

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Rebecca A. Vega (Respondent) was employed by Respondent California Substance Abuse Treatment Facility & State Prison, Corcoran, California Department of Corrections and Rehabilitation (Respondent CDCR) as a Correctional Officer. By virtue of her employment, Respondent was a state safety member of CalPERS. On or about March 14, 2014, Respondent submitted an application for industrial disability retirement on the basis of an orthopedic (right arm and right elbow) condition. Respondent's application was approved by CalPERS and she retired effective January 10, 2014.

In order to receive disability retirement benefits, competent medical evidence must demonstrate that an individual is substantially incapacitated from performing the usual and customary duties of her 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.

CalPERS re-evaluates members who receive disability retirement benefits and are below the minimum age for service retirement to confirm that they remain substantially incapacitated, and thus eligible to continue to receive disability retirement benefits. In 2017, CalPERS notified Respondent that she would be re-evaluated to confirm that she remained substantially incapacitated from the performance of her usual and customary duties to due to her orthopedic (right arm and right elbow) condition.

As part of CalPERS' review of Respondent's medical condition, Respondent was sent for an Independent Medical Examination (IME) with Ernest B. Miller, M.D., a board-certified Orthopedic Surgeon. Dr. Miller interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed medical records. Dr. Miller also performed a comprehensive IME. Dr. Miller opined that Respondent was no longer substantially incapacitated due to the condition of her right arm and elbow.

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

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 August 5, 2019. Respondent represented herself at the hearing. Respondent CDCR did not appear at the hearing and the matter proceeded as a default under Government Code section 11520, as to that party only.

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.

At the hearing, Dr. Miller testified in a manner consistent with his examination of Respondent and the report prepared after the IME. Dr. Miller explained that Respondent was 43 years old when she was originally evaluated for disability retirement benefits following a work-related incident on October 7, 2012, where Respondent was using a key to open a gate and experienced radiating burning pain and swelling over her right elbow. Respondent was diagnosed as having a right wrist strain and right forearm strain. An MRI taken after the incident suggested Respondent experienced a common extensor tear and mild tendonitis. Records that Dr. Miller reviewed also revealed a diagnosis of right lateral epicondylitis, or tennis elbow. Respondent underwent surgery that she claimed did not resolve the pain but instead made it worse. Respondent takes four Norco per day for pain relief, as prescribed by her physician.

On physical examination in October 2017, Dr. Miller found that Respondent had normal range of motion and normal muscle strength. Dr. Miller found Respondent's grip strength in her right hand to be one-third of normal, but did not give the measurement significant weight because it is subjective. There was no evidence of muscle atrophy. On the basis of these findings, Dr. Miller diagnosed Respondent as having a narcotic addiction to hydrocodone, and having a tennis elbow diagnosis not noted in contemporary medical records. Though Dr. Miller testified that Respondent could not be a professional bowler, ping pong or tennis player, he found that she was not substantially incapacitated from performing her usual and customary duties as a Correctional Officer due to the condition of her right arm or elbow.

Respondent testified on her own behalf. Respondent testified that surgery did not improve her condition and that going off work also did not alleviate her problems. Respondent testified she has difficulty doing chores, yardwork and exercising, and that her ex-husband has had to move back to her community to assist Respondent in caring for their daughter, who has special needs. Respondent testified that she disagrees with Dr. Miller's determination, and that she does not believe she could perform the duties required of a Correctional Officer, including breaking up inmate fights or taking down inmates.

Edward Vega, Respondent's ex-husband, testified at hearing that he moved back to Respondent's community to help care for their daughter, and that he helps Respondent with any lifting, including moving items, doing chores, and yardwork. Mr. Vega also testified that Respondent's injury has made her mentally tired due to the physical difficulties she faces.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent's appeal. The ALJ found that the only competent medical evidence offered at hearing was the report and testimony of Dr. Miller, who established that Respondent is no longer substantially incapacitated from performing her duties as a Correctional Officer for Respondent CDCR. The ALJ found Dr. Miller to be "comprehensive and persuasive." Though Respondent credibly testified that she continues to experience pain, she did not submit competent medical evidence to contravene CalPERS' evidence.

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

November 20, 2019

KEVIN KREUTZ
Senior Attorney