

ATTACHMENT B

STAFF'S ARGUMENT

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

Travis A. Busch (Respondent) applied for industrial disability retirement based on cardiovascular (hypertension, heart disease and atrial fibrillation) and psychological (stress) conditions. By virtue of his employment as a Correctional Sergeant for Respondent Sierra Conservation Center, California Department of Corrections and Rehabilitation (CDCR), Respondent was a state safety member of CalPERS.

Respondent originally filed an application for industrial disability retirement on December 15, 2016 and on that date a CalPERS representative informed Respondent that he needed to submit required documents within 21 days to avoid his application being cancelled. Prior to the filing of the original application, CalPERS sent Respondent a Guide to Completing Your Disability Retirement Election Application Publication (PUB 35) on December 4, 2015. Respondent met with a representative of a CalPERS Regional Office on December 30, 2015 and was provided disability retirement information and documentation. On July 26, 2016, he again met with a representative of CalPERS for retirement counseling and the representative reviewed Respondent's disability retirement application.

Thereafter, CalPERS notified Respondent on December 23, 2016, that it had not received the required documents to support his application for industrial disability retirement and requested that the documents be submitted within 21 days, or his application would be cancelled. On January 20, 2017, CalPERS cancelled Respondent's application for industrial disability retirement because CalPERS had not received the required documents. On February 15, 2017, CalPERS informed Respondent that his application was cancelled due to missing documents and that he would need to reapply for industrial disability retirement and submit all the required forms as soon as possible.

Respondent submitted his second application for industrial disability retirement on August 15, 2017 at the CalPERS Regional Office in Fresno and Respondent was again told that he would need to submit the required documents. On August 18, 2017, CalPERS again informed Respondent by letter that he would need to submit all required forms within 21 days or his application would be cancelled. Later, on September 15, 2017, CalPERS cancelled Respondent's second application because CalPERS had not received the required documents.

Respondent then filed his third application for industrial disability retirement on March 29, 2018. In the application, Respondent requested a retirement effective date of "expiration of benefits," which was March 1, 2016. Respondent returned to work in April 2019 as a Correctional Sergeant and transferred to the position of Correctional Officer in June 2019. He has been working at CDCR since April 2019.

As part of CalPERS' review of Respondent's medical conditions, Thomas E. Leonard, M.D., a board-certified Cardiologist, performed an Independent Medical Examination (IME). Dr. Leonard interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, reviewed his medical records, and performed a physical examination. Dr. Leonard opined that Respondent had an isolated incident of atrial fibrillation and none documented after that. Dr. Leonard opined that Respondent is not substantially incapacitated for the performance of his duties as a Correctional Sergeant and that there are no specific job duties he is unable to perform because of a cardiac condition.

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 his position as a result of a cardiovascular condition. CalPERS was unable to make a determination on the psychological condition because the medical evidence was insufficient.

CalPERS also requested information from Respondent and CDCR concerning Respondent's request for an earlier effective retirement date. After reviewing all the facts and information, CalPERS determined that Respondent did not meet the criteria under Government Code section 20160 to allow for the correction of a mistake and confirmed that his request for an earlier effective retirement date was denied.

Respondent appealed CalPERS' determinations 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 October 7, 2019. Respondent represented himself 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 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.

Copies of written job descriptions for the positions of Correctional Sergeant and Correctional Officer for CDCR were received into evidence and considered by the ALJ.

At the hearing, Dr. Leonard testified in a manner consistent with his examination of Respondent and the IME report. Dr. Leonard's medical opinion is that Respondent's medical history and Dr. Leonard's physical examination did not reveal an on-going cardiovascular condition. Respondent performed well on the treadmill test, he had a normal echocardiogram, his electrocardiogram showed that he was no longer suffering from atrial fibrillation, and testing showed Respondent's heart was beating a normal rhythm. The heart portion of Dr. Leonard's physical examination of Respondent was "very normal" and consistent with his echocardiogram results. Therefore, Dr. Leonard 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. The witness also testified to the information received by CalPERS concerning Respondent's alleged psychological (stress) condition and why there was insufficient medical evidence for CalPERS to make a determination on a psychological condition. At the hearing, Respondent informed the ALJ that a psychological condition was not preventing him from working. Therefore, a psychological condition was not considered and was not at issue at the hearing.

The CalPERS staff witness also testified to CalPERS' process for reviewing requests for earlier effective retirement dates. The witness testified that CalPERS cancelled Respondent's two prior applications for industrial disability retirement because he did not submit required requested information and that CalPERS informed Respondent of the information required and sent multiple letters to him requesting that information. CalPERS did not receive all required information until his March 29, 2018 application, which was his third application. Furthermore, the witness testified that CalPERS cannot assign a retirement date that is earlier than the member's last day on pay and that a member cannot receive pay/salary and a retirement allowance concurrently.

Respondent testified on his own behalf to the history of his cardiovascular condition, his symptoms, his job as a Correctional Sergeant and that he voluntarily "demoted" himself to a Correctional Officer. Respondent also testified that a doctor medically cleared him back to work and that he worked full duty as a Correctional Sergeant and a Correctional Officer. Respondent did not call any physicians or other medical professionals to testify. Respondent submitted a medical report from his treating physician to support his appeal.

Respondent also testified that his application was delayed because workers' compensation did not provide medical information to CalPERS, that CalPERS lost his application for four months, and that he did submit the required requested information.

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 establish that he was substantially and permanently incapacitated from performing the usual duties of his job as a Correctional Sergeant, at the time he applied for industrial

disability retirement, based on his cardiovascular (hypertension, heart disease, and atrial fibrillation) condition. The ALJ found Dr. Leonard's opinion that Respondent is not substantially incapacitated to be persuasive. The ALJ found that Dr. Leonard's testimony and IME report established that Respondent suffered an episode of atrial fibrillation but there was no indication of on-going heart disease based on the medical reports and Dr. Leonard's physical examination.

The ALJ concluded that Respondent is not eligible for industrial disability retirement. The ALJ further concluded that because Respondent did not establish that he is eligible for industrial disability retirement, there was no need to reach the issue of whether Respondent's effective retirement date should be retroactive to March 1, 2016, as a result of inadvertence, mistake, surprise or excusable neglect correctable by Government Code section 20160.

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 15, 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." Staff also recommends that "industrial" be added before "disability retirement" on page 2, paragraph "a", line 1; page 5, paragraph 4, line 9; page 11, paragraph 18, line 3; page 13, paragraph 23, line 2; page 13, paragraph 23, line 10; page 14, paragraph 24, line 1; page 14, paragraph 2, line 1; page 14, paragraph 2, line 2; page 15, paragraph 4, line 2; page 15, paragraph 4, line 4; page 15, paragraph 4, line 7; and page 16.

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

December 18, 2019

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Attorney