

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

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

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.

As part of CalPERS' review of Respondent's medical condition, John D. Kaufman, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Kaufman interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Kaufman opined that Respondent is not substantially incapacitated due to the condition of his low back.

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 (OAH). A hearing was held on July 10, 2019. Respondent represented himself at the hearing. Respondent CDCR did not appear at the hearing, and a default was taken against that party only, pursuant to 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. Kaufman testified in a manner consistent with his examination of Respondent and with his IME report. Dr. Kaufman's medical opinion is that Respondent injured his low back during an altercation with an inmate on or about June 30, 2017. Respondent experienced low back pain approximately 15 minutes after the incident but continued to work, even though the pain increased over time. A few days after the incident, Respondent received treatment but did not receive x-rays. Respondent was

taken off work and has not worked since the altercation with the inmate. Since that time, Respondent has received treatment including medication and massage therapy. Respondent was referred for physical therapy, but declined. A Magnetic Resonance Imaging scan (MRI) of Respondent's lumbar spine after the incident showed mild degenerative changes, minimal canal stenosis, and no protrusion, extrusion or focal neural impingement.

Dr. Kaufman performed a physical examination of Respondent on or about March 11, 2018. On examination, Respondent presented with a light spasm in the muscles around the lumbar spine, no lower extremity atrophy, and good muscle strength in both lower extremities. In his report, Dr. Kaufman noted Respondent had normal range of motion and no sensory deficits in lower extremities. Dr. Kaufman stated that Respondent had no objecting findings of disability on any of his examinations from his treating doctors, which Dr. Kaufman felt corroborated his findings on physical examination.

At the hearing, Dr. Kaufman testified that, to a reasonable degree of medical probability, Respondent had a lumbar strain resulting from the inmate altercation. Though one of Respondent's treating doctors diagnosed Respondent as having lumbar radiculopathy, Dr. Kaufman opined that this diagnosis was not supported by objective evidence, as such a diagnosis requires presentation of (1) pattern-specific numbness in the lower back¹, (2) a change in reflexes, (3) muscular atrophy and (4) an MRI that shows evidence of a pinched nerve. Dr. Kaufman testified that Respondent had no evidence of any single indicator, and that all are required to be present to make a lumbar radiculopathy diagnosis.

Overall, Dr. Kaufman testified that the only abnormal, objective findings for Respondent were some decreased range of motion and a slight, age-related muscle spasm, both of which are consistent with a lumbar sprain or strain. Because such a condition generally resolves within a few months, and based on the lack of objective evidence sufficient to demonstrate a more serious condition, Dr. Kaufman found that Respondent was not substantially incapacitated.²

Respondent testified on his own behalf that he experiences significant pain since he stopped working in August 2018. His low back pain has not changed since then, and he testified to being in great pain at the hearing. Respondent presented written medical records at hearing from workers' compensation physicians, which were admitted as administrative hearsay. Respondent did not call any physicians or other medical professionals to testify.

After considering all the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent failed to offer

¹ For example, numbness in the toe as opposed to the whole foot.

² Dr. Kaufman authored a supplemental report after reviewing an MRI report from one of Respondent's treating physicians. Because the MRI report showed no evidence of a pinched nerve, Dr. Kaufman's opinion did not change.

competent medical evidence to establish that he was substantially incapacitated because of the condition of his low back. The ALJ found Dr. Kaufman to be “thorough and evenhanded,” and that his testimony at the hearing applied the appropriate substantial incapacity standard to this CalPERS proceeding, in contrast to the hearsay opinions offered by the workers’ compensation physicians in the records submitted by Respondent. Though the ALJ commented that he found Respondent to be credible in his complaints of serious low back pain, Respondent ultimately did not meet his burden of proof because he did not present competent medical evidence applying the CalPERS’ substantial incapacity standard. For these reasons, the ALJ concluded that Respondent is not eligible for industrial disability retirement.

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

November 20, 2019

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