

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

David E. Jaffe (Respondent) applied for industrial disability retirement based on orthopedic (bilateral elbows, hands and wrists) conditions. By virtue of his employment as a Clinical Psychologist for Respondent R.J. Donovan Correctional Facility, California Department of Corrections and Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

Respondent filed an application for industrial disability retirement on August 3, 2018.

As part of CalPERS' review of Respondent's medical condition, Jon P. Kelly, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME). Dr. Kelly interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. In addition, Dr. Kelly reviewed surveillance video of Respondent's activities, which included, but is not limited to, walking his dog while holding a leash and exercising on an elliptical trainer, which has handles for one to grasp. Dr. Kelly opined that Respondent is not substantially incapacitated from the performance of his usual duties with Respondent CDCR. Dr. Kelly did not observe any evidence of impairment when he viewed the surveillance video of Respondent. In addition, Dr. Kelly believed that Respondent's symptoms were primarily subjective, and there were limited objective findings to support Respondent's complaints.

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.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. A hearing was held on December 12, 2019. Respondent represented himself at the hearing. Respondent CDCR did not appear at the hearing.

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, CalPERS presented the testimony of a CalPERS investigator who conducted surveillance of Respondent. CalPERS' investigator prepared a report with her findings of Respondent's activities, and information she was able to obtain through researching social media. The activities CalPERS' investigator observed included the following: Respondent traveling to and from his work (a private psychology practice), Respondent holding a leash while walking his dog, Respondent using his cell phone, Respondent pushing trash containers and putting objects into the trash containers, going on shopping trips and placing items into the trunk of his car, and going to the gym to work out, which included using an elliptical machine.

CalPERS also presented the testimony of Dr. Kelly, who testified in a manner consistent with his examination of Respondent and the IME report. Dr. Kelly's medical opinion is that Respondent is not substantially incapacitated from the performance of his usual and customary work duties with Respondent CDCR. Dr. Kelly testified that there were no significant objective findings to support Respondent's subjective complaints of pain. In addition, Respondent's physical exam showed that he had normal grip strength, full range of motion, and x-rays were normal other than mild flattening of the thumb metacarpal that is consistent with mild osteoarthritis. Therefore, Dr. Kelly is of the medical opinion that Respondent is not substantially incapacitated.

Respondent testified on his own behalf that his medical condition has been one of the biggest challenges of his life. He believes that his pain symptoms are related to repetitive typing on a computer keyboard for data entry. He was required to input his psychological assessment of patients into the electronic medical record system. He testified that he has encountered a lot of bias from medical professionals because of the nature of his injury. Respondent indicated that he can no longer participate in activities he used to enjoy, such as playing hockey, golf, and weight-lifting. Respondent also testified that the pain he suffers impacts his day-to-day activities. Respondent testified that he has looked for work in different settings, but that most employers use the same type of electronic medical record system he claims caused his injury.

Respondent did not call any physicians or other medical professionals to testify. Respondent submitted a report by Larry H. Woodcox, DPM, DC,¹ dated April 25, 2019, in support of his case. Dr. Woodcox evaluated Respondent in connection with a workers' compensation claim and opined that Respondent could continue at his usual and customary occupation without restrictions.

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 has the burden of proving that he is substantially incapacitated and entitled to disability benefits, and that he did not meet his burden. The ALJ found that CalPERS

¹ Dr. Woodcox did not testify at the hearing and a copy of his curriculum vitae was not offered into evidence. Therefore, we do not have evidence as to his professional and/or medical background. However, the report that was submitted by Respondent suggests that Dr. Woodcox has a Doctor of Podiatric Medicine (DPM) degree, as well as a Doctor of Chiropractic (DC) degree.

presented competent medical opinion that Respondent is not substantially incapacitated and does not qualify for industrial disability retirement. In addition, the ALJ found that Respondent presented no competent medical evidence establishing that he is disabled. The ALJ found that Dr. Kelly conducted a thorough review of medical records and comprehensive physical examination, and that Respondent did not challenge Dr. Kelly's opinion through competent medical evidence.

The ALJ concluded that Respondent is not eligible for industrial disability retirement, and that CalPERS' denial of his industrial disability retirement application was appropriate.

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

February 19, 2020

John Shipley
Senior Attorney