

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION AFTER REMAND

Raymond C. LeBlanc (Respondent) applied for disability retirement based on orthopedic (chronic back pain, compression fracture T11-L3) conditions. By virtue of his employment as a Construction & Safety Inspector III for Respondent Eastern Municipal Water District (Respondent EMWD), Respondent was a local miscellaneous member of CalPERS.

On January 17, 2018, Respondent filed an application for service pending disability retirement. Respondent retired for service effective March 6, 2018 and has been receiving benefits since that time.

CalPERS denied Respondent's application for disability retirement. 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 initially held on January 30, 2019. A second hearing on remand convened on December 11, 2019, to take and consider additional evidence pertaining to Respondent's orthopedic condition.

January 30, 2019 Hearing

As part of CalPERS' review of Respondent's medical condition, Juan Antonio Realyvasquez, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Realyvasquez interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Realyvasquez opined that Respondent was not substantially incapacitated from performing his usual and customary job duties.

At the hearing, Dr. Realyvasquez testified in a manner consistent with his examination of Respondent and the IME reports. As part of his IME, Dr. Realyvasquez reviewed Respondent's medical records. From the records, Dr. Realyvasquez learned that Respondent sustained a compression fracture in 2015 to the eleventh thoracic vertebrae (T11), while trimming a tree at home. Respondent continued working until 2017, when he was hospitalized after a syncopal (fainting) episode resulting from a gastrointestinal bleed. Most of the records initially reviewed by Dr. Realyvasquez did not relate to Respondent's back or spine, but to other medical conditions not included in the application for disability retirement.

Dr. Realyvasquez found the range of motion in Respondent's back to be limited upon physical examination. The examination found Kyphosis (acute forward bend) in Respondent's neck, and Dr. Realyvasquez measured the Kyphosis at 35 degrees. Dr. Realyvasquez also noted tenderness on palpation, and mild spasms on both sides of Respondent's thoracic spine.

In addition to the above findings, Dr. Realyvasquez opined that Respondent was exaggerating his symptoms. Respondent reported his pain levels to be at 10 out of 10. Respondent did not appear to be in any pain, though, as observed by Dr. Realyvasquez during the examination. Based on his records review and physical examination, Dr. Realyvasquez concluded that Respondent was not substantially incapacitated from performing his usual and customary job duties.

On July 9, 2018, CalPERS requested Dr. Realyvasquez review additional records and issue a supplemental IME report after the additional review. Of note in the additional records was a May 31, 2018 report from Vance Johnson, M.D., who is a Physiatrist and pain specialist. The May 31, 2018 report by Dr. Johnson indicated that Respondent used a walker, had poor balance, and had multiple tender points. Conversely, Dr. Realyvasquez observed that Respondent did not use a walker, did not limp, and walked quite well at the time of his examination with Dr. Realyvasquez in February 2018.

In his supplemental IME report, Dr. Realyvasquez ultimately concluded that Respondent was able to perform his usual and customary job duties. Although Respondent may have been in some pain, Respondent was able to perform his job for several years following his 2015 thoracic spine injury. Therefore, Dr. Realyvasquez found that Respondent was not substantially incapacitated at the time of his examination.

Respondent testified on his own behalf that he suffered a fracture to his L1 vertebrae in 2015. Respondent explained that he was then hospitalized in 2017, from which he never returned to work, as a result of a gastric bleed caused by too much ibuprofen. Respondent further explained that he suffered four new vertebral fractures in 2018, which were confirmed by a Magnetic Resonance Imaging (MRI). Respondent also stated that two new fractures were found by an MRI in September 2018. Respondent explained that his physicians have told him that they are unsure of the cause of his fractures, although they have ruled out cancer. Respondent further testified that he can squat with the assistance of a chair, and has difficulty twisting his body. There are some days, Respondent said, in which he cannot make it through the day without having to lie down.

Respondent submitted medical records from his treating physicians to support his appeal. Those records were admitted as administrative hearsay under Government Code section 11513(d).

The ALJ denied Respondent's appeal after the initial hearing. Although the ALJ found Respondent to be credible, he did not present any competent medical opinion, and thus did not meet his burden of proof.

December 11, 2019 Hearing

Respondent was represented by counsel on the second day of hearing. Through his attorney, Respondent presented the telephonic testimony of Karmin Nissan, M.D. Dr. Nissan is board-certified in Anesthesiology and Pain Medicine and began treating Respondent around September 2018.

Dr. Nissan believes that Respondent's spine condition prevents him from performing his job functions. Dr. Nissan noted that Respondent has received multiple compression fractures in his back and suffers from severe kyphotic deformities that have altered his spine mechanics. In Dr. Nissan's opinion, Respondent's spine pathology precludes him from standing for an extended period of time. Respondent's condition also renders him unable to crawl, and also prevents him from bending his spine in certain directions. Dr. Nissan emphasized that Respondent cannot perform his job, and that the restrictions are not merely prophylactic. Dr. Nissan thus concluded that Respondent is substantially incapacitated from performing his usual and customary job duties.

Dr. Realyvasquez issued a supplemental response to the report and testimony of Dr. Nissan. Dr. Realyvasquez maintained his opinion that Respondent is not substantially incapacitated from performing his usual and customary job duties.

Proposed Decision After the December 11, 2019 Hearing

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ granted Respondent's appeal. The ALJ found that Dr. Nissan was persuasive in his testimony that the mechanics of Respondent's injuries prevent him from performing key duties of his job. Moreover, the ALJ determined that Respondent was credible when explaining his pain and physical limitations. Hence, the ALJ concluded that Respondent was substantially incapacitated from performing his usual and customary duties as a Construction and Safety Inspector III.

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

February 19, 2020

Charles H. Glauber
Senior Attorney