the survey and that she experiences pain between seven and nine, out of ten, all of the time and frequent episodes of ten out of ten or "excruciating pain." However, Dr. Anderson noted no inflammation, no swollen lymph nodes, no tenderness and no muscle atrophy during his physical examination. In addition, he noted that she put no effort on the Jamar dynamometer grip strength test and her level of weakness was not consistent with someone who could function physically including driving herself to the examination, which Respondent did. Further, Dr. Anderson stated that fibromyalgia "does not cause excruciating pain" and noted Respondent's reports regarding discomfort and impairment were "out of proportion to what [he] would expect from fibromyalgia," or what he observed on physical examination. Dr. Anderson also testified that fibromyalgia does not preclude Respondent from performing a sedentary job. Therefore, Dr. Anderson concluded that Respondent is not substantially incapacitated.

CalPERS also presented a staff witness who testified to CalPERS' process for reviewing conditions alleged by members on their disability retirement applications. Staff testified that CalPERS requested from Respondent medical reports concerning the conditions alleged on her disability retirement application on November 28, 2016 and December 19, 2016. Staff further testified that CalPERS requested from Respondent a completed Physician's Report on Disability form and medical reports concerning her alleged psychological condition on October 19, 2017, April 16, 2018 and July 18, 2018. CalPERS did not receive a completed Physician's Report on Disability form regarding Respondent's alleged psychological condition nor did CalPERS receive medical reports that established that Respondent was continuously disabled as a result of a psychological condition from the date she discontinued her employment with DMV. Therefore, Respondent's alleged psychological condition was not considered and was not at issue at the hearing.

Respondent did not testify on her own behalf. Nor did she submit any evidence 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 as follows:

Based on the evidence presented, [R]espondent failed to offer sufficient competent medical evidence to establish that at the time she applied for disability retirement, she was substantially and permanently incapacitated from performing the usual

duties of a Motor Vehicle Field Representative due to her rheumatological (fibromyalgia) condition. Conversely, Dr. Anderson's testimony and his IME report's findings established [R]espondent was not substantially incapacitated from performing her usual job duties. [R]espondent failed to challenge Dr. Anderson's findings and opinions.

The ALJ concluded that Respondent is not eligible for 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 on page 8, paragraph 2, the definition for Government Code section 20026 be corrected from ". . . mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion" to ". . . mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion."

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

November 20, 2019

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Attorney