

ATTACHMENT B

STAFF'S ARGUMENT

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

Sarah A. Zuniga (Respondent) was employed by Respondent Correctional Training Facility, California Department of Corrections & Rehabilitation (CDCR) as an Office Technician (OT). By virtue of her employment, Respondent was a state industrial member of CalPERS. On or about November 19, 2015, Respondent submitted an application for disability retirement on the basis of orthopedic (bilateral upper extremities and low back) conditions. Respondent's application was approved by CalPERS and she retired effective March 1, 2014.

In 2018, CalPERS staff notified Respondent that CalPERS conducts reexamination of persons on disability retirement, and that she would be reevaluated for purposes of determining whether she remains substantially incapacitated and is entitled to continue to receive a disability retirement.

In order to remain eligible for disability retirement, competent medical evidence must demonstrate that the individual remains 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.

As part of CalPERS' review of Respondent's medical condition, Respondent was sent for an Independent Medical Examination (IME) to Harry A. Khasigian, M.D. Dr. Khasigian interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Khasigian also performed a comprehensive physical examination and ordered and reviewed x-rays of her cervical and lumbar spine. Dr. Khasigian opined that Respondent is able to perform all of her job duties based on the physical examination and could lift and carry 50 pounds because of the absence of neurological dysfunction. He further opined that Respondent is not substantially incapacitated and that there is no basis of incapacity.

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

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 October 30, 2019. Respondent represented herself at the hearing. Respondent CDCR did not appear at the hearing.

At the hearing, the ALJ received documentary evidence demonstrating that CalPERS had provided both Respondent and CDCR with proper notice of the date, time and

place of the hearing. The ALJ found that the matter could proceed as a default against CDCR, 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 OT for CDCR were received into evidence and considered by the ALJ.

At the hearing, Dr. Khasigian testified in a manner consistent with his examination of Respondent and the three reports he prepared after the IME. Dr. Khasigian opined that Respondent demonstrated significant Waddell's findings, her presentation at the IME was inconsistent, she did not have dermatomal abnormalities or evidence of radiculopathy, and she had no clinical findings on her upper extremities. Dr. Khasigian further testified that he reviewed the additional medical reports submitted to him following his examination of Respondent and reviewed the x-rays of Respondent's cervical and lumbar spine that he ordered with a Radiologist, who agreed with Dr. Khasigian's findings. Dr. Khasigian's medical opinion is that Respondent can perform the duties of her position, as described by the written job descriptions and by Respondent's description of her job, and is therefore no longer substantially incapacitated.

Respondent testified on her own behalf. Respondent testified that her job duties as an OT for CDCR were different than the duties listed on her written job descriptions and that it would not be beneficial for her and CDCR if she returned back to work. Respondent also testified to the history of her orthopedic conditions, the medical treatment she receives, and her symptoms and limitations. At the hearing, Respondent testified that she did not disagree with the results of Dr. Khasigian's examination and reports but that she did not believe it was fair for him to evaluate her ability to perform her job based on a 45-minute evaluation.

Respondent did not call any physicians or other medical professionals to testify. Respondent submitted medical records from her treating physicians and medical professionals, which were admitted into evidence as administrative hearsay, and the Retiree Questionnaire for CalPERS Disability Re-evaluation form she completed to support her appeal.

The ALJ found that the only competent medical evidence presented was by Dr. Khasigian and it established that Respondent is no longer substantially incapacitated from performing her duties as an OT for CDCR. The ALJ found as follows:

Dr. Khasigian persuasively testified that there is no objective medical evidence that [R]espondent is unable to perform the duties of an OT,

including the duties described by [R]espondent for her position in the Property Unit at the Training Facility. Respondent had carpal tunnel surgeries that successfully treated her bilateral upper extremity condition. While her lower back has degenerative changes, the evidence established that her low back condition does not prevent her from performing her job duties.

The ALJ found that Respondent failed to offer sufficient competent medical evidence to rebut CalPERS showing that she is no longer substantially incapacitated from performing her usual duties on the basis of orthopedic conditions.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ denied Respondent's appeal and granted CalPERS' request to reinstate Respondent from disability retirement. The ALJ found that CalPERS established that Respondent is no longer substantially incapacitated for the performance of her usual duties as an OT for CDCR.

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 16, paragraph 3, 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." Staff also recommends that on page 3, paragraph 4, the date "April 8, 2018" be corrected to "April 9, 2018." Furthermore, staff recommends that on page 3, paragraph 3, line 2, Respondent's effective retirement date be corrected from "effective on the first day of the month CalPERS received her application" to "effective the day following her last day on pay."

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

December 18, 2019

Helen L. Louie
Attorney